The Madras Law Journal Reports.

II] JULY [1955

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE RAJAGOPALA AYYANGAR.

M.K. Ranganathan and another .. *Appellants**

v.

The Government of Madras, represented by the Secretary to Government, Development Department (*Fort. St George*, Madras) and others .. *Respondents.*

Companies Act (VII of 1913), *sections* 171 *and* 232—*Comparative scope—Sale by receiver appointed by trustees for debenture-holders—When could be impeached—Supervening liquidation—If affects such a sale—Title of buyer—If affected.*

Companies Act (VII of 1913), *sections* 129 *and* 230 (2)—*Floating charge—When ceases to float.*

The scope of section 232 of the Indian Companies Act is not wider than that of section 171 of the said Act and the language of the provision is not apt to include within its purview cases where no legal proceedings are at all involved. Even in a case where a private sale, that is, outside Court is held by public auction, it would not be a sale held within the meaning of section 232 of the Companies Act.

Governor-General in Council v. *Shiromani Sugar Mills, Ltd.*, (1946) F.L.J. 29 : (1946) 1 M.L.J. 415 (F.C.), referred.

A private sale effected by a receiver or a mortgagee is not a 'legal proceeding' and sanction of Court is not necessary under section 171 of the Companies Act to commence or continue such a proceeding. If a sale is not a proceeding within the meaning of that section it would not also be hit by the avoiding provision in section 232 of the Companies Act.

A secured creditor realising his security without seeking the assistance of Court is outside any winding up of the Company.

Food Controller v. *Cork*, L.R. (1923) A.C. 647 ; *Lloyd* v. *David Lloyd & Co.*, (1877) 6 Ch.D. 339 and In re *Henry Pound, Son, and Hutchins*, (1889) 42 Ch.D. 402, referred.

Except in cases of fraud, recklessness or want of *bona fides* where a receiver appointed by the mortgagee debenture-holders of a Company has exercised his powers of sale, for which no leave of Court is needed the sale held by the receiver is valid and effectual to convey title to the purchaser, and such a sale cannot be avoided on the ground of either want of due notice or on the ground of under-value. Any supervening liquidation of the Company does not make any difference to the rights of the buyer in such cases.

A floating charge created over the assets of a company operates in favour of the creditors for preferential payment over the debenture-holders only if at the moment of the winding-up there is still a floating charge. When once a receiver is appointed by the debenture-holders and he takes charge of the assets of the company that charge ceases to float and becomes crystallised and fixed and the provisions of section 230(2) of the Companies Act, cannot apply.

Griffin Hotel Company, In re, *Joshua Tetley & Son, Ltd.* v. *The Company*, L.R. (1941) 1 Ch.D. 129, referred and followed.

On appeal from the Order of the Honourable Mr. Justice Balakrishna Ayyar dated the 9th August, 1954 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in application No. 3542 of 1954 in O.P. No. 419 of 1953.

S. Mohan Kumaramangalam and *V. Venkataraman* for Appellants.

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* O.S.A. No. 113 of 1954. 24th September, 1954.

The Assistant Government Pleader (*K. Veeraswami*), *K. V. Venkatasubramaniam, O.T.G. Nambiar* instructed by *Messrs. King & Partridge, C. Venugopalachari and John and Row* for Respondents.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J:—This is an appeal against an order of Balakrishna Ayyar, J., dismissing Application No. 3542 of 1954 in O.P.No. 419 of 1953. This was an application by the Official Liquidator of the Madras Electric Tramways to set aside a sale effected by a Receiver, appointed by the trustees for the debenture-holders of the Company, of certain assets of the Company of which the latter had taken possession.

It is necessary to set out in some detail the facts of the case giving rise to this application before the points arising for consideration could be properly understood. O. P. No. 419 of 1953 is a petition for the winding up of the Madras Electric Tramways (1904), Limited, under the Indian Companies Act (VII of 1913). The Company was incorporated in England for carrying on the business of running electric tramways in the City of Madras. The Company was ordered to be wound up by this Court by order dated 20th January, 1954 on its own petition dated December, 1953 on the ground that it was unable to pay its debts and the Official Receiver, High Court, Madras, has been appointed as the official liquidator of the Company. Notwithstanding the winding up order and the appointment of the Official Receiver as the liquidator of the Company, no assets came into the possession of the liquidator. The reason was this : In or about October, 1924, the Company had issued debentures covering a very large sum of money which with interest on the date of the winding-up, came to over Rs. 7 lakhs. These debentures were secured by a trust deed charging the fixed assets of the Company by a first mortgage and there was also a floating charge by way of first charge in favour of the trustees in respect of the undertaking and all the other property and assets of the Company for the time being, both present and future, including its uncalled capital to secure the payment of all moneys for the time being owing on the security of the debentures. For reasons which it is unnecessary to state or discuss, the Madras Electric Tramways had to suspend the running of the trams on account of the fact that the Company was incurring losses on a large scale for some years in succession. There was a default in the payment of interest due to the debenture-holders and as in addition, the Company suspended its operation in the way of running the trams, the trustees for the debenture-holders appointed Mr. P. G. Brookes as Receiver under the powers vested in them under the debenture trust deed, to take charge and possession of all the assets of the Company which were the subject-matter of the first mortgage as well as of the floating charge. Having regard to the comprehensive nature of the assets included in the floating charge which has been summarised above, the entirety of the property of the company was taken possession of by Mr. Brookes as Receiver on 11th April, 1953.

Even before Mr. Brookes took possession of the assets of the company as Receiver for the debenture-holders, there had been disputes between the workers of the tramways and the Company regarding the terms of their employment including bonus, etc. and the matter had been referred to the adjudication of an Industrial Tribunal. Subsequent to Mr. Brookes taking possession of the assets of the Company as Receiver he was impleaded in the labour dispute before the Industrial Tribunal in order to bind him also by the adjudication that might be passed in those proceedings. The Tribunal passed an award in July, 1953, granting to the workers compensation which totalled about Rs. 7 lakhs. This amount has not yet been paid. Mr. Brookes was eager and desirous of effecting a sale of the assets which had vested in him for the purpose of realising the moneys due to the debenture-holders on whose behalf he had taken possession. Meanwhile, however, the State of Madras filed a suit C.S. No. 368 of 1953 on the file of this Court claiming a sum of Rs. 9,26,183 as due to them for the value of electricity supplied to the Electric Tramways and they claimed priority for the payment of this sum and they also put forward a contention that the debenture trust deed was legally ineffective to secure the charge in favour of the debenture-holders in respect of the entirety of the assets covered by the floating charge, on certain legal grounds. Mr. Brookes was made a defendant to the

action and the reliefs were claimed as against him, since the claim was as against the assets in his hands. Immediately after the suit was filed, an application No. 4552 of 1953 was taken out for restraining Mr. Brookes from effecting a sale of the assets but no order of injunction was passed because of an undertaking given by Mr. Brookes on 14th December, 1953 that he would not dispose of the assets of the undertaking without the specific orders of Court. Mr. Brookes advertised for the sale of the assets in one copy of *The Hindu*, *The Madras Mail*, *The Swadesamitran*, *The Hindustan Times*, *The Times of India* and *The Andhra Patrika*. These advertisements were inserted on or about the 23rd or the last week of January, 1954. In this advertisement it was stated :

" Sales are for the time being subject to the approval of the High Court of Madras and it will be for the undersigned (Mr. Brookes) to obtain such approval for accepted offers, free of all costs to the purchaser."

In the advertisement it was stated that the offers to purchase would be received upto Wednesday the 17th February, 1954. Offers were being received by Mr. Brookes in response to this advertisement. Though a time limit was set for the receipt of the offers, offers were coming in even after 17th February, 1954. Meanwhile, the ex-employees of the Madras Electric Tramways who had been thrown out of employment by reason of the closure of the Madras Electric Tramways were approaching the Government as well as the Corporation of Madras to take over the concern themselves and re-start the business, so that these workmen could get re-employment. Efforts were being made in this direction by the Government of Madras. Pending all these discussions between the authorities and those interested in the workmen in taking over the assets and reviving the tramways, Mr. Brookes did not effect any sale, notwithstanding that he had received some offers. These discussions proceeded inconclusively till about July, 1954, when there was an informal discussion between Mr. Brookes and the Chief Minister to the Government of Madras. The purport of these discussions is set out in a communication dated 5th July, 1954 addressed by Mr. Brookes to the Chief Minister to the Government. The difficulties of reviving the tramways particularly having regard to the attitude of the debenture-holders who were not prepared to face further losses, were made clear and he pointed out that unless fresh capital of a substantial amount were raised and the co-operation of the unsecured creditors of the Company and the workers were secured, it would not be possible to revive it. This letter ended with the note that he would be intimating to the Government after consulting the debenture trustees as to whether further negotiations would be fruitful. This was followed by the last letter on the topic dated 16th July, 1954 which might be set out in full as it figured prominantly during the arguments in the appeal :

"With further reference to the interview which you were kind enough to grant me on 3rd July, and my letter of 5th July confirming our conversation, I have now heard from the Trustees in London. I have to advise you that, as forecast by me, the Trustees do not consider to be in the best interests of the Debenture-holders for them to be concerned with the resuscitation and running of the tramways. They have reiterated their instructions to me to accept forthwith an offer already in my hands for the assets in my possession. I have therefore accepted that offer (of which I advised you) and have completed a sale agreement with the tenderers."

The offer that is referred to as to as having been accepted by Mr. Brookes on 16th July, 1954, was that of a firm by name Messrs. T. Hasanally & Company of Bombay, who will be hereafter referred to as the Bombay firm, at a purchase price of Rs. 4,01, 655. This Bombay firm has been impleaded to the application before Balakrishna Ayyar, J., as the second respondent, Mr. Brookes being the first respondent. Only one thing more remains to be stated and that is, that the suit C.S. No. 368 of 1953 has been dismissed, the Judgment having been pronounced on 16th March, 1954 and the sale by Mr. Brookes of the assets to the Bombay firm was effected without the sanction of the Court. After the sale was effected, the Official Liquidator took out an application No. 3542 of 1954 in O.P. No. 419 of 1953 for setting aside this sale, and it is the order in this petition that is the subject-matter of this Original Side Appeal.

The grounds upon which the sale was sought to be set aside would be apparent from the report of the Official Liquidator filed in support of the application. After referring to the advertisement in *The Hindu* and to the condition as to the approval

of the Court being obtained before sale was effected to which reference has already been made and the undertaking given by Mr. Brookes in C.S. No. 368 of 1953 not to alienate any of the assets in his possession without obtaining orders of Court, the report proceeded to indicate certain negotiations which are made for the purchase of the entire assets of the Company by the Corporation of Madras so that they might run the tramways themselves, as also certain proposals for the acquisition of the entire assets by a group of industrialists in the City who with the co-operation of the Government of Madras contemplated reviving the tramways. The report then went on to state that Mr. Brookes concluded this sale with the Bombay firm with unnecessary haste for a price much lower than the sum offered by higher tenders and without applying to the Court for leave and without notice to the liquidator in whom the equity of redemption in the secured property is vested. This portion of the petition concluded with the allegation :

"The statement of affairs filed by a Director of the Company shows that the assets of the Company are valuable and after paying the amount due to the debenture-holders, a surplus will be available to the unsecured creditors. The sale to the second respondent of such assets for a sum far less than the amount due to the secured creditors requires scrutiny."

Finally, the report concluded that

" Though the secured creditors may realise the security, it will be in the interests of the unsecured creditors to see that a fair and proper price is obtained. In the interest of the unsecured creditors, it is just and necessary to have a fair valuation ascertained and an enquiry held to ascertain whether the sale by the first respondent in favour of the second respondent is *bona fide* and for a proper price .... The Corporation of Madras who were one of the prospective purchasers of the assets of the Company as a going concern and who are also creditors of the Company have agreed to indemnify me for costs and have also agreed to provide funds for filing this aplication."

There was a supporting affidavit filed by the Commissioner of the Corporation in which it was prayed that in the interests of justice the sale of the assets of the Company should be made only after extensive notification in the newspapers giving full details and also after giving sufficient time to the Corporation of Madras to come to a final decision after negotiations with the Government whether the tram service should be undertaken by the Corporation. Mr. Brookes filed a counter affidavit in the course of which he explained that the offer by the Bombay firm was the highest offer that he had received and that this had been accepted *bona fide*. He also explained that in the advertisement the condition as to the previous sanction of the Court was inserted because of the undertaking that he had given to the Court in C.S. No. 368 of 1953 and that this undertaking lapsed with the dismissal of the suit on 16th March, 1954. Though for his part he was intending to apply to the Court for previous sanction before finally effecting the sale, he had been advised by the Solicitors for the debenture trustees in England that it was unnecessary for him to obtain the sanction of the Court and that he had been instructed not to apply for such sanction. It was in consequence of this advice that the sale to the Bombay firm was concluded without placing the matter before the Court and obtaining its sanction. He asserted that the sale was *bona fide* and that he had obtained as good a price as could be obtained. He also pointed out that the trustees for the debenture-holders could not wait indefinitely for the Corporation or the Government of Madras or other individuals making up their minds as to whether they would purchase the assets in order to revive the tramways. Having waited for months and nothing definite being known he had been instructed to conclude the sale and realise monies for the debenture-holders. He, therefore, pleaded that there were no grounds for setting aside the sale which had been properly concluded by him.

With these allegations by either side, the application came on for hearing before Balakrishna Ayyar, J. Before the learned Judge the *bona fides* of Mr. Brookes's conduct was not impeached nor the statement by him that the offer of the Bombay firm was the highest and the only question considered by him was whether in the circumstances, the sale to the Bombay firm was or was not the best, even taking into account subsequent offers before him.

The question was raised at the hearing, which was emphasised in the report of the Official Liquidator, that Mr. Brookes had violated an undertaking given to the Court in application No. 4552 of 1953 in effecting the sale without obtaining

the sanction, notwithstanding that the suit had reached its termination by dismissal in March 1954, months before the sale was effected. The learned Judge rejected this objection as irrelevant to the issue and stated that the matter might be investigated when the occasion arose. The learned Judge also repelled a contention that there had not been due publicity before Mr. Brookes effected the sale, the learned Judge stating after referring to the advertisements in the several newspapers, "It cannot therefore, be said that the sale that was effected was *sub rosa*." The next question that the learned Judge considered was whether Mr. Brookes had accepted the best offer made to him. An abstract of all the offers received was placed before the Court and there being no allegation that Mr. Brookes had suppressed any offer that had been made it was proved that the offer of the Bombay firm was the best in the circumstances. The learned Judge said that this would be sufficient to dispose of the matter, but he also considered whether there were any better offers even at that stage. One such was placed before him and that was an offer by one Ambalavana Chettiar who offered to purchase the identical assets purchased by the Bombay firm for a sum of Rs. 4,25, 000, which would have exceeded the price paid by the Bombay firm by about Rs. 24,000. This Ambalavana Chettiar was given time to produce a Bank-guarantee that he was in a position to implement his offer to pay the sum and the hearing of the petition was adjourned to enable this Bank-guarantee to be produced. Even on the adjourned date this was not forthcoming and therefore, this offer of Ambalavana Chettiar was dissmissed from consideration. The learned Judge also heard counsel on behalf of the Corporation of Madras. The Bombay firm agreed to prove that the sale to them was not at an undervalue, by offering to part with what they had bought to the Corporation of Madras at the same price and were willing to give them a fortnight's time within which to make payment. Counsel for the Corporation, however, was not willing to commit himself to the purchase, but merely wanted time to consider whether his clients would think of purchasing. In the circumstances, the learned Judge thought that no purpose would be served by adjourning the proceedings for the purpose of ascertaining whether they would be in a position to take over those assets. The learned Judge further pointed out that the request for time by the Corporation was not reasonable, since they had really more than a year within which to consider whether they would take over the tramways as a going concern. As the Corporation had merely stated that further advertisements might be inserted with the off-chance of getting a better offer, the learned Judge thought that as there was no gurantee by the Corporation indemnifying Mr. Brookes against any loss, it was not worthwhile considering the request of the Corporation. In the circumstances, the learned Judge dismissed this application to set aside the sale effected by Mr. Brookes to the Bombay firm.

The official Liquidator accepted the decision of Balakrishna Ayyar, J. and has filed no appeal from his order. But two office-bearers of the Madras Tramway Workers' Association to whom under the Award of the Industrial Tribunal of June 1953, a large sum of Rs. 7 lakhs was due from the Company and who are as such its unsecured creditors but who were no parties to the application before Balakrishna Ayyar, J., have preferred this appeal against the order, after obtaining leave of Court for filing the appeal.

In the grounds of appeal and during the arguments when the appeal was originally opened, the only point that was urged by Mr. Kumaramangalam, learned counsel for the appellants, was that there was not due publicity before Mr. Brookes effected the sale and that Balakrishna Ayyar, J., was in error in holding that there had been such publicity as could call forth the best offers from prospective buyers. It was also conceded that there was no challenge on the *bona fides* of Mr. Brookes in concluding the sale in favour of the Bombay firm. We must say that we feel impressed with this contention and if the matter rested merely on a decision of this point, we would have allowed the appeal and set aside the sale. It is clear that there was an advertisement only in one issue of each newspaper before the sale was effected and two things were expressly stated in this advertisement, *viz.*, (i) that offers would be received only till 17th February, 1954 and (ii) that the sale would be

concluded only after obtaining the sanction of the Court. It was a matter of common knowledge that negotiations were proceeding between the Workers Associations with the Government on the one hand and the Corporation on the other, for the revival of the tramways as a going concern. Now and then, information was published in the newspapers, sometimes consisting of press-notes and on other occasions of interviews by correspondents stating the result of the discussions which were proceeding between the parties. These negotiations started soon after the date of the advertisement and it is not unreasonable to hold that by reason of this information which was in the possession of the public, even people who would otherwise take any interest in the purchase of the assets which was the subject-matter of the advertisement might not have made tenders because of their feeling that the sale might not ultimately come off. As stated before those negotiations continued right upto 5th July, 1954. Mr Brookes had himself not definitely rejected all ideas in such a direction in the interview with the Chief Minister on the 3rd July, 1954: while so, suddenly on the 16th July without any further notice and without any further advertisement of an intimation to the public of the failure of the negotiations and of the intention to sell the assets of the Company, the sale was effected by Mr. Brookes to the Bombay firm accepting an offer which had been made to him months earlier. It might very well be that if there had been a fresh advertisement calling for tenders after July, 1954, other people might have been willing to purchase the assets for a higher price. In fact during the hearing of the appeal before us, one Govindarajulu Naidu had made an offer to purchase the identical assets sold to the Bombay firm for a sum of Rs. 4½ lakhs and he had deposited Rs. 2½ lakhs to show his *bona fides* in the matter.

But Mr. Venkatasubramania Ayyar appearing for the Bombay firm raised for our consideration an objection that the Court had no power or jurisdiction to set aside this sale, except on the ground that it was vitiated by fraud or by want of *bona fides* and as in the present case all such allegations were expressly disclaimed by the appellants, the Court has no jurisdiction to set aside the sale. The point in this form has not been raised before the learned Judge and in fact the consideration of Ambalavana Chettiar's offer by Balakrishna Ayyar, J., proceeded upon a negation of this objection. However, we find nothing in law to preclude the respondent from sustaining the judgment or decree of the Court in his favour by supporting it upon this legal ground. The question is one of pure law as to the jurisdiction of a Court to set aside the sale and we considered that it was proper to permit the respondent to urge this objection to the petition.

The point that was raised was this : Mr Brookes was functioning here as a Receiver appointed by the debenture trustees. The debenture-holders on whose behalf he is acting are outside the liquidation and if under the terms of the trust deed securing the debt due to them, they have a power to realise amounts due by the appointment of a Receiver and the Receiver having entered into possession of the property effects a sale, such sale does not require any sanction of the Court and can be impeached by the Official Receiver or by the unsecured creditors of the Company only on certain well-defined grounds, *viz.*, fraud or want of *bona fides*. The fact that there has not been due publicity or that if properly advertised, a higher price might have been realised, is not a ground for setting aside such sale.

Before dealing with this argument, it is only necessary to add that Mr. Nambiar appearing for Mr. Brookes stated that he was merely anxious to establish that his client had acted *bona fide* and in the best interests of the parties and that though as one who had effected the sale his client was naturally interested to support its validity, he was willing to leave the matter in the hands of the Court and to abide by any orders it might pass in regard to the sale effected by him. Though this was the attitude of Mr. Brookes, it certainly does not preclude the Bombay firm from insisting upon its legal rights to maintain the sale, and we will next proceed to consider the correctness of the legal position taken up by the learned Counsel on its behalf.

In the present case the facts necessary to be mentioned in regard to this point are that under clause 5 of the indenture dated 30th October, 1924, between the Electric Tramways and the trustees for the debenture-holders by name the Be aver Trust Limited, the Company covenanted with the trustees

" that they will forthwith effect in favour of the trustees and to their satisfaction a first mortgage of the hereditaments specified in the second schedule thereto and all other freehold property owned by the Company in Madras in accordance with the law of Madras."

and in pursuance of this clause a simple mortgage was executed by the Company in favour of the Beaver Trust who are the trustees for the debenture-holders. Under clause 6 of the same indenture, a floating charge was created on the assets of the Company, present and future for the payment of the moneys due on the security of the debentures. Under clause 8, the security becomes enforceable, *inter alia* on default in payment of principal moneys or interest or if the company stopped payment or ceased to carry on business or thereatens so to do. When the security becomes enforceable, the trustees are given the right to enter upon the premises and in such an event the trustees may, in their discretion, appoint one or more persons to be a Receiver. Of course both the trustees as well as the Receiver acting on their behalf have powers to realise by sale the assets of the Company for the purpose of paying over what is due to the debenture-holders. In pursuance of the powers contained in this behalf, the debenture trustees appointed Mr. Brookes as Receiver and he took possession of the Company's assets on 11th April, 1953 and the sale was effected by him in his character as such Receiver for the purpose of realising the amounts due to the debenture-holders. If there had been no liquidation it is clear and it does not need any authority, that any sale effected by the Receiver could not have been called in question by or on behalf of the mortgagor on the ground that due publicity or notice was not given of the sale and that a smaller sum than could possibly have been realised was obtained by the sale. It is sufficient in this connection to refer to section 69 (3) of the Transfer of Property Act, (IV of 1882). After laying down the conditions before which a power of sale vested in a mortgagee may be exercised, sub-section (3) of section 69 enacts :

" When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised ; but any person damnified by an unauthorised or improper or irregular exercise of the power, shall have his remedy in damages against the person exercising the power."

Similarly, the provision in section 8 of the Trustees' and Mortgagees' Powers Act XXVIII of 1866 may be noticed :

" No such sale as last aforesaid shall be made until after six months' notice in writing given to the person or one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of such property ; but when a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power or that no such notice as aforesaid had been given ; but any person damnified by any such unauthorised exercise of such power shall have his remedy in damages against the person or persons selling."

There is abundance of authority in favour of the position that a mortgagee's sale in exercise of the power reserved in that behalf is not liable to be impeached on account of want of publicity or want of notice as required either by the instrument of mortgage or by the law. Therefore, if the sale had been effected by Mr. Brookes as Receiver without the liquidation supervening, there would have been no possibility of argument that the sale in favour of the Bombay firm could have been set aside, of course in the absence of fraud or want of *bona fides* on the part of the seller, and in which the buyer was also implicated.

The question that next arises is whether the supervening of the winding up makes any difference to the rights of the buyer from a mortgagee exercising a power of sale for the realisation of his security. The effect of a winding up order is set out in section 171 of the Indian Companies Act :

"When a winding up order has been made or a provisional liquidator has been appointed no suit or other legal proceeding shall be proceeded with or commenced against the Company except by leave of the Court, and subject to such terms as the Courts may impose."

Under this provision if a mortgagee or a receiver for the debenture-holders is obliged to file any suit or take other legal proceedings for the realisation of the security, he has necessarily to obtain leave of the Court and subject to such terms as the Court may impose. The consequence of a failure to observe the terms of this section is provided by section 232 which runs thus :

"Where any Company is being wound up by or subject to the supervision of the Court, any attachment, distress or execution put in force without leave of the Court against the estate or effects, or any sale held without leave of the Court of any of the properties of the Company after the commencement of the winding up shall be void.

These being the relevant provisions, the question that falls to be considered is whether a sale by a mortgagee or receiver for debenture-holders effected in pursuance of the power vested in him in that behalf by the mortgage deed or the debenture trust deed as the case may be, without the sanction of the Court could be avoided as falling under either section 171 or 232 of the Indian Companies Act. The correlation between sections 171 and 232 of the Indian Companies Act has been brought out in the Judgment of the Federal Court in *Governor-General in Council* v. *Shiromani Sugar Mills, Ltd.*,[1] that it is necessary and sufficient to refer to the observations in this decision. The point that was considered by the Federal Court related to the question whether the proceedings taken by the Government for the realisation of income-tax due to them from the respondent-Company in liquidation under section 46 (1) of the Indian Income-tax Act without applying to the Court for sanction under section 171 of the Indian Companies Act would or would not render the sale effected in the course of such realisation void under section 232 of the Indian Companies Act. The question therefore was whether the proceeding under section 46 of the Indian Income-tax Act was covered by the phrase "other legal proceeding" within section 171 of the Indian Companies Act. Dealing with this, Spens, C.J., delivering the Judgment of the Court said (page 420) :

"Section 171 must, in our judgment be construed with reference to other sections of the Act and the general scheme of administration of the assets of a Company in liquidation laid down by the Act. In particular, we would refer to section 232. Section 232 appears to us to be supplementary to section 171 by providing that any creditor (other than Government) who goes ahead, notwithstanding a winding up order or in ignorance of it, with any attachment, distress, execution or sale, without the previous leave of the Court, will find that such steps are void. The reference to "distress" indicates that leave of the Court is required for more than the initiation of original proceedings in the nature of a suit in an ordinary Court of law. Moreover, the scheme of the application of the Company's property in the *pari passu* satisfaction of its liabilities, envisaged in section 211 and other sections of the Act cannot be made to work in co-ordination unless all creditors (except such secured creditors) as are "outside the winding up" in the sense indicated by Lord Wrenbury in his speech in *Food Controller* v. *Cork*,[2] are subjected as to their actions against the property of the Company to the control of the Court. Accordingly, in our judgment, no narrow construcions should be placed upon the words "or other legal proceeding" in section 171."

It is necessary to add only one observation. It is not and cannot be contended that a private sale effected by a Receiver or a mortgagee is "a legal proceeding" which cannot be commenced or continued without the sanction of Court under section 171. If it is not "a proceeding" within section 171, it follows on the reasoning of Their Lordships of the Federal Court that it would not also be hit at by the avoiding provision in section 232.

Some argument was addressed to us on the language of section 232 of the Indian Companies Act which avoids any sale held without the leave of the Court after the commencement of the winding up. This section corresponds to section 223 of the English Companies Act of 1948 being section 174 of the English Companies Act of 1929. In the English enactment the words "or any sale held without the leave of the Court" do not occur. These words were inserted into the Indian enactment by the Companies Amendment Act of 1936. It was sought to be argued on the basis of this difference in language that there was a real difference in the content of the provisions of India, as contrasted with that in England and that whatever be the law in England, any sale by a mortgagee even if outside Court

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1. (1946) 1 M.L.J. 415 : (1946) F.L.J. 29 (F.C.). 2. L.R. (1923) A.C. 647 at 670.

was within the mischief of section 232 of the Indian Companies Act and would be avoided, unless the sale were held with the sanction of Court. Having examined the matter carefully, we are of the opinion that there is no substance in the point. Section 232 was amended in 1936 by the insertion of the provision referring to sales, in order to get over the decision of the Allahabad High Court in *Kayastha Trading and Banking Corporation, Ltd.* v. *Sat Narain Singh*[1]. Piggott and Walsh, JJ., had held in that decision that though leave of Court was required to put an execution into force under the terms of section 232 as it then stood, *i.e.*, in order to effect an attachment, where an attachment had been effected prior to the winding up, but a sale was held subsequently in pursuance of that attachment, the sale was not avoided by reason of the winding up order. In other words, the reason for the amendment was to make it clear that proceedings in execution continue to be in force and are being put into force right upto the date of the sale. Its effect, however, is not to affect a sale held without legal proceedings as provided for by section 171 of the Indian Companies Act to which we have already referred. We are clearly of the opinion that the scope of section 232 of the Indian Companies Act is not wider than that of section 171 and the language of the provision is not apt to include within its purview cases where no legal proceedings are at all involved. This is made clear by the use of the expression 'held' occurring after the word 'sale'. When a sale is effected, say by a private treaty, as in the present case, it could not be termed to be a sale *held*, though it is a sale *effected*. We are further of the opinion that even in a case where a private sale, *i.e.*, outside Court is held by public auction, it would not be a sale held within the meaning of section 232 of the Indian Companies Act. The construction we are adopting would be in accordance with the view expressed by the Federal Court as to the relative scope of sections 171 and 232 in the decision already referred to.

Section 232 being out of the way, the next question that falls to be considered is whether the rights of a secured creditor to proceed to realise his security is affected by liquidation and an order for winding up. The point is summarised thus in Halsbury's Laws of England Vol. VI, III Edition, paragraph 968 : Dealing with the powers of a debenture-holder having a charge on the assets of the Company, Lord Cohen, who has contributed the article relating to Companies, says:—

> "One of these rights is to have a sale of the property charged, either under the power given by the charge or by statute, or with the assistance of the Court. If the Company goes into liquidation, the rights of a secured creditor under his security are not prejudiced, and the liquidator cannot obtain an injunction to restrain a sale by the secured creditor except on the usual terms of paying the amount due, or, if it is not agreed, paying the amount claimed, into Court."

There can be no doubt that even a secured creditor if he is to approach the Court for the purpose of realising his security, has to obtain the leave of the Court under section 171 of the Indian Companies Act and section 231 of the English Companies Act of 1948. But in a case where he can effect a sale without recourse to the Court, he has no necessity to obtain leave of the Court before effecting a private sale. It is in this context that the observations of Lord Wrenbury in *Food Controller* v. *Cork*[2] become relevant and important. The learned Lord said at page 670 dealing with a contention that the Crown was outside the winding up :

> "The phrase 'outside the winding up' is an intelligible phrase if used, as it often is, with reference to a secured creditor, say a mortgagee. The mortgagee of a Company in liquidation is in a position to say "the mortgaged property is to the extent of the mortgage, my property. It is immaterial to me whether my mortgagor is in winding up or not. I remain 'outside the winding up' and shall enforce my rights as mortgagee." This is to be contrasted with the case in which such a creditor prefers to assert his right, not as a mortgagee, but as a creditor, He may say 'I will prove in respect of my debt.' If so, he comes into the winding up."

In view of these observations in the House of Lords, it would be unnecessary to cite further authority in support of the proposition that a secured creditor realising his security without seeking the assistance of the Court is outside the winding up. But if such were neceassary, reference may be made to a few decisions of the English Courts. The first case to be referred to is a decision of the Court of Appeal

1. (1921) I.L.R. 43 All. 433.
2. L.R. (1923) A.C. 647 at 670.

in *Lloyd* v. *David Lloyd Co.*[1]. A mortgagee had instituted an action and this was pending when an order was made to wind up the mortgagor company. The mortgagee made an application to the Court under section 87 of the Companies Act of 1862 corresponding to section 171 of the Indian Companies Act for leave to proceed with the action. Malins, V.C., imposed certain terms upon the mortgagee before he should be allowed to proceed with the action. The mortgagee appealed and the appeal was heard by a very strong Court consisting of Jessel, M.R., James and Cotton, L.JJ. The appeal was allowed and the mortgagee was permitted to proceed with the action without any terms being imposed upon him. Jessel, M.R., stated :

> "As a rule, a mortgagee has a right to realize his security, and of course, as incidental to that, a right to bring an action for foreclosure. Those who say that he should be restrained from bringing or proceeding with such an action must either show some special ground for restraining him, or must say, 'we can offer the mortgagee all he is entitled to, foreclosure or sale, as the case may be, at once, without any proceeding in the action'.............But, short of that, it appears to me that the Court ought not under the 87th section of the Act to interfere with the rights of a mortgagee."

James, L.J., put the matter thus : After referring to the basis of section 87 of the Companies Act of 1862, he said :

> "That has really nothing to do with the case of a man who for the present purpose is to be considered as entirely outside the Company, who is merely seeking to enforce a claim, not against the Company, but to his own property."

And he added

> "The Court would exercise it with a due regard to the rights of third persons, persons who were not members of the Company, and who had not to come in and claim to share in the distribution of the Company's assets among the creditors, and who were not therefore *quasi* parties to the winding-up proceedings. The Court would have due regard to the rights of independent persons. A mortgagee, is to my mind, such an independent person, and his rights ought not to be interfered with because his mortgagors have chosen to become insolvent and to have a winding-up.

The next case to be referred to is another decision of the Court of Appeal in In re *Henry Pound, Son & Hutchins*[2] The headnote of the case succinctly summarizes the facts.

> "A Company issued debentures constituting a first charge on the whole of the undertaking and property, and empowering the holders, in the event of proceedings for the winding-up of the Company to appoint a receiver invested with very ample powers of carrying on the Company's business, and managing and disposing of their undertaking and property. An order was made for the winding-up of the Company and an official liquidator was appointed. The debenture-holders, under their powers, appointed a receiver and applied to the Court, that, notwithstanding the appointment of the liquidator, the receiver might be at liberty forthwith to take possession of all the company's undertaking and property."

Kay, J., before whom the application came on for hearing appointed the official liquidator as receiver on behalf of the debenture-holders directing him to treat himself as the receiver of the debenture-holders. The debenture-holders filed an appeal and the question which the Court had to consider was whether the right of the debenture-holders to appoint their own trustee should not be given effect to by the Court notwithstanding the winding-up. The appeal was allowed, Cotton, L.J., stating :

> "I cannot understand, I must say, with great respect, how Mr. Justice Kay could appoint the liquidator receiver, because there was no action in which any receiver could be appointed by the Court, and if he did not give to the receiver appointed under this deed what I think was the right of the debenture-holders to take possession of, I cannot see how he could appoint the liquidator to be a receiver on behalf of the debenture-holders."

To a similar effect are the decisions of the Court of Appeal in *Barnoy* v. *Joshua Stubbs, Limited*[3] and *Strong* v. *Carlyle Press*[4] so that the question is not open to controversy at all.

The matter is thus summarized in Palmer's Company precedents, Part II at page 415 :

1. (1877) L.R. 6 Ch.D. 339.
2. (1889) L.R. 42 Ch. D. 402.
3. (1891) L.R. 1 Ch.D. 475.
4. (1893) L.R. 1 Ch.D. 268.

"Sometimes the mortgagee sells, with or without the concurrence of the liquidator, in exercise of a power of sale vested in him by the mortgage. It is not necessary to obtain liberty to exercise the power of sale, although orders giving such liberty have sometimes been made."

We thus reach the position that no leave of Court was needed before the Receiver appointed by the mortgagee debenture-holders exercised the power of sale and that as there is no allegation of want of *bona fides* or recklessness or fraud against the Receiver in exercising such a power, it would follow that the sale held by the Receiver is valid and effectual to convey title to the purchaser and that such a sale cannot be avoided on the ground either of want of due notice given by the Receiver before effecting the sale or on the ground of undervalue. One observation remains to be made in connection with this point about undervalue. It will be seen that the price realized by the Receiver at the private sale effected by him in favour of the Bombay firm was for Rs. 4,01,655, while the price offered by Ambalavana Chettiar before Balakrishna Ayyar, J., and by Govindarajulu Naidu now in the appeal before us is in excess of this by about Rs. 24,000. We do not consider that in the circumstances the sale could be stated to be at any gross undervalue, even assuming that it could be set aside on such a ground.

Only one further point remains to be mentioned which was raised at almost the close of the arguments in the appeal. The point was this : The security in favour of the debenture-holders in the present case consisted of two parts. The first was a regular mortgage on the land and buildings comprised in Schedule II to the debenture trust deed and covered by the simple mortgage in favour of the Beaver Trust Limited executed by the Directors of the Madras Electric Tramways, Limited. In addition to this mortgage, the debenture-holders had also, as we have seen, a floating charge on all the other assets of the Company. The argument that was sought to be raised was based upon this distinction between the two parts of the security by reasons of the provision in section 230 (2) of the Indian Companies Act. The provision is to this effect : Section 230 (1) enumerates the debts which have to be paid in priority in a winding-up and section 230 (2) (*b*) enacts :

" So far as the assets of the Company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the Company, and be paid accordingly out of any property comprised in or subject to that charge."

The argument on this head was this : The Receiver for the debenture-holders could not sell without the leave of the Court because of the provision in section 230 (2)(*b*) as the bulk of the assets which have been sold were comprised in the floating charge. In this connection reference was also made to section 129 of the Indian Companies Act which enacts :

" Where either a Receiver is appointed on behalf of the holders of any debentures of a Company secured by a floating charge, or possession is taken by or on behalf of these debenture-holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are under the provisions of Part V relating to preferenial payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the Receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures."

Basing himself on those provisions, learned counsel for the appellants contended that the official liquidator would have control over the assets comprised in the floating charge and that consequently the sale by Mr. Brookes held without reference to the Court was liable to be set aside. It would have been noticed that this point was never thought of or put forward by the Official Liquidator when he filed Application No. 3542 of 1954 before Balakrishna Ayyar, J. And this notwithstanding that a contention in about the same form was raised by the State of Madras in the suit C.S. No. 368 of 1953. The point was decided against the Government by Balakrishna Ayyar, J., on the ground that the Madras Electric Tramways, Limited being a Company registered in England and not being one registered under the Indian Companies Act, the provisions of section 129 would not apply to uch a Company (*Vide* section 276, etc.). As this judgment in C.S. No. 368 of 1953 is now under

appeal, we do not wish to say anything about this which would be prejudging an issue in the appeal by the State. Suffice it to say that if the point were sound, Mr. Brookes would be a trespasser and would have no right to take possession of the properties comprised in the floating charge and the Official Receiver would have been entitled to move the Court for a direction that he be put in possession of these properties but he never did so.

But apart from this, we have this fact that long before the petition for winding-up was filed, the Receiver had taken possession of these properties as early as in April, 1953. The effect of such an act on the part of the Receiver on the floating charge has been considered by Bennett, J., in In re *Griffin Hotel Company, Limited, Joshua Tetley & Son, Ltd.* v. *The Company*[1]. The learned Judge considered the effect of the sections corresponding to sections 129 and 230 (2) which are word for word identical with that in the English enactment in a case where a Receiver appointed by the debenture-holders had taken possession of the security and said :

"In my judgment sub-S. 4 (*b*) of section 264 (corresponding to section 230 (2) (*b*) of the Indian Companies Act) only operates if at the moment of the winding up there is still floating a charge created by the Company and it only gives the preferential creditors a priority over the claims of the debenture-holders in any property which at that moment of time is comprised in or subject to that charge. In the present case the debenture held by the plaintiffs contained a floating charge over all the borrowers' property. On December 9, 1938 that charge ceased to float on the property and assets of which Mr. Veale was appointed Receiver. The charge on that day crystallized and became fixed on that property and those assets."

These observations are, in our opinion, pertinent and make it clear that in the present case also the security ceased to float when Mr. Brookes as receiver took charge of the assets comprised in the floating charge on the 11th of April, 1953. There is no question of any floating charge to which the provisions of section 230 (2) of the Indian Companies Act could apply after that date. This point, therefore even if open to the appellants is without substance and has to be repelled.

The result is, that the appeal is dismissed, though we have reached the same result as the learned Judge by a different line of reasoning, having regard to the fresh points raised by the respondents in this appeal.

One further observation remains to be made and that is regarding the sum of Rs. 2½ lakhs which has been deposited in Court at the time of the filing of the appeal by a prospective buyer one Mr. Govindarajulu Naidu. When the appellants applied for a stay of delivery of the properties to the Bombay buyers, they showed their *bona fides* by producing a prospective buyer one Mr. Govindarajulu Naidu who stated that he was willing to purchase the identical assets purchased by the Bombay firm for an increased price. For that purpose the prospective buyer deposited in Court a sum of Rs. 2½ lakhs. In view of our decision dismissing the appeal, it follows that the sum deposited into Court should be refnnded to the person making the deposit.

There will be no order as to costs.

R.M. *Appeal dismissed.*

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1. L.R. (1941) 1 Ch.D. 129.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Arasayi .. *Petitioner**

v.

Pottammal and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 6, rule 17—Amendment of plaint—Leave to amend original claim as a legatee—Amendment in effect altering cause of action—If can be allowed.

Where a legatee under a will claimed exclusive possession of a house and the defendants, co-sharers in the testator's properties, contended against her claim and therefore she sought to amend her plaint by adding a fresh paragraph making out the existence of an agreement between the parties by virtue of which the plaintiff was to have been given exclusive possession of the suit house,

Held, that as by the amendment the plaintiff's case would try to make out the possession as analogous to that of a usufructuary mortgagee while the original claim was only that of a legatee, such an agreement could not be permitted as it would completely alter the cause of action.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Mathurai Town, dated, 16th April, 1953 and made in I.A. No. 1084 of 1952 in O.S. No. 357 of 1952 (suit since transferred to the Court of the District Munsif, Melurand numbered as O.S. No. 166 of 1953).

M. S. Vaidyanatha Ayyar for Petitioner.

M. R. Narayanaswami for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff sued for recovery of possession of a house and for an injunction restraining defendants 1 to 3 from interfering with her exclusive possession of the suit properties. She claimed that she was entitled to exclusive possession of the properties by virtue of certain provisions in a will left by her deceased husband. The defendants contended that under the terms of the will the plaintiff was not entitled to exclusive possession of the properties. Thereupon the plaintiff sought leave in the lower Court to amend the plaint by adding a paragraph to this effect. After the death of the testator, the plaintiff spent more than Rs. 500 towards his funeral expenses. There was an agreement among the plaintiff, the first defendant and the other co-sharers that the plaintiff should be entitled to exclusive possession of the house in order that she might recoup the amount she had spent towards the testator's funeral expenses. The learned District Munsif refused to grant permission to the plaintiff to amend the plaint. Therefore, she has come to this Court.

Mr. Vaidyanatha Ayyar, the learned Advocate for the petitioner, argued strenuously that the defendants would not suffer any injustice if the amendment were allowed, and that this is a case in which any hardship, which the defendants might be supposed to suffer could be compensated by costs. He also read a number of cases in which leave to amend the plaint had been granted. The decisions on the subject are legion and nobody can possibly reconcile them all. Nevertheless the rule on the matter is clear and it is set out on page 601 in Mulla's latest edition of the Civil Procedure Code. It runs as follows :—

> "Where a plaintiff bases his claim on a *specific title* he may not be allowed to amend the plaint so as to base it on a different title. But this is subject to rule 1 and when the title by which the plaintiff claims remains unaltered, the plaint will not be allowed to be amended, if it completely alters the cause of action."

It seems to me that this rule is applicable to the facts of this case. By an amendment of the plaint, the plaintiff wants to make out that her possession of the property is analogous to that of an usufructuary mortgagee while her original case was that her possession was as legatee. The order passed by the lower Court is correct and this petition is dismissed with costs.

K.C. —— *Petition dismissed.*

* C.R.P. No. 1164 of 1953. 17th August, 1954.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMY NAYUDU.

Arumugha Thevar .. *Appellant**

v.

Navanna Pena Chella Thevar. .. *Respondent.*

Mortgage—Usufructuary—Mortgagee of suit properties claiming title—Rule of estoppel—Whether available in the circumstances against such assertion—Trusts Act (II of 1882), section 90.

The rule of estoppel generally claimed against a mortgagee from denying title in the mortgagor from whom he had taken possession cannot be available in the case of mortgagor who had not only no title on the date of the mortgage but had in addition admitted his want of title and tried to acquire the same from a third person in whom it had vested.

Passage in Bigelow's "Law of Estoppel" page 376 cited in approval.

Where the plaintiff and his father usfructuarily mortgaged suit items to defendant and when there was a suit filed for redemption, it was contended by defendant that he had taken an assignment of suit lands from an estate of a Rajah to which the lands belonged and the plaintiff had consequently no title to claim recovery of the same by way of a suit for redemption.

Held : that because on the date of the said mortgage the plaintiff had no possession, the property having already been purchased by the estate notwithstanding the plaintiff's father having taken pattas in his own name subsequently, the fact remained that the plaintiff by setting up title in a third person on the strength of an alleged assignment in her favour by the estate, admitted his own want of title on the date of mortgage. Hence the rule of estoppel generally applicable to a mortgagor cannot hold good in view of such admission by the plaintiff himself regarding vesting of title in a third person.

Jasoda Bai v. *Mangal Chand*, (1940) 45 C.W.N. 470 at 474 applied.

Held also: that section 90, Trusts Act, could not also be invoked by plaintiff since there was nothing to prove defendant's utilising his position as a mortgagee for obtaining the assignment in his favour.

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga in Appeal Suit No. 7 of 1949 preferred against the decree of the Court of the District Munsiff of Manamadura in Original Suit No. 269 of 1944.

V. T. Rangaswami Ayyengar and *K. Kalyanasundaram* for Appellant.

R. Gopalaswami Ayyangar and *P. S. Raghavarama Sastri* for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises in a suit for redemption in which the appellant was the plaintiff. The plaintiff and his father usufructuarily mortgaged in favour of the defendant the two suit items of properties together with another item of property for securing a loan of Rs. 400 by a deed Exhibit A-1, dated 12th October, 1934. There is no dispute as regards the third item as it has been allowed to be redeemed. But in so far as the suit items are concerned the defence is that they belonged to the Rajah of Ramnad from whom the defendant took an assignment and that consequently the plaintiff had no title to the properties to entitle him to claim recovery of the properties by way of redemption.

The suit items are situated in the Ramnad Samasthanam and originally belonged to the plaintiff's father and in execution of a Rent decree the landholder himself purchased the property under two sale certificates, dated 5th December, 1933 and 23rd January, 1934 Exhibits B-11 and B-12. Notwithstanding these purchases subsequently patta appears to have been issued in favour of the plaintiff's father for faslis 1343 and 1345, Exhibits A-2 and A-3, dated 20th June, 1934 and 28th June, 1936 and the plaintiff's father continued to pay the kist till 1937, Exhibit A-8 being the last kist receipt in favour of the plaintiff, dated 18th July, 1937. In August 1938, the plaintiff claimed the suit items as belonging to his sister Karuppayi stating that he held the same under a lease and preferred a criminal complaint against the defendant that he trespassed into the said items. His sister's (Karuppayi's) title is said to have arisen by assignment of the suit properties by the landholder on receipt of a *nazarana* from her. The attitude the plaintiff took in those proceedings was that the title to the properties vested in his sister and that he was a lessee and there-

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* S.A. No. 1201 of 1950. 2nd September, 1954.

fore entitled to be in possession, and that the defendant, though he was in possession as a usufructuary mortgagee, was not entitled, to be in possession, in effect taking the position that he had no title to the property and that the title vested in his sister. There is evidence to show that Karuppayi made payment of a *nazar* amount of Rs. 76-6-0, as per Exhibit B-4 the receipt granted by the estate dated 1st June, 1938. Earlier, on 4th June, 1937, the plaintiff made an application for the grant of a patta offering to pay a sum of Rs. 76-6-0 as *nazarana* but expressed his inability later as can be seen from Exhibit B-6, dated 21st November, 1937. Probably after the statement Exhibit B-6, his sister paid the *nazarana* and claimed an assignment of the lands. The defendant also applied to the landholder for an assignment of the suit land and orders were passed on 1st December, 1938, granting the assignment to the defendant if he paid a sum of Rs. 100 besides the arrears of Rs. 36-6-0 outstanding on the said date. The said amount having been paid an order was passed by the estate manager assigning the suit lands to the defendant (*Vide* Exhibit B-10, dated 16th November, 1939). Exhibits B-13 and B-14 dated 24th June, 1940 and 25th June, 1945, respectively are the pattas issued by the estate in favour of the defendant. As regards payment of kist, there is one payment of kist made by Karuppayi on 10th July, 1938, Exhibit A-9 and after the issue of the pattas kist was invariably paid by the defendant.

The main contention of the appellant is that the defendant having taken possession of the property as usufructuary mortgagee from the plaintiff and his father is estopped from denying the title of the mortgagors that the defendant having obtained possession on the assumption that the mortgagors had title it would not be open to him to resist delivery of possession and that any right which he claims he could establish only after surrendering possession. Reliance is therefore placed on the rule of estoppel that the mortgagee cannot deny the title of his mortgagor having obtained the property from the mortgagor. It is well established that no Court will suffer a mortgagor to set up the title of a third person against his mortgagee; nor can the mortgagee deny the title of his mortgagor. The mortgagee having obtained possession of the property from the mortgagor cannot plead that the mortgagor had no title to the property.

But the position in the present case is that the plaintiff and his father as mortgagors had no title on the date of the mortgage, the property having already been purchased by the estate. Notwithstanding that the plaintiff's father was in possession and subsequently pattas were granted to him Exhibits A-2 and A-3, it might be contended that the plaintiff's father has a possessory title and the defendant having obtained the mortgage on the strength of such title cannot resist the plaintiff's claim to take possession as the representative of the mortgagor. But the events that have happened subsequently do not warrant the application of the doctrine of estoppel in the present case. The plaintiff by setting up title in his sister on the strength of an alleged assignment by the estate in her favour denied title in himself admitting title to a third party. Not only did his consent imply an absence of title in himself, but he applied to the estate for assignment of the lands on payment of a *nazarana* along with the defendant. The estate eventually granted the land to the defendant. The principle of estoppel cannot therefore be invoked, the plaintiff himself having admitted that he had no title and title as such vested in a third party and passed on to the defendant by the date of the suit for redemption. Neither party therefore had any title, but the title was in a third person, but the defendant acquired title after the mortgage from the third person in the present case. In *Jasoda Bai* v. *Mangal Chand*[1], 470 it was observed that:

"Though a mortgagee cannot dispute the mortgagor's title to the mortgaged property, yet if a person on whose behalf, among others, the mortgage deed was signed tries to get out of the mortgage on the plea that he was not a mortgagor and the mortgagee accepts the position, the latter is not prevented thereafter from disputing such person's title, nor can such person turn round and assert for a different purpose that he is a mortgagor."

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1. (1940) 45 C.W.N. 470.

At page 474 it was observed as follows :

"It is a well-recognised doctrine that neither the mortgagor nor the mortgagee can deny the title of the other at the time of the mortgage. They can only show that the title had ceased after the mortgage. This doctrine of estoppel has for its basis the relationship of mortgagor and mortgagee and is based on the principle that one who derives a benefit from the other cannot deny the other's title. The mortgagor having obtained money from the mortgagee on the representation that he has the title which he conveys to the mortgagee by way of security cannot turn round and say that he had no title in opposition to a claim founded on the mortgage, and thereby defeat the mortgagee's rights. The mortgagee having obtained a transfer of an interest in the property from the mortgagor cannot also turn round and say that his mortgagor had no title."

Not only the mortgagor had no title on the date of the mortgage ; but the plaintiff took up the position that he had no title and that title was with a third person and that position was accepted by both the parties, who applied to the person having title for grant of the land.

In Bigelow's "Law of Estoppel" it is observed at page 376 as follows :—

"Between the grantor and the grantee the recitals of the deed will doubtless be conclusive evidence in a proper case ; but the instrument will not for all purposes prevent the grantee from asserting a paramount title which he has acquired from a third person. And this being the case between grantor and grantee, it follows that the grantee may assert a title which he has acquired paramount to that of such grantor in a contest with one who claims under the same grantor and it is not broadly true to say, as is sometimes said, that when two persons trace title to the same grantor each is estopped against the other."

It will therefore be seen that the present is not a case where the plaintiff can rely on the rule of estoppel as not only he had no title on the date of the mortgage, but he admitted that he had no title and tried to acquire the same from a third person in whom the title vested. The view taken by the learned Subordinate Judge that the defendant is not prevented by the rule of estoppel from setting up his title obtained by assignment from the Ramnad Samasthanam is correct.

The contention raised under section 90 of the Trusts Act cannot also avail the plaintiff since there is nothing to show that the defendant utilised his position as mortgagee for obtaining the assignment. Reliance is placed on his evidence when he says that he applied for the lands stating that he got *othi* of the lands from the plaintiff. This is not sufficient to establish that the grant of the land by the landholder to the defendant was by virtue of his having been in possession as othidar. There were applications from Karuppayi, from the plaintiff and from the defendant. The defendant apparently paid the largest amount as *nazarana* and secured an assignment in preference to others merely for the reason that the amount which he paid was more than the others. There is no indication in the order granting the assignment that he was preferred for the reason that he was the othidar.

In the result the appeal is dismissed with costs. No leave.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Samikannu Chettiar .. *Petitioner**

v.

Arumugham Thomban .. *Respondent.*

Civil Procedure Code (V of 1908), section 21—Execution Court—Objection for the first time as to want of jurisdiction in the Court passing the decree—Whether can be raised.

It is not open to an execution Court to allow an objection on the ground of want of jurisdiction in the Court which passed the decree, if at the time when the suit was heard and decree passed no such objection had been raised.

Zamindar of Ettiyapuram v. *Chidambaram Chetty*, (1920) 39 M.L.J. 203 : I.L.R. 43 Mad. 675 (F.B.) followed.

The provisions of section 21, Civil Procedure Code will clearly apply to a case like this and prevent any such objection being raised in the execution stage.

*C. R. P. No. 342 of 1952. 1st November, 1954.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Vridhachalam, dated 17th April, 1951 and made in E.P. No. 27 of 1951 in P.C. No. 59 of 1949 on the file of the Court of the Vellayankuppam Panchayat.

K. R. Rama Ayyar and *S. V. Venugopalachari* for Petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT.—The District Munsif in execution wrongly upheld the contention of the judgment-debtor that the decree sought to be executed against him was a nullity as he was not a permanent resident in the jurisdiction of the Panchayat Court of Vellayankuppam, which passed it. He took no objection to jurisdiction at the time the suit was heard and in fact submitted to it. No appearance has been made on his behalf on this petition perhaps for the obvious reason that there is really no answer to this revision petition. This is a case clearly covered by section 21 of the Civil Procedure Code according to which

"no objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity....... and unless there has been a consequent failure of justice."

A fortiori it follows that it is not open to an execuion Court to allow any such objection. In *Zamindar of Ettayapuram* v. *Chidambaram Chetty*[1], a Full Bench of this Court clearly held that the provisions of section 21, Civil Procedure Code, apply to objections regarding want of territorial jurisdiction and that such an objection, not taken as provided by the section, must be considered cured for all purposes, and cannot be allowed in execution proceedings.

The petition is allowed with costs and execution will proceed in the District Munsif's Court.

K.C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

A.P.S. Karuppaiah Nadar .. *Appellant**

v.

The Special Deputy Collector for Land Acquisition, Virudhunagar, Ramanathapuram District and another .. *Respondents.*

Land Acquisition Act (I of 1894), section 25 (2)—Applicability—Irregularity in service of notice under section 9 (3)—Receipt of notice by servant—Claimant appearing before Acquisition Officer—Waiver of irregularity—Failure to make claim as to amount of compensation before the Officer—If bar to claim before the Court for enhancement of compensation.

If the notice under section 9 (3) of the Land Acquisition Act though served on a person not specified in section 45 actually reaches the claimant and in response to such a notice he appears before the officer, the irregularity in the manner of service is completely waived. It cannot be the law that when the claimant appears in response to such a notice, the officer has to send him back and serve another notice on him conforming to section 45. Where the claimant in such a case did not make any claim as to the amount of compensation before the Land Acquisition Officer he is precluded from claiming enhanced compensation before the Subordinate Judge as the terms of section 25 (2) are attracted.

Subramanian Chettiar v. *State of Madras*, (1953) 2 M.L.J. 568; *Venkatarama Aiyar* v. *Collector of Tanjore*, (1930) I.L.R. 53 Mad. 921 and *Taraprasad Chaliha* v. *The Secretary of State for India in Council*, (1929) I.L.R. 57 Cal. 837, distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Ramanathapuram at Mathurai, dated 8th February, 1950 and made in O.P.No. 67 of 1948.

M. Natesan for Appellant.

The Government Pleader (*C.A. Vaidialingam*) and *V. Srinivasan* for Respondents.

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1. (1920) 39 M.L.J. 203 : I.L.R. 43 Mad. 675 (F.B.).

* Appeals Nos. 185 and 211 of 1951. 7th December, 1954.

The Judgment of the Court was delivered by

RAJAGOPALA AYYANGAR, *J.*—These are appeals filed by a claimant from the judgment of the Subordinate Judge of Ramanathapuram at Mathurai with reference to certain land acquisition proceedings and the point raised for consideration is whether the appellant was precluded from claiming enhanced compensation before the learned Subordinate Judge by reason of the absence of any claim made before the Land Acquisition Officer.

Appeal No. 185 of 1951 has been filed against a reference under section 18 of the Land Acquisition Act which was numbered as O.P. No. 67 of 1948 on the file of the Subordinate Judge of Ramanathapuram at Mathurai and Appeal No. 211 of 1951 is directed against the order in O.P. No. 66 of 1948. In O.P. No. 67 of 1948 the appellant was awarded by the Land Acquisition Officer Rs. 1604-7-3 in respect of certain lands acquired while in O.P.No. 66 of 1948 the amount awarded was Rs. 51-12-3. These figures were based upon the valuation of the lands at Rs. 24 per cent. The claimant-appellant made an application for reference claiming at the rate of Rs. 500 per cent. The learned Subordinate Judge has rejected the claim for enhanced compensation by the appellant in these two Original Petitions on the ground that he had not made any claim for any particular sum when he appeared before the Land Acquisition Officer in response to a notice under section 9 (3) of the Act. In consequence of this failure on his part, the provision in section 25 (2) of the Land Acquisition Act was held to be attracted to the appellant's case and his claim for enhanced compensation was rejected. Hence these appeals.

The facts necessary to appreciate the points raised on behalf of the appellant are shortly these: There was a notification under section 4 of the Act in respect of the lands sought to be acquired. The appellant appeared before the Land Acquisition Officer under section 5 (A) of the Act and filed a statement on 28th February, 1948, objecting to the acquisition on the ground that these lands need not be acquired as they were required for the purpose of a school. Subsequently a notice under section 9 (1) was published and an individual notice under section 9 (3) of the Act was addressed to the appellant and was received by his servant one Kasirajan. In reponse to this notice, the appellant appeared before the Land Acquisition Officer on 14th June, 1948 and promised the officer to produce some documents within a few days. Subsequently however he never turned up. It is now common ground that he did not make any oral claim regarding the quantum of the compensation payable for the acquisition on the date when he appeared before the Officer. Records in this case show that the documents which the appellant promised to produce, had reference to a dispute as to title to the property being acquired, between the appellant and another. This was all the part that the appellant took before the award. The Officer made an award on 7th July, 1948 and the same was served upon the appellant, whereupon within the time limited by section 18 of the Land Acquisition Act the appellant desired a reference to be made to the Court regarding the quantum of compensation payable to him which he claimed on the basis of the figure already mentioned.

In the statement of claim requiring a reference, the appellant stated in paragraph 10

"The applicant has referred to the value in his objections to the Special Deputy Collector and no opportunity was afforded to him to produce evidence regarding market value and compensation."

It would be seen that the appellant had made a definite and positive assertion that he had filed before the Officer a claim to compensation based upon a particular value and there was a complaint that he was not given the opportunity by the Officer to prove his case. When the matter came up before the Court, counsel on behalf of the Government denied the appellant's allegation regarding his having filed any statement of claim before the Officer. The files of the Acquisition Officer as well as his notes paper were examined and it was found that there was no trace of any such claim having been filed. Notwithstanding this, the appellant in his evidence in the case repeated his assertion that he had filed such a statement and went on to add that he had also

a copy of this statement with him. In the circumstances, it is not surprising that he was unable to produce the copy which he admitted was in his possession. On these facts, the learned Subordinate Judge held (1) that there had been proper service of notice under section 9 (3) of the Act by its being delivered to Kasirajan and (2) that the appellant had omitted without proper excuse to make a claim before the Land Acquisition Officer and was consequently debarred under section 25 (2) of the Act from claiming enhanced compensation on the reference. On these conclusions O.P. Nos. 66 and 67 were dismissed.

Before us Mr. Natesan, learned counsel for the appellant, raised both the above points. His first objection was that on a proper construction of section 45 of the Act, the service of the notice on a servant, who is not a member of the claimants' family, is not proper service and the second, that if notice under section 9 (3) of the Act were not properly served, the appearance of the claimant before the Acquisition Officer would not amount to a waiver of the irregularity and that section 25 (2) contemplated the existence of a valid notice to the claimant before it could be invoked.

In the view we are taking of the second contention of learned counsel, it is unnecessary for us to finally decide whether the service in the present case on the servant was a sufficient compliance with section 45. We will therefore proceed upon the assumption that the service of the notice was irregular but in response to this irregular notice the appellant did appear before the Officer. It is stated that the claimant was not aware of the irregularity and that consequently we cannot draw any presumption against him of an acquiescence in or waiver of, this irregularity. Following on this, two contentions were raised by learned counsel. The first was that there was a duty cast upon the Acquisition Officer to inform the claimant that he should make a claim for a particular amount of compensation and that in the absence of any notice or warning, the provisions of section 25 (2) would not be attracted. It is conceded that there is no provision in the Land Acquisition Act directing this to be done and in the absence of any such provision it would be adding to the terms of the statute to import such a duty. Learned counsel relied for this purpose on the decision of a Bench of this Court in *Subramania Chettiar* v. *The State of Madras*[1]. Having carefully examined it, we find that it does not support any such proposition. The facts of that case were that at the time when the appellant apeared before the Acquisition Officer in response to a notice under section 9 (3) of the Act, he was still objecting to the acquisition itself and was under the impression that he had to formulate his claim only after his objection to the acquisition were disposed of. Acting on this belief, the claimant did not make any claim specifying the amount of compensation for the property acquired. The learned Judges held that the claimant had a just cause for omitting to make the claim within the meaning of section 25 (2) of the Act and that the Court could, on a consideration of the circumstances, permit a claim for enhanced compensation to be made at the stage of the reference. The facts of the present case do not raise any such mistake or misapprehension on the part of the appellant who has positively asserted that he did make a claim for compensation though his statement was found to be false. The next set of cases relied on are those reported in *Venkatarama Ayyar* v. *The Collector of Tanjore*[2], and *Taraprasad Chaliha* v. *The Secretary of State for India in Council*[3]. In both these, the notice served under section 9 (3) of the Act did not conform to the requirements of the statute which prescribes a minimum of 15 days between the date of the receipt of the notice and the enquiry. In both these the learned Judges held that when in response to such a notice, a claimant appears but has not made any claim, the provisions of 25 (2) are not attracted. We do not see how these cases afford any assistance to the appellant. In the first place there is a marked distinction between the irregularity in the manner of service of notice and a non-compliance with the terms of the enactment in regard to the duration of the notice. In the former cases if the notice though served on a person not specified in section 45 actually reaches the claimant and in response to such a notice he appears before the officer, we

1. (1953) 2 M.L.J. 568.
2. (1930) I.L.R. 53 Mad. 921.
3. (1929) I.L.R. 57 Cal. 837.

are of the opinion that the irregularity in the manner of service is completely waived. It cannot be the law that when the claimant appears in response to such a notice, the officer has to send him back and serve another notice on him conforming to section 45. The latter type of cases where the minimum duration of notice fixed by the statute is not complied with, stand on an entirely different footing. The statute intends this duration for the purpose of the objector gathering sufficient materials and acquainting himself with what he has to do when he appears in response to the notice. If in such a case an irregularity occurs, it would be for the Government to prove that notwithstanding the non-compliance with the statute, the claimant is not prejudiced. Unless therefore they are able to establish that the claimant was informed of the steps he has to take and the statements he has to file to assert his rights, the infirmity arising out of the defect continues to afford protection to the claimant. These circumstances however can never apply to cases of defective service as distinguished from defective notice. We are therefore clearly of the opinion that the decisions do not afford any support for the contention so strenuously urged by learned counsel for the appellant.

We are further prepared to hold that in the present case where the appellant himself asserts that at the enquiry he did make a claim for compensation at a particular figure, there is sufficient proof of the claimant's knowledge of the steps he has to take to enable him to claim enhanced compensation.

The fact that this statement has turned out subsequently to be false has no bearing on the question of the appellant's knowledge of the procedure. We are, therefore, of the opinion that the terms of section 25 (2) are attracted to the present case and that the claimant has either refused or omitted to make a claim without sufficient cause as provided in section 25 (2) of the Act.

In the result, we concur with the conclusion reached by the learned Subordinate Judge. These appeals fail and are dismissed with costs.

K.S. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

The Union of India represented by the Income-tax Office, Nagapattinam, for itself and on behalf of all the Creditors of M. Kanakarathnam and Brothers by its Partners M. Kanakarathnam and Ramalingam .. *Petitioners**

v.

The Firm of M. Kanakarathnam and Brothers by its Partners : (1) Kanakarathnam Pillai, (2) M. Ramalingam Pillai, (3) Kandaiya Pillai. .. *Respondents.*

Income-tax Act (XI of 1922), sections 54 (1) and 3 (d)—Assessee's fraudulent sale of properties—Suit by Income-tax Department under section 53, Transfer of Property Act (IV of 1882) for recovery of dues—Documents confidential by nature produced in evidence—No bar to production and use as evidence—Suit not foreign to proceedings unde the Act.

For purposes connected with assessment made under the Income-tax Act or for the recovery thereof, it is always open to the Income-tax Department to use particulars contained in documents or records or parts of records or proceedings ; the confidential nature of the documents cannot be used against the Department to bar their being produced in evidence.

Where in proceedings taken by the Income-tax Department, an assessee, who in fraud of the assessment dues alienated his properties by sale to a third person and thereby tried to defeat the Income-tax Department from recovering their dues, some of the documents which were within the knowledge of the parties were produced by the Department by way of establishing their rights to proceed against properties so alienated by the assessee.

Held : the Income-tax Department was entitled to use the documents, since they had been deprived of assets of the assessee against which they had a right to proceed by processes provided in the Act or otherwise. Section 54 (1) of the Act would not be a bar to the reception of the documents in Court as evidence in the suit filed to recover the dues.

(2) Despite the suit filed having been under section 53 of the Transfer of Property Act, it could not be suggested it was entirely foreign to a proceeding already taken under the Income-tax Act. The

*C.R.P. No. 2027 of 1953. 17th December, 1954.

suit had to be deemed as one arising out of or a proceeding under the Act in the sense that it did not pertain to any proceeding or which could not ordinarily be expected to arise out of a proceeding under the Act. Section 54 (3) (*d*) of the Act cannot be confined to a proceeding arising directly out of the Act but can be understood to refer to any suit or proceeding or any other matter pertaining to a proceeding under the Act.

Joslowitz v. *Burstein*, L.R. (1948) 1 K.B. 408, distinguished.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court of East Tanjore at Nagapattinam, dated 10th October, 1953 and made in O.S. No. 82 of 1951.

C. S. Rama Rao Saheb for Petitioners.

M. Subbaroya Ayyar, V. Sethuraman, S. Padmanabhan, K. R. Ramani and *T. Srinivasamurthi* for Respondents.

The Court delivered the following

JUDGMENT.—This revision petition raises a question of the applicability of section 54 of the Indian Income-tax Act. The petitioner is the Union of India represented by the Income-tax Officer, Nagapattinam, who instituted the suit O.S. No. 82 of 1951 on behalf of the general body of creditors of defendants 1 and 2 for a declarationthat the sale deed, dated 9th May, 1947, executed by defendants 1 and 2 in favour of defendant 3 the father-in-law of defendant 1, of the suit properties is null and void and not binding on the plaintiff as being sham or in fraud of creditors and made with an intention to defeat or delay the creditors of defendants 1 and 2. Defendants 1 and 2 were brothers and were carrying on business in partnership. For the financial year 1942-43 defendants 1 and 2 as partners were assessed to income-tax, super-tax, etc., in the sum of Rs. 36,833-5-0., The assessment was completed by March, 1947 and a notice of demand was served on them on 1st April, 1947, calling upon them to pay the tax in two instalments. The assessees appealed to the Appellate Assistant Commissioner of Income-tax and pending the appeal they applied o the Income-tax Officer by a letter, dated 25th April, 1947, for time. This application was rejected and the assessees applied to the Inspecting Assistant Commissioner for a similar relief. The Inspecting Assistant Commissioner passed an order that if the assessee paid a sum of Rs. 10,000 forthwith and gives an undertaking not to create any charge over or alienate their properties in British India until the income-tax dues were paid, time would be granted till the disposal of the appeal. Further time was asked for complying with the condition as to payment and on 15th May, 1947, the first defendant applied for extension of time to pay the amounts and undertaking that himself and the other partner will not create any charge over or alienate the properties. An undertaking signed by defendants 1 and 2 was filed before the Inspecting Assistant Commissioner. The assessees paid only a sum of Rs. 5,000 and failed to pay the balance. In the meanwhile on 9th May, 1947, they brought into existence the sale deed in question in favour of defendant 3. The plaintiff's case is that the suit properties formed the bulk of the properties belonging to the assessees and except for a few small items they have practically alienated their entire estate with a view to defeat and delay the creditors including the Government. When the suit was taken up for trial and when the plaintiff intended to use as evidence certain documents on its side, objection was taken as to their admissibility in evidence, the objection being founded on section 54 of the Indian Income-tax Act.

The documents which the plaintiff sought to use in support of his case are demand notices for the tax due for 1942-43, applications by the first defendant or his authorised agent for time for payment of the tax for 1942-43, the communication by the first defendant to the income-tax authority promising to file an undertaking and asking for time, the undertaking itself filed by defendants 1 and 2, the letter of the first defendant asking for still further time and the appeal petition filed by the first defendant against the order of assessment. The contention is that these documents formed part of the record of the assessment proceedings which under section 54 of the Income-tax Act should be treated as confidential and therefore could not be produced in evidence in the suit. Section 54 (1) says :—

"All particulars contained in any statement made, return furnished or accounts or documents produced under the provisions of this Act, or in any evidence given, or affidavit or deposition made, in the course of any proceedings under this Act other than proceedings under this Chapter, or in any record of any assessment proceeding, or any proceeding relating to the recovery of demand, prepared for the purposes of this Act, shall be treated as confidential, and notwithstanding anything contained in the Indian Evidence Act, 1872, no Court shall save as provided in this Act, be entitled to require any public servant to produce before it any such return, accounts, documents or record or any part of any such record, or to give evidence before it in respect thereof."

Under clause (2)

"If a public servant discloses any particulars contained in any such statement, return, accounts, documents, evidence, affidavit, deposition or record, he is liable to be punished with imprisonment which may extend to six months, and shall also be liable to fine."

Clause (3) provides for exemption under certain conditions, where the confidential nature of the document cannot be insisted upon. One such condition provided under clause (3) (*d*) is as regards the furnishing of any such particulars to a civil Court in any suit to which the Government is a party, which relates to any matter arising out of any proceeding under the Act.

Mr. Rama Rao Saheb contends that the confidential nature of the documents is with reference to their being disclosed to third parties but as between the assessee and the income-tax department there is no question of any secrecy arising out of this section. Undoubtedly whatever evidence is given or statement made is already in the possession of the income-tax authorities, that is, those are particulars which are known to the assessee and which have been placed before the income-tax authorities and ordinarily knowledge of such particulars could be confined only to the two parties, namely, the income-tax department and the assessee, and what is prohibited and also penalised under section 54 is the production by any public servant of any such return, accounts, documents or record or any part of any such record, and no public servant can be compelled to give evidence before any Court in respect of such matters. So far as the effect of section 54 (1) is concerned, a Full Bench of this Court has considered in *Rama Rao* v. *Venkata Ramayya*[1]. In that case the question was whether a profit and loss statement and a statement showing the details of net income, filed by an assessee in support of his return of income furnished under section 22 of the Indian Income-tax Act, are public documents with reference to section 74 of the Evidence Act, of which certified copies would be admissible under section 65 (*e*) of the Evidence Act. That decision overruled the contrary view taken in *Mythili* v. *Janaki*[2], that these are not public documents. In the course of the judgment the learned Chief Justice observed that while section 54 prohibits the disclosure, except on specified occasions, of matters connected with an assessment to income-tax and prohibits a Court from requiring a public servant to produce the documents mentioned in the section or to give evidence in respect of them it does not follow that the Court may not admit in evidence a document which falls within section 54 (1). Then the question whether the documents in question in that case were public documents was considered. In *Suraj Narain* v. *Jhabbu Lall*[3], it was held that all that section 54 of the Indian Income-tax Act provides for is, that the documents specified shall be treated as confidential and that no Court shall require a public servant to produce them. The language of the section cannot be stretched to mean that an assessee cannot himself disclose the contents of the documents referred to therein. So in so far as the assessee who was a party to the proceedings is concerned he cannot be prevented from disclosing the documents if he requires their use in any civil Court since the provision for its secrecy in section 54 is for his benefit and interest and it is open to him to waive that right. The view taken in the above case was based on the principle that the assessee has always the option to waive his right to insist upon its being kept confidential. If section 54 (1) only prohibits their disclosure to third parties any disclosure by production of the record in a proceeding between the income-tax authorities and the assessee would only amount to disclosing to the party who has already knowledge of the contents of the records and of the proceeding and the income-tax authorities cannot therefore be prevented form making use of them if they required

1. (1940) 2 M.L.J. 257 : I.L.R. (1940) Mad. 969 (F.B.).
2. I.L.R. (1940) Mad. 329.
3. I.L.R. (1944) All. 221.

the same for the purpose of further implementing the provisions of the Indian Income-tax Act.

The present is a case where the assessees have failed to pay the tax due and the income-tax authorities have taken steps under the Act for recovery of the amount. The assessees obtained time and an order for payment in instalments and before the expiry of the time granted the assessees sold the properties against which the income-tax authorities have a right to proceed for collection of their dues. Since the department has been deprived of the assets of the assessee against which they have got a right to proceed by processes provided in the Act or otherwise, their use of these documents in pursuance of the right to recover the tax could not be said to relate to something which is not connected with the enforcement of their order of assessment made under the Act. For the purposes connected with the assessment or for the recovery thereof, it is always open to the income-tax department to use the particulars contained in such documents or record or part of the record or proceedings, and the confidential nature of the document therefore cannot be used against them. In seeking to pursue their remedies and for implementing the same by appropriate proceedings as in the present case they had necessarily to institute the suit for virtually recovering the properties against which they have got a right to proceed. In that view I consider that section 54 (1) would not be a bar to the reception of these documents in Court as evidence in this case. The learned District Judge while observing that the prohibition in the section is made for the protection or benefit of the assessee and it is open to the assessee to waive that protection, however did not think that either the income-tax authority can be permitted to produce and use the original document since a third party, who somehow manages to get a certified copy of a document, can be allowed to use that document against the assessee. I am unable to understand this observation of the learned Judge as to a third party managing to get a certified copy of a document. A certified copy cannot be granted by a Court unless it be to the parties or to those who are interested in the proceedings. Since the suit is between the Government and the assessee, no other person can be held to be entitled to a certified copy of any document filed in the suit excepting the parties or those who may in the opinion of the Court be considered to be persons interested in the suit. There is therefore no question of a third party getting a certified copy of a document and the confidential nature of the documents cannot therefore be violated by their being filed in a proceeding between the Government and the assessee.

Another argument advanced by Mr. Rama Rao Saheb based on section 54 (3) (*d*) is that the present suit is a matter arising out of a proceeding under this Act. This is not a suit which could be held to arise under this Act. But the question is whether this could be said to be a suit which arose out of a proceeding under this Act. The suit being one under section 53 of the Transfer of Property Act, *prima facie* is not a proceeding which is provided for in the Income-tax Act. But at the same time it cannot be suggested that the suit is entirely foreign to a proceeding already taken under the Act. The suit has been instituted by reason of the assessees failing to comply with the notice of demand and further failing to keep up the undertaking given by them not to alienate the properties which they impliedly agreed to make available for the recovery of the income-tax dues. It cannot therefore be said that the suit is not a matter arising out of a proceeding under the Act in the sense that it does not pertain to any proceeding or which could not ordinarily be expected to, in the natural course of events, arise out of a proceeding taken under the Act. In my view section 54 (3) (*d*) cannot be confined to a proceeding arising directly out of the Act but can be undertsood to refer to any suit or proceeding or any other matter which may pertain to a proceeding under the Act or in the natural course of events follow a proceeding taken under the Act, though not directly provided under the Act. Mr. Subbaraya Aiyar for the assessees referred to a decision in *Joslowitz* v. *Burstein*[1] and sought to seek support from the construction of a similar language in the Increase of Rent and Mortgage Interest (Restrictions) Act for his contention that unless the present suit could be said to be a suit provided for under

the Act, it could not be held to come within the scope of a matter arising out of a proceeding under the Act. In that case under a tenancy agreement the defendant who became the tenant of a dwelling house belonging to the plaintiff agreed not to assign, sub-let or part with possession of the demised premises without the consent in writing of the landlord. There was a proviso for re-entry on breach by the tenant of any of his obligations. The tenant sub-let part of the demised premises to one sub-tenant and the remainder to another sub-tenant, in each case without the written consent of the landlord. The landlord after serving upon the tenant a notice under the Law of Property Act, 1925, requiring the tenant to remedy the breach, brought the action in the High Court claiming possession of the demised premises and recovered judgment. The point was then taken for the defendant that this action was a claim or other proceeding arising out of the Rent Restriction Acts and that under section 17 (2) of the Act of 1920 the plaintiff was not entitled to recover any costs as she might have brought the action in the County Court instead of the High Court. While holding that the action was not a claim or other proceeding arising out of the Rent Restriction Acts and there was no defence based on those Acts, the learned Judge observed that it was a perfectly simple case of a common law action to recover possession of premises and mesne profits at the rent reserved by the original tenancy agreement and the suit was not one in which any one wanted to take advantage of or claimed benefit derived from the Rent Restriction Act; and the statute was not pleaded and there was no suggestion that there was any right in the defendant to be protected by the statute and nobody had suggested that the statute has anything at all to do with the case. The facts of the present case are entirely different. The Act has everything to do with the present suit. Bur for the Act the plaintiff has no *locus standi* to institute the suit. This is a suit which has intimate connection with the proceedings which had already been taken under the Act. If the contention of the assessees has to be accepted the result would be that the plaintiff would be deprived of establishing the case, the main evidence in support of his plaint being the record of the proceedings before and after the assessment. In short, the attempt is to deprive the plaintiff from placing before the Court the evidence in support of its case. I am of opinion that the documents which the plaintiff sought to file are not affected by section 54 of the Act in so far as their disclosure in the present suit is concerned.

This revision is allowed with costs. Advocate's fee Rs. 100.

K.C. ——— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P.V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

R. Govinda Naicker .. *Appellant**

v.

National Paper Company, by its Partner Jaya Narayana Daga .. *Respondent.*

Madras Indebted Agriculturists (Temporary Relief) Act (V of 1954), section 3—"Application for the execution of a decree" —Scope of—When could be stayed.

Whether a particular application is or is not an application for the execution of a decree within the meaning of section 3 of the Madras Act V of 1954 must be decided on the plain meaning to be attached to the words " application for the execution of a decree." No assistance can be derived from decisions on questions such as whether a particular proceeding is or is not a proceeding which falls within section 47 of the Code of Civil Procedure for purposes of appeal or whether a particular application is an execution application for the purpose of determining the Article of the Limitation Act applicable to such an application.

So far as the decree for payment of money is concerned there can be no application for the execution of such a decree after a sale had been held in execution of such a decree and such a sale had been confirmed duly and after a sale certificate had been issued to the purchaser, be it the decree-holder himself or a stranger The decree-holder purchaser may have his remedies to obtain possession in pursuance of the sale certificate issued to him. But in doing so he is not seeking to execute the decree. In one sense an application under Order 21, rule 95 of the Code of Civil Procedure may be described as an execution petition. But that would not make the application one for the execution of a decree.

An application by a decree-holder purchaser under Order 21, rule 95, for delivery of possession of the property purchased in execution is not an application for the execution of a decree within the meaning of section 3 of the Madras Act V of 1954.

Appeal under clause 15 of the Letters Patent against the order of the High Court, dated 13th September, 1954 and made in A.A.O.No. 363 of 1954, preferred to the High Court against the order of the Court of the Subordinate Judge of Chingleput, dated 19th July, 1954 and made in E.A. No. 91 of 1954, in C.S. No. 448 of 1948 on the file of the High Court, Madras.

B. C. Seshachala Aiyar and *J. Nagarajan* for Appellant.

D. Ramaswami Ayyangar and *K. Krishnuswami* for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal under clause 15 of the Letters Patent against the judgment of Rajagopalan, J., dismissing a Civil Miscellaneous Appeal preferred by the Appellant before us against the order of the Subordinate Judge of Chingleput on an application made by him under the provisions of the Madras Indebted Agriculturists Temporary Relief Act (V of 1954), for stay. The respondent had obtained a decree against the appellant in a suit on the file of this Court, for the recovery of the amount due under a promissory note. In execution of this money decree, the respondent attached and brought to sale a house alleged to belong to the appellant situated in Tambaram, and at the Court sale the respondent himself purchased it on 5th July, 1950. The sale was duly confirmed, and a sale certificate was issued to the decree-holder auction-purchaser. The wife of the appellant intervened with a claim which was rejected. She thereupon filed a suit to set aside the adverse order, and it is represented to us that that suit has also since been dismissed and an appeal is pending. The decree-holder who had purchased the property filed an application under Order 21, rule 95 of the Code of Civil Procedure (E.A.No. 343 of 1951) for delivery of possession of the house which he had purchased. It is to stay this application that the appellant made the application under Madras Act V of 1954. The learned Subordinate Judge dismissed the application. The appellant filed the Civil Miscellanous Appeal against the order of dismissal, and it was dismissed by Rajagopalan, J., by the judgment now under appeal. Rajagopalan, J., held that the appellant was an agriculturist within the meaning of Madras Act V of 1954, but he held that section 3 of the Act did not apply. Though the decree was for payment of money passed in a suit for recovery of a debt, there was no application for the execution of that decree, which could be stayed under the Act. The question is, whether the learned Judge was right in this view. We have no hesitation in saying that he was.

Whether a particular application is or is not an application for the execution of a decree within the meaning of section 3 must be decided on the plain meaning to be attached to the words "application for the execution of a decree". In our opinion, no assistance can be derived from decisions on questions such as whether a particular proceeding is or is not a proceeding which falls within section 47 of the Code of Civil Procedure for purposes of appeal or whether a particular application is an execution application for the purpose of determining the article of the Limitation Act applicable to such an application. So far as a decree for payment of money is concerned, there can be no application for the execution of such a decree after a sale had been held in execution of such a decree and such a sale had been confirmed duly and after a sale cetificate had been issued to the purchaser, be it the decree-holder himself or a stranger. Mr. Seshachala Ayyar, learned counsel for the appellant, contended that the decree cannot be deemed to have been executed till possession was obtained by the purchaser decree-holder. We do not agree with him. The decree-holder purchaser may have his remedies to obtain possession in pursuance of the sale certificate issued to him. But in doing so, he is not seeking to execute the decree. In one sense, an application under Order 21, rule 95, Civil Procedure Code may be described as an execution petition because the provision is found in the Order relating to execution, namely, Order 21. But that would not make the application one for the execution of a decree.

We agree with the learned Judge that the application made by the decree-holder purchaser under Order 21, rule 95, Civil Procedure Code, for delivery of possession was not an application for the execution of a decree within the meaning of section 3 of the Madras Act V of 1954.

The appeal is, therefore, dismissed with costs.

The interim stay granted (in C.M.P. No. 8439 of 1954) pending the appeal will stand vacated.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAJAGOPALAN.

Ravula Subba Rao and another .. *Petitioners**

v.

The Commissioner of Income-tax, Madras and another .. *Respondents.*

Income-tax Act (XI of 1922), section 33 (4)—Scope and effect—If in conflict with Income-tax Appellate Tribunal Rules, 1946, rule 24 (8)—Power to dismiss appeal for default—Vires of rule providing for such dismissal.

Section 33 (4) of the Income-tax Act does not make it obligatory on the part of the Appellate Tribunal to dispose of the appeal on the merits, when the opportunity which was given to the party concerned was not availed of, and the appeal was not argued on behalf of such party. In this view there is no conflict between rule 24 (8) of the Income-tax Appellate Tribunal Rules (which provides for disposal on merits or dismissal for default when the appellant does not appear) and section 33 (4) of the Act. Accordingly the rule is *intra vires* and the Appellate Tribunal had jurisdiction to dismiss the appeal for default.

Under the Act and under the Appellate Tribunal Rules, 1946, no provision is made for restoring appeals which were dismissed for default. If it is a lacuna, it is a matter for the appropriate authority to remedy it.

Petitions under Article 226 of the Constitution of India praying that the High Court will be pleased to issue a writ of *certiorari* calling for the records in Income-tax Appeals Nos. 3602-3603—'51-52 and Income-tax Appeals Nos. 3240-44—'51-52 on the file of the Income-tax Appellate Tribunal, Madras Bench " A " respectively and quash the orders, dated 28th July, 1952, made therein.

K. Bhimasankaram for Petitioners.

C. S. Rama Rao Sahib for Respondents.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—These are applications to issue writs of *certiorari* to quash the proceedings of the Income-tax Appellate Tribunal. By virtue of the rule-making power vested in the Appellate Tribunal under section 5-A, sub-clause 8, rule 24 of the Income-tax Appellate Tribunal Rules, 1946, was made, and it provides :

" Where on the day fixed for hearing or any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may, in its discretion, either dismiss the appeal for default or may hear it *ex parte*."

The point raised in these petitions is that this rule is *ultra vires* and is opposed to section 33 (4) of the Income-tax Act. The rule-making power under section 5-A, sub-clause (8), is, of course, subject to the provisions of the Act, and the scope of the power is to regulate the procedure of the Appellate Tribunal and the procedure of Benches of the Tribunal in all matters arising out of the discharge of its functions, including the places at which the Benches shall hold their sittings. It is essentially a power to regulate the Tribunal's own procedure, but is subject to the provisions of the Act.

The point for decision therefore is, whether the rule is in conflict with section 33 (4) of the Act. The sub-section runs as follows :—

" The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner."

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* W.P. Nos. 679, 680 and 769 to 773 of 1952. 21st January, 1954.

The argument is that, under this sub-section, even if the party did not avail himself of the opportunity given to him of being heard and was not present on the day fixed for hearing, it was the duty of the Appellate Tribunal to dispose of the appeal on merits, and that it could not dismiss it for default. On this construction, it was contended that the rule providing for dismissal for default was in conflict with section 33 (4) and was therefore *ultra vires*. We are unable to place such a narrow construction on section 33 (4). It requires the Appellate Tribunal to give both parties an opportunity of being heard. If that opportunity is availed of, and the Tribunal hears the appeal, it is no doubt true that the Tribunal has to dispose of the appeal on merits. But if the opportunity is not availed of by the appellant, the Appellate Tribunal may follow one of two courses. Notwithstanding the non-appearance of the party, it may dispose of the appeal on merits, or it may dismiss the appeal for default. A very wide power is given to the Appellate Tribunal, for the language employed is that " it may pass such orders thereon as it thinks fit," and that is, such orders as accord with the circumstances of the case, whether the opportunity was availed of by the party concerned or was not availed of. Section 33 (4) does not make it obligatory on the part of the Appellate Tribunal to dispose of the appeal on merits, when the opportunity which was given to the party concerned was not availed of, and the appeal was not argued on behalf of such party. In the view of the matter, we are unable to see any conflict between rule 24 of the Rules and section 33 (4) of the Act. Our attention was drawn in the course of the arguments to the powers of the Appellate Assistant Commissioner in hearing an appeal, provided under section 31 of the Act. These powers bear no analogy, in our opinion, to the powers of the Appellate Tribunal hearing an appeal, as the powers of the Appellate Tribunal are not specified in the same detail as in section 31 ; but the mode of disposing of the appeal is left to it, giving it a wide discretion to dispose of it as it thinks fit.

In these cases, what happened was that the applicant wanted to apply for an adjournment, as the point raised in the appeals was before the Supreme Court in an appeal preferred by the same assessee against the decision of this Court in *Subba Rao* v. *Commissioner of Income-tax* [1]. On the day fixed for the hearing of these appeals, the assessee did not appear and he did not instruct any Advocate to argue the appeals on his behalf. The Appellate Tribunal therefore dismissed these appeals for default. There is nothing to show that the order of the Tribunal was without jurisdiction, so as to justify interference by this Court by issuing a writ of *certiorari* to quash the proceedings. It may be observed that under section 66 of the Act it was open to the assessee to have asked for a reference raising the same question which was urged before us. We do not agree with the contention of the learned Advocate that the question now agitated before us is not a question of law and that it did not arise out of the orders of the Appellate Tribunal. The very jurisdiction of the Appellate Tribunal to dismiss an appeal for default without disposing of it on merits is the question raised before us, and we fail to see how that question is not one which did not arise out of the orders of the Appellate Tribunal. He could have therefore asked for a reference to this Court ; but he did not avail himself of that remedy. We do not wish to rest our decision on this aspect of the case, as we disagree with the contention of the learned Advocate regarding the construction of section 33 (4) of the Act and rule 24 of the Income-tax Appellate Tribunal Rules, 1946. The same view was taken by the Allahabad High Court in *Bhagwan Radha Kishen* v. *Commissioner of Income-tax, U.P.* [2]. It is no doubt true that under the Act under the Appellate Tribunal Rules, 1946, no provision is made for restoring appeals which were dismissed for default. The Allahabad High Court, however, thinks that it is the inherent right of a Tribunal to set aside an order of dismissal for default, but we think it is unnecessary to express any opinion on that question in this case. If it is a lacuna, it is a matter for the appropriate authority to remedy it.

In the result, the petitions are dismissed with costs, Rs. 250, in Writ Petition No. 679 of 1952.

K.S. *Petitions dismissed.*

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1. (1951) 2 M.L.J. 424.
2. A.I.R. 1952 All. 857 : (1952) 22 I.T.R.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK AND MR. JUSTICE KRISHNASWAMI NAYUDU.

Muthuchellappa Chettiar .. *Appellant**

v.

P. M. P. L. Palaniappa Chettiar and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 20—Appointment of a Receiver to collect a debt—If tantamount to assignment of the debt to him, so as to enable him to file suit for its recovery at place where he was appointed Receiver.

An order of appointment of a Receiver to collect a debt is only to empower him to realise the amount and to await further directions of the Court as regards its disposal if such directions had not been given at the time of the appointment of a Receiver. The appointment of a Receiver in respect of a debt would not be tantamount to an assignment in his favour of the debt itself so as to enable him to file a suit in the forum where he was appointed Receiver.

Appeal against the order of the Court of the Subordinate Judge (Additional) of Pudukottai, dated 16th November, 1951 and made in O.S. No. 112 of 1949 (O.S. No. 666 of 1947, Chief Court, Pudukottai).

T. R. Srinivasan and *N. Ramaswami Aiyar* for Appellant.

Respondents not represented.

The Court delivered the following Judgments :—

Mack, J.—I am in complete agreement with my learned brother that it is not possible to give the plaintiff any relief in this Court without deviating from the ordinary law as regards jurisdiction in such matters. It would be dangerous to lay down any principle that a Receiver by virtue of his appointment in a Court to collect debts or even a particular debt becomes clothed with jurisdiction to file within the jurisdiction of such Court suits for the recovery of debts which ordinarily must be filed in Courts outside the jurisdiction of the Court which appointed him. We have taken into consideration the fact that the respondents have not continued their challenge regarding jurisdiction in this Court but it is not possible to give the plaintiff relief on this ground. What I am quite unable to follow is why the plaintiff did not immediately comply with the direction of the learned Subordinate Judge and file the present plaint in the Sub-Court, Devakottai. The result of his electing to file his appeals has been that has not been able to get any relief for nearly five years a delay for which he is primarily responsible.

Krishnaswami Nayudu, J.—This appeal is against an order of the Subordinate Judge, Pudukottai, holding that the Court has no jurisdiction to entertain the suit instituted by the appellant.

O.S. No. 112 of 1949 was instituted for the recovery of a sum of Rs. 29,516-10-8 under a hand letter executed by the first defendant to the second defendant on 16th October, 1941, for a sum of Rs. 22,000. The second defendant is a brother of the plaintiff-appellant and on a promissory note executed by the second defendant in favour of the plaintiff for Rs. 15,000, a suit was instituted by the plaintiff in the same Court, O.S.No. 731 of 1941, and along with the suit the plaintiff applied for an attachment before judgment and injunction in respect of the debt due by the first defendant to the second defendant under the hand letter dated, 16th October, 1941, Exhibit A-8. An order for attachment before judgment and interim injunction were made. Subsequently the plaintiff obtained a decree in O.S. No. 731 of 1941 and in execution had the same debt attached. The second defendant produced the hand letter Exhibit A-8 at the Sub-Court, Pudukottai. On the 2nd May, 1943, in E.A. No. 819 of 1943 in the said suit, O.S. No. 731 of 1941 the plaintiff was appointed Receiver to collect the debt due under Exhibit A-8. It is in his capacity as Receiver appointed under the orders of the Subordinate Judge, Pudukottai, in E.A. No. 819 of 1943 that the plaintiff instituted the present suit O.S. No. 112 of 1949. The third defendant also impleaded as the plaintiff alleged that there was a further assignment to the third defendant. The third defendant remained *ex parte*.

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* Appeal Against Order No. 685 of 1951. 14th February, 1955.

The debt under Exhibit A-8 was payable only on the 16th October, 1944, while the interest was to be paid as and when it accrued. It is stated that the second defendant appeared in Court in I. A. No. 608 of 1941 when he produced the letter Exhibit A-8. The first defendant also appeared and undertook to pay the debt as and when it became due and also agreed to pay the interest accruing due from time to time and that in fact some payments towards interest were made towards it.

The objection to jurisdiction is based on the ground that the first defendant resides according to the learned Judge, in Malacca, but according to the learned counsel for the appellant at Pallathur, in any event, outside the jurisdiction of the Subordinate Judge of Pudukottai, and that the third defendant also is a resident of Pallathur. It is common ground that Exhibit A-8 was executed at Pallathur, here again outside the jurisdiction of the Court.

The contention raised before us was that by the appointment of a Receiver to collect the debt, there must be deemed to have been an assignment of the debt in his favour which assignment having taken place by virtue of the appointment having been made at Pudukottai, the Pudukottai Court is clothed with jurisdiction to entertain the suit. In support of this contention the line of cases where it has been consistently held that in the case of promissory note or hundi which was executed at one place and assigned in another place, the place of assignment is also clothed with jurisdiction to entertain the suit were cited. On the basis of the principle of those cases it is urged that by reason of the order of appointment of the Receiver having been passed at Pudukottai, the Receiver has got the right to recover the debt and the debt being deemed to have been assigned to him. The observations of Lord Esher, M.R., in the oft-quoted case in *Read* v. *Brown*[1], are relied on. Our attention is drawn to the meaning of the word "the cause of action" as has been understood in the said case, as every fact which is necessary for the plaintiff to prove in order to obtain a decree. Cause of action has nowhere been defined in the Civil Procedure Code and the meaning given by Lord Esher, M.R., in that judgment has been invariably adopted by Courts in India and in considering whether a particular cause of action arose within the jurisdiction of a Court it is generally accepted that if any fact which requires to be proved and which entitled the plaintiff to a decree, that fact or event, if it had taken place at a certain place, that place could be said to be one where part of the cause of action could be held to have arisen. In *Read* v. *Brown*[1], the assigment was the cause of action and Lord Esher, M.R., observed that the plaintiff will be bound to prove the assignment to him of the debt and that the assignment under section 25, sub-section (6) of the Judicature Act, 1873, gave to the assignee of a debt more than the mere right to sue for it, it gave him the debt and the legal right to the debt and it followed from that that he would have a legal right to sue for and recover it. In that case and the line of cases following *Read* v. *Brown* [1], the plaintiff by reason of his becoming the assignee of the debt, and the assignment having been made by a party to the document and the plaintiff having thereby acquired a right to the debt, the assignment was properly considered to be a vital factor in the establishment of the right to recover the debt. The order of appointment of Receiver is only to empower him to realise the amount and to await the further directions of the Court as regards its disposal if such directions had not been given at the time of the appointment of Receiver. The appointment of a Receiver in respect of a debt would not be tantamount to an assignment in his favour of the debt itself and the present case does not warrant the application of the principles of the cases cited. To hold otherwise would in our view lead to very disastrous consequences since a Receiver appointed by a Court to collect certain outstanding arising out of a business or out of a contract due by persons residing in places outside the jurisdiction of the Court would claim the right to recover the amount at the place where he was appointed Receiver, apart from the various other complications arising from such a conclusion. We are unable, therefore to accept the contention of the learned counsel and

1. L.R. (1888) 22 Q.B.D. 128.

we are in agreement with the learned Subordinate Judge that the Pudukottai Court had no jurisdiction to entertain the suit.

The appeal is dismissed. The Respondents are not represented and there will be no order as to costs. The plaintiff is given two weeks' time for presenting the plaint to the proper Court.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK AND JUSTICE KRISHNASWAMI NAYUDU.

Peria Karuppan Chettiar (deceased) and others .. *Appellants**

v.

K. O. K. Vaithyanathan Chettiar and others .. *Respondents.*

Madras Agriculturists Relief Act (IV of 1938), *section 9-A and section 19-A—Petition for determination of amount—Scop of—If one overrides the other.*

On a plain reading of the provisions of section 19-A of the Madras Agriculturists Relief Act, 1938, a mortgage debt is not as such excluded from the operation of the section. A mortgage is within the definition of 'debt' in the Act and as such the machinery of section 19-A will in terms be applicable to a mortgage debt.

Prior to the enactment of section 19-A of the Act, it is only a decree-debt that was capable of being scaled down under the Act. Section 19-A provides only an additional remedy, a cheaper and simple method of obtaining declaration as to amounts due in respect of non-decree debts, which is to the advantage of both the creditor and the debtor. There is nothing in section 9-A of the Act to show that the procedure prescribed in section 19-A is in any way controlled by it. A person applying under section 19-A of the Act for a declaration as to the amount due under the provisions of the Act or that a debt is discharged can have only an order of declaration. Any further remedy which the mortgagor might claim to have as and by way of recovery of possession or otherwise, could be had, not in a proceeding under section 19-A, but by other modes open to him under law. It is competent for the Court in an application by a mortgagor to have a declaration of the discharge of a mortgage to inquire into the value of the improvements which the mortgagee would be entitled to under the law.

Appeal against and petition to revise the order of the District Court of West Tanjore at Tanjore, dated 20th April, 1951 and made in O.P. No. 81 of 1949.

D. Ramaswami Ayyangar and *P. R. Varadarajan* for Appellant in A. A. O. No. 735 of 1951 and Petitioner in C.R.P. No. 2286 of 1951 and for Respondent in A.A.O. No. 66 of 1952.

R. Ekambaram for Respondent in A.A.O. No. 735 and C.R.P. No. 2286 of 1951.

R. Gopalaswami Ayyangar and *R. Ekambaram* for Appellant in A.A.O. 66 of 1952.

The Judgment of the Court was delivered by

Krishnaswami Nayudu, J.—These Appeals and Revision Petition arise out of an order passed under sections 9-A and 19-A of the Madras Agriculturists Relief Act (IV of 1938). The Appellants in C.M.A. No. 66 of 1952 are the representatives of the mortgagee and the respondents are the representatives of the mortgagors, under an *othi* deed, dated 22nd February, 1906, for Rs, 50,000. The Respondents filed O.P. No. 81 of 1949 on the file of the District Court of West Tanjore under sections 9-A and 19-A for scaling down the mortgage debt, their contention being that under section 9-A, the mortgage debt had become completely discharged. There is no dispute that the Respondents are agriculturists, or that the transaction has not been taken out of the scope of section 9-A by reason of any of its exceptions.

The main contention urged before the lower Court and reiterated here is that a petition under section 19-A is not available to the mortgagors, who claim to have a declaration of the discharge of mortgage debt by the application of section 9-A of the Act, their remedy being only by a suit for redemption. The learned District Judge rejected this contention and held that it was open to the mortgagors to apply under section 19-A for having a declaration that the mortgage debt had become discharged under section 9-A of the Act. The other question that the learned

* A.A.O. No. 735 of 1951 and C.R.P. No. 2286 of 1951. 15th February, 1955.

District Judge had gone into is about the value of the improvements, which the mortgagee would be entitled to. Section 19-A has been introduced by the Madras Agriculturists Relief (Amendment) Act XV of 1943. Prior to the enactment of section 19-A, it is only a decree debt that was capable of being scaled down under the Act. Section 19-A provides only an additional remedy a cheaper and simple method of obtaining declarations as to amounts due in respect of debts, which is to the advantage of both the creditor and the debtor, since upon such a declaration as to the exact amount due, the parties would generally be well advised not to take further proceedings, but pay or receive the amounts so declared. It is no bar to suit being filed and since the Agriculturists Relief Act has been enacted to give relief to agriculturists, the obvious intention of the Legislature is to provide a less costly method of ascertaining the rights and liabilities of parties. Section 19-A extended the remedy by way of application to non-decree debts so as to enable the creditor or debtor to have a declaration from Court as to the proper amount due by an agriculturist. Section 19-A (1) provides that:

"Where any debt incurred before the 22nd March, 1938, other than a decree debt, is due by any person who claims that he was an agriculturist both on that date and on the 1st October, 1937, the debtor or the creditor may apply to the Court having jurisdiction for a declaration of the amount of the debt due by the debtor on the date of the application.............."

By clause (2):

"The provisions of sub-section (1) shall apply also to any person claiming to be such an agriculturist, who contends that any such debt due by him has been discharged."

Sub-section (4) (*a*) provides that

"Where any such application is made, the Court shall first decide whether the debtor was such an agriculturist or not, and if it finds that he was such an agriculturist, pass an order declaring the amount due by him or declaring that the debt has been discharged, as the case may be."

Sub-section 9 (2) provides:

"No Court shall entertain a suit by the creditor for the recovery of a debt—

* * * *

(ii) If a Court having jurisdiction has passed an order under clause (*a*) of sub-section (4) in respect of such debt."

On a plain reading of the provisions of section 19-A a mortgage debt is not as such excluded from the operation of section 19-A. It is common ground that in the *othi* deed there is a personal covenant to pay and there can be no doubt therefore that the mortgage in question comes within the definition of the word 'debt' in the Act and as such section 19-A will be in terms applicable to a mortgage debt dealt with under section 9-A unless there is anything in the language of section 19-A, or section 9-A or in the Act excluding the application of section 19-A to scaling down of debts covered by section 9-A of the Act.

Mr. Gopalaswami Ayyangar, learned counsel for the appellants, contends that the declaration of discharge, which a mortgagor of a mortgage debt to which section 9-A is applicable can obtain is only in a proceeding contemplated under section 9-A and that such a proceeding could be only by way of suit for redemption and not by means of an application under the Act, that section 9-A is a self-contained section and that the right and the remedy of a mortgagor has to be taken from the provisions of section 9-A alone and that, therefore, an application under section 19-A is not maintainable. It therefore becomes necessary to examine the provisions of section 9-A to ascertain whether the remedy provided to an agriculturist in general for scaling down of a debt under section 19-A could be said to be excluded by the language of section 9-A. Section 9-A (1) says:

"This section applied to all mortgages executed at any time before the 30th September, 1947, and by virtue of which the mortgagee is in possession of the property mortgaged to him or any portion thereof—

(*a*) Where no rate of interest is stipulated for as due to the mortgagee, or

(*b*) Where a rate of interest is stipulated for as due to the mortgagee, in respect of the principal amount secured by the mortgage or any portion thereof, in addition to the usufruct from the property, or in respect of any other sum payable to the mortgagee by the mortgagor in his capacity as such."

In so far as the present mortgage is concerned, it is a case coming within section 9-A (1) (*a*) where there is no rate of interest stipulated to the mortgagee. It is virtually a usufructuary mortgage where the income from the property is to be appropriated in lieu of interest. The mortgage being of 1906, more than 30 years had elapsed, and since the mortgagee has been in possession of the whole of the property mortgaged to him for an aggregate period of thirty years and more, the mortgage debt must be deemed to have been wholly discharged under sub-section (5) of section 9-A with effect from the commencement of the Madras Agriculturists Relief (Amendment) Act of 1948, but subject to the condition under sub-clause (*iii*) that no other sums or interest thereon are due to the mortgagee by the mortgagor in his capacity as such. The mortgagors therefore claim to be entitled to a declaration that the mortgagee having been in possession for admittedly more than 30 years, the mortgage has become discharged as and from the date of the commencement of the Amending Act of 1948.

The argument against the maintainability of an application is based on the language of some of the provisions of section 9-A. Sub-section (2) of section 9-A provides that

> " That mortgagor shall be entitled to redeem the whole of the property mortgaged, notwithstanding that the time, if any, fixed in the mortgage deed for redeeming the mortgage has not arrived."

Under Sub-Section (3), if the mortgagee has been in possession of the whole of the property mortgaged to him for an aggregate period of less than thirty years, the mortgagor is held not entitled to redeem the mortgage. There are similar provisions as regards the rights of the mortgagor to redeem a portion of the property mortgaged, or redeem a property before the expiry of 30 years. It is therefore urged that the proper remedy is the remedy of a mortgagor provided under the the Transfer of Property Act, *viz.*, a suit for redemption and therefore even under section 9-A it is by a suit for redemption and it is only such a suit that is contemplated by section 9-A and not any other method of obtaining a declaration. Sub-section (8) provides that the mortgagor shall not be entitled to obtain possession of the mortgaged property by virtue of sub-section (5) (*a*), unless he pays to the mortgagee the cost of the improvements effected by him to the mortgaged property.

Relying on the reference to the right of the mortgagor to redeem, it is urged that section 9-A is self-contained. It not only declares the right, but also provides the method or the remedy by which that right could be enforced. There is, however, nothing in the language of section 9-A excluding the possibility of the application of any other provision of the Act, unless the application of such a provision could be inconsistent with the right conferred on a mortgagor under section 9-A. The language of section 9-A does not provide that the right could be agitated only in a suit for redemption and not otherwise, so long as a mortgage debt is not outside the scope of section 19-A. Again, there is nothing in section 19-A which could be said to bar an application by a mortgagor, who is entitled to rights of scaling down under section 9-A to obtain a declaration of discharge of the mortgage. Such declaration would certainly not entitle him to recover possession of the property, since sub-section (8) of section 9-A provides that unless he pays to the mortgagee the cost of the improvements, he cannot obtain possession. Even apart, the order which a Court could pass under section 19-A, sub-section (4) (*a*) is only an order declaring that the debt is discharged, in this case, the mortgage debt. Any further remedy which the mortgagor might claim to have, as and by way of recovery of possession or otherwise, could be had not in a proceeding under section 19-A but by the other modes open to him under law, ordinarily by way of a suit.

A creditor applying under section 19-A for a declaration as to the amount due under the provisions of the Act can have only an order far declaration and if he desires to have a decree, he has to pay the necessary Court-fee. Further, it may be noted that section 19-A is a general provision under Chapter IV relating to procedure, whereas section 9-A is included in Chapter II relating to the scaling down of debts and future rate of interest. Chapter II deals with the rights granted to agriculturists, while Chapter IV relates to the procedure under which the rights could be enforced

in the manner in which the Act provides. There is therefore nothing to show that section 9-A is an overriding provision and otherwise self-contained having no relation whatever with the procedure laid in the Act for enforcing the rights of the agriculturists. We are therefore of the opinion that the learned District Judge has taken the correct view in holding that a petition under section 19-A is maintainable for declaring the mortgage discharged.

C.M.A. No. 735 and C.R.P. No. 2286 of 1951 are filed by the mortgagors questioning the jurisdiction of the Court to inquire into the question of improvements, which are claimed by the mortgagee and the same contention, which is urged by the mortgagee, as to the non-maintainability of an application is urged by the mortgagors in so far as the question of improvements is concerned. The declaration of discharge, which a mortgagor is entitled to in a case of a mortgage coming within the scope of section 9-A could be had under sub-section (5) (*a*) only if no other sums or interest thereon are due by the mortgagor to the mortgagee in his capacity as such. A usufructuary mortgagee is entitled to the value of improvements under section 63 (*a*) (2) of the Transfer of Property Act and the value of the improvement would necessarily be a sum due to the mortgagee in his capacity as such. Without ascertainment therefore of the value of the improvements, no declaration of discharge could be made, even though the mortgagee had been in possession for an aggregate period of thirty years or more. We have therefore no hesitation in observing that it was quite competent for the Court on an application by a mortgagor to have a declaration of the discharge of a mortgage to inquire into the value of the improvements, which the mortgagee would be entitled to under the law and the inquiry, and the fixing of the value of the improvements are perfectly within the jurisdiction of the Court.

Then as regards the amount declared to be due to the mortgagee as and for improvements, a sum of Rs. 15,000 was claimed as the estimated value of the improvements. A commissioner was appointed and he examined the accounts of the mortgagee, which he observed, were kept in the usual course of business. He was satisfied with the expenditure shown in the accounts relating to the maintenance of tanks costing about Rs. 2995. Claims were also made as regards the amount spent in repairing an old *viduthi* or rest-house and expenses incurred for putting up a new structure for an office and agents' quarters in respect of both of which the Commissioner allowed only a sum of Rs. 1,700. In addition, he allowed a sum of Rs. 890 and odd as expenditure incurred by the mortgagee for re-thatching of the *viduthi* and out-houses and repairs to well, compound wall, etc. and altogether a sum of Rs. 5587 was allowed as the value of the improvements. The learned District Judge in considering the report of the commissioner, has effected a reduction in the amount, which the mortgagee would be entitled to. The learned Judge deducted a sum of Rs. 1179 and held that the proper value of the improvements would be only Rs. 4410. The learned Judge took the view that the mortgagee is not entitled to the amount of expenditure incurred on the construction of a new office building and accepted the contention of the mortgagors that the improvement was totally uncalled for and not necessary for the proper enjoyment of the property.

Mr. Gopalaswami Ayyangar sought to argue that whatever improvements which are found to have been made by the mortgagee, must be paid for by the mortgagor, if he applies under section 9-A, since sub-section (8) of section 9-A mentions that the mortgagor has to pay the mortgagee the cost of the improvements, and not such improvements as he would be entitled as mortgagee under the Transfer of Property Act. The argument ignores sub-section (5) (*a*) (*iii*) under which the mortgage debt shall be deemed to have been wholly discharged, where the mortgagee had been in possession of the whole of the property mortgaged to him for an aggregate period of thirty years or more, if no other *sums* or interest thereon are due to the mortgagee by the mortgagor in his capacity as such. The '*sums*' due to the mortgagee in his capacity as such obviously refer to the sums expended on improvements, which the mortgagee can claim, because except under contract, no sums except

probably any sums paid by the mortgagee as and towards public revenues, other than those incurred by him as and by way of improvements can be claimed by a mortgagee in possession, who becomes entitled to their value under section 63-A (2) of the Transfer of Property Act. The improvements referred to in section 9-A are not any imporvements effected while the mortgagee has been in possession but only such improvements to the value of which a mortgagee in possession could claim to be entitled to under section 63-A (2) of the Transfer of Property Act. That is the view I expressed in *Dandayuthapani Devasthanam* v. *Mohammad Gani* [1], where I observed that:

"The improvements referred to in section 9-A can only be improvements to the mortgaged property as are contemplated under section 63-A (2) of the Transfer of Property Act, *i.e.*, in cases where improvement becomes necessary to preserve the property from destruction or deterioration or to prevent the security from destruction or deterioration or to prevent the security from becoming insufficient or was made in compliance with the lawful order of any public servant or public authority....."

It is urged that the construction of a new office building for the quarters of the agents and to house the office is not necessary either to preserve the property from destruction or deterioration or to prevent the security from becoming insufficient. *Prima facie* this contention appears to be sound, but if we examine the particular facts of the present case, it would appear that such an improvement, as has been made in the present case of putting up a new building, would be necessary for proper conservation of the land, *i.e.*, to prevent the security from becoming insufficient or to preserve the property from destruction or deterioration. The extent of the property, which is the subject-matter, is nearly 2000 acres of dry land consisting of 11 tanks and the management of such a large estate would require the assistance of agents and persons who should be expected to be on the spot and quarters for such agents and office for them could not be considered to be beyond the scope of the purposes enumerated under section 63-A (2) of the Transfer of Proporty Act. Further, the mortgage deed provides that the mortgagees should keep correct and proper accounts of the expenditure incurred and apart from their general obligation as usufructuary mortgagees to maintain accounts, a specific duty is provided under the contract for the maintenance of accounts and the supervision of the lands for which agents and clerks would be necessary. We consider, therefore, that the amount that was allowed by the Commissioner as and for the additional construction should not have been disallowed as not amounting to an improvement.

The result is that we accept the Commissioner's estimate of the improvements at Rs. 5587-0-2 and hold that there will be a declaration that the *othi* debt has been completely discharged and the mortgagors are liable to pay the improvements assessed as stated above. There appears to be little practical purpose served by the direction of the learned Judge even on the view he took permitting the appellants to dismantle this structure and take away the materials. This clause in the decree of the lower Court to dismantle the structure will however now be deleted. Subject to the above modification, the appeal and the Civil Revision Petition are dismissed. In the circumstances of the case the parties will bear their respective costs.

R.M. ——— *Appeal and petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BALAKRISHNA AYYAR.

The Public Prosecutor .. *Appellant**

v.

M. Murugesan .. *Respondent.*

Motor Vehicles Act (IV of 1939), section 2 (9) and (13)—Heavy transport vehicle and light transport vehicle—What are.

The definition of heavy transport vehicle under section 2 (9) of the Motor Vehicles Act proceeds solely on the basis of the weight of the vehicle, whereas the definition of a light transport vehicle

1. (1953) 2 M.L.J. 454 at 457.

*Criminal Appeal No. 442 of 1954. 20th January, 1955.

proceeds on a different basis. When analysed under sub-section 2 (13) of the Act a light transport vehicle means (1) any public service vehicle *minus* motor cabs and (2) goods vehicle *minus* (*a*) heavy transport vehicles and *minus* also (*b*) delivery vans.

The definition does not in terms exclude heavy transport vehicles from the category of public service vehicles. Hence as the definition stands a bus or taxi, whatever its weight, would be a light transport vehicle.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondent (Accused) by the Sub-Magistrate of Chidambaram in C.C. No. 548 of 1954 on his file.

R. Santanam for the Public Prosecutor (*V. T. Rangaswamy Ayyangar*) for the Appellant.

G. Gopalaswami for the Respondent.

The Court delivered the following

Judgment.—The facts are not in controversy. MDF 455 is a bus whose laden weight is 15,900 pounds. On 11th February, 1954, the driver of the bus was one Doraisami who had a license to drive only a light transport vehicle. The police took the view that MDF 455 is a heavy transport vehicle and prosecuted Doraisami under section 3 (1) of the Motor Vehicles Act for driving a heavy transport vehicle without proper authority in that behalf. Doraisami was convicted and fined. Subsequently, the owner of the bus was proceeded against under section 5 of the Moror Vehicles Act for permitting Doraisami to drive that vehicle. The Stationary Sub-Magistrate, Chidambaram, acquitted the owner. He observed :

"The present definition of a light transport vehicle in S. 2, Cl. 13 would then seem meaningless. Having regard to all aspects stated above, it seems to me that the question of axle weight and laden weight is to be considered only in the case of goods vehicles to determine whether it is a heavy transport vehicle or a light transport vehicle. All public service vehicles of whatever weight will come only under the classification of 'light transport vehicles.'

The driver had a valid licence to drive a light transport vehicle in this case.' The accused in this case has not contravened the provisions of section 3 (1) of the Motor Vehicles Act inasmuch as the driver was a person competent to drive a light transport vehicle. The accused is therefore found not guilty of the offence he is charged with and I acquit him under section 245 (1), Criminal Procedure Code."

The State has preferred this appeal against the order of acquittal.

Section 2 (9) of the Motor Vehicles Act defines a heavy transport vehicle in these terms :

" 'Heavy transport vehicle' means a transport vehicle the registered axle weight of which exceeds 10,600 pounds avoirdupois, or the registered laden weight of which exceeds 14,400 pounds avoirdupois."

It will be noticed that this definition proceeds solely on the basis of the weight of the vehicle. The definition of a light transport vehicle is given in section 2 (13) and runs as follows :

"'Light transport vehicle' means any public service vehicle other than a motor cab, or any goods vehicle other than a heavy transport-vehicle or a delivery van."

If the definition of a light transport vehicle had also proceeded on the basis adopted for defining a heavy transport vehicle, *i.e.*, the basis of weight the difficulty that has arisen in the present case would not have cropped up. But the Legislature adopted a different mode of definition for a light transport vehicle. When the definition is broken up, we get the following result : A light transport vehicle means (1) any public service vehicle *minus* motor cabs and (2) goods vehicle *minus* (*a*) heavy transport vehicles and *minus* also (*b*) delivery vans. It will be noticed that from the category of public service vehicles the definition does not in terms exclude heavy transport vehicles. Now, public service vehicles are what are popularly called buses and taxis, that is, vehicles which carry passengers for hire. As the definition stands the result, therefore, is that a bus or a taxi, whatever its weight may be would be a light transport vehicle. To exclude a bus like MDF 455 from the category of a light transport vehicle, the definition must—if its present shape is retained—repeat the words "or a heavy transport vehicle" immediately after

the words "other than a cab". This requires the introduction of extra words into the definition and a Court has no power to do that. As the definition stands, MDF 455 falls within the definition of both a heavy transport vehicle and a light transport vehicle. The charge preferred against the owner of the bus is that he permitted Doraiswami to drive the bus when he had authority to drive only a light transport vehicle. The answer of the owner is that MDF 455 is also a light transport vehicle as defined in the Act and Doraisami had the license requisite to drive a light transport vehicle. That answer effectively meets the charge framed against the owner of the vehicle.

In my view, the conclusion of the learned Magistrate is right; this appeal is therefore dismissed.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE RAMASWAMI.

Gopalan Nayar (died) and others .. *Appellants**

v.

Lakshmi *alias* Kutty Amma and others .. *Respondents.*

Malabar Law—Marumakathayam and Aliyasanthana Tarwad—Acquisitions by karnavan—If self-acquired or tarwad properties—Presumptions and onus.

The mere fact that a person happens to be the eldest member of a Marumakathayam or Aliyasanthana tavazhi or tarwad would not enable the Court to presume that all the properties standing in his name are the joint family properties ; but if there is evidence to show that at the time the individual became senior-most member of the tavazhi or tarwad he had to manage sufficient property belonging to the joint group as to leave a surplus income then it can be presumed that the subsequent acquisitions were made in a representative capacity and not in his individual capacity.

Case-law reviewed.

Appeal against the decree of the Court of the Subordinate Judge, Ottapalam, dated 30th November, 1948, in O.S. No. 56 of 1946.

N. Sundara Ayyar and *V.R. Venkatakrishnan* for Appellants.

T. C. Raghavan, C. Rajaraman, K. Sridhara Menon, A. R. Srinivasan and *T. Bhaskara Menon* for Respondents.

The Court delivered the following Judgments :—

Govinda Menon J.—I am in entire agreement with my learned brother. Since he has discussed the facts of the case *in extenso* I do not wish to repeat them.

As it has been found that most of the properties now in dispute came into existence after Exhibit B. 17, dated 1st December, 1918, it is contended on behalf of the plaintiffs that the first defendant that is the karnavan of the tarwad, must be deemed to have acquired them from out of the nucleus afforded by the properties which belonged to the tavazhi on that date, whereas the contention of the first defendant in the Court below and now repeated here by his legal-representatives is that there was no sufficient nucleus out of which any acquisitions could have been made by the first defendant and unless the plaintiffs are able to show that there were surplus funds in the hands of the first defendant with which such properties could be acquired, the presumption must be that the even tenor of the documents namely, that the acquisitions belonged to the first defendant must prevail. This raises the general question of law with regard to the ownership of properties standing in the name of the karnavan of a tavazhi. That the first defendant was the karnavan of the group by birth from the time the tavazhi separated from the main tarwad at least for the purpose of living has not been questioned.

The law is stated in P.R. Sundara Iyer's "Malabar and Aliyasantana Law" at page 179, in the following terms :

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* Appeal Nos. 1 and 149 of 1949. 26th August, 1954.

"A karnavan who is in possession of family funds for instance would be presumed to have made all his acquisitions with them for the benefit of the family and in his case the presumption would be very strong."

The presumption referred to is that the properties should be deemed to be joint family properties. But if it is proved that there was no joint family property from which the disputed properties could have been acquired that fact would certainly rebut the presumption of family acquisition but it is not sufficient to show that the family funds alone cannot account for the acquisition. The learned author also states that when there is a mixing up of the family funds and separate funds the presumption is that the separate funds are merged in the family funds. This presumption does not ordinarily apply to acquisitions made by the junior members as is laid down to that effect in a series of decisions. It is stated in Mayne's Hindu Law and Usage (11th Edition) at pages 992-993 that in such matters there cannot be a definite presumption either way but that the circumstances of the particular case have to be looked at to ascertain the nature of ownership. The view taken has been that property acquired by a junior member is to be presumed to be his own separate acquisition and that it lies on the party setting up, that it is tarwad property to prove that it was an acquisition on behalf of the tarwad. But where properties stand in the name of the karnavan and were acquired at a time when he was the *de facto* karnavan there is a natural presumption that the acquisitions were for and on behalf of the tarwad. The customary Marumakkathayam law has always been that when the karnavan in possession of tarwad property is found to acquire other properties it must be deemed that he acquired them on behalf of the tarwad. The same rule has been held to be applicable when an Anandravan is the manager of a branch tarwad and is in possession of funds belonging to such branch tarwad. See *Mari Veetil Chattu Nair* v. *Mari Veetil Mulamparol.*[1] There is no difference in this matter so far as Aliyasanthana law also is concerned: Vide the decision in *Kunhanna Shetty* v. *Timmaju*[2]. Where it was seen that a manager of an Aliyasanthana family which was undivided acquired certain properties in his name it was held in *Thimmakka* v. *Akku*[3], that the onus was on the person who set up private ownership that the properties were acquired in fact out of private funds. Otherwise it will be presumed to belong to the joint family.

It has been laid in *Chathu Nambiar* v. *Sekharan Nambiar*[4], by Krishnan, J., that

"in the absence of evidence to the contrary there is a presumption that property acquired by the karnavan of a tavazhi was acquired for the tavazhi and with the tavazhi funds and this presumption must prevail unless the person who avers that such property is his self-acquistion proves that fact by evidence."

A year later Phillips and Ramesam, JJ., in *Soopiadath Ahmed* v. *Irimbantakath Manha Mammad Kunhi*[5], laid down the proposition following *Chathu Nambiar* v. *Sekharan Nambiar*[4] and *Mari Veetil Chattun Nair* v. *Mari Veetil Mulamparol*[1] that in regard to property standing in the name of a karnavan

"there is a presumption that the property belongs to the tarwad but the same presumption does not ordinarily apply to a property which stands in the name of an Anandravan."

The reason for laying down that proposition in the words of the learned judges is

"undoubtedly in regard to karnavans the presumption is very strong for they are in possession of the whole of the property of the tarwad and can deal with it as they like."

As under the Hindu Law so under the Marumakkathayam and Aliyasanthana systems there is no presumption that the joint family as such owns property. A joint family is the result of relationship by birth and it is not a necessary *sine quo non* of a joint family, that the entity should be bound by reason of owning property

1. (1909) 20 M.L.J. 86 : I.L.R. 33 Mad. 250.
2. (1914) 27 M.L.J. 60.
3. 1910 M.W.N. 297.
4. (1924) 47 M.L.J. 695.
5. (1925) 23 L.W. 574.

in common. Therefore the mere fact that a person happens to be the eldest member of a Marumakkathayam or Aliyasanthana tavazhi or tarwad would not enable the Court to presume that all the properties standing in his name are the joint family properties; but if there is evidence to show that at the time the individual became the seniormost member of the tavazhi or tarwad he had to manage sufficient property belonging to the joint group as to leave a surplus income then it can be presumed that the subsequent acquisitions were made in a representative capacity and not in his individual capacity. This presumption therefore is restricted to cases where it can be shown that there were surplus funds left from which acquisitions could be made. Such a thing would depend upon various factors. A family with insufficient properties and a large number of members to be fed and clothed cannot be expected to leave any surplus. The karnavan may have a profession of his own and may be in a position to save some amounts as a result of his own exertions. In such a case it would be unwise or improper to draw a presumption that wherever a person is able to save by reason of his own gains by science or learning the mere fact that he is the head of the family should impress his acquisitions with the family character. In these circumstances the question of presumption will arise only where it is shown that the karnavan had properties which were sufficient to meet the daily needs of the family and to leave a surplus. It is on this principle that the learned Judges in *Soopiadath Ahmed* v. *Iimbantakath Manha Mammad Kunhi*[1], made the observations quoted above. But where there is a group of persons constituting a natural tavazhi or tarwad all working together harmoniously and engaging themselves in the pursuit of agriculture together or where the family is a trading one and all the members of the family take some part or other in the family business then even if the acquisitions were made in the name of the karnavan they should be deemed to belong to the entire group. It is not the fact of one being the seniormost member of the family that is crucial in the decision regarding the nature of the property acquired but the deciding factor is the possession of funds belonging to the family from which the acquisition is made and even in the case of Anandravans any possession of sufficient family funds out of which the acquisitions could be made raises the presumption that the acquisition has been made for the benefit of the family. See the decision in *Iswaran Nambudiri* v. *Vishnu Nambudiri*[2]. Even there, the principle has been stated rather too widely when the learned Judge observes that if nothing appears in the case except that a member of a joint family is in possession of property the burden of proving self acquisition lies on such persons, applies also to the property acquired by a junior member of a Malabar tarwad. In my view this statement of law cannot be applicable to all cases. In the case of an Anandravan if he is found in possession of property and there is nothing to show that he had anything to do with the family property then the presumption is quite the other way and that is that the property belongs to him. As stated already the question of presumption can arise only if there is firstly the nucleus and then the surplus out of that nucleus. It is the same principle that pervades throughout the judgment in *Vythinatha Aiyar* v. *Varadaraja Aiyar*[3], where the learned Judge, Madhavan Nair, J. states that the nucleus should be shown to be of such a character as would reasonably be expected to lead to the acquisition of the property alleged to be part of the joint family property. The only other case which requires reference in this connection is the decision by Venkataramana Rao, J., in *Puthiamathummal Peringadi Assan Kutti* v. *Peedikayilahath Mammad*[4]. On the facts of that case the conclusion arrived at was perfectly correct and justified but certain observations made by the learned judge have been attempted to be used in such a way as was not probably intended to be understood in that manner. When the learned Judge says :

"It is not enough to show that the karnavan had possession of tavazhi funds in his hands wherewith the acquisition might have been made."

1. (1925) 23 L.W. 574.
2. (1930) 60 M.L.J. 467.
3. (1938) 1 M.L.J. 216 : I.L.R. (1938) Mad. 696.
4. (1939) 1 M.L.J. 308.

With due respect the statement is made rather too broadly. The following general observations at page 331 should in my view be confined only to the facts of that particular case :

"where again with the consent of the members of the family an individual member including a manager is allowed to have separate trade and acquire properties, the presumption ought to be that the property acquired in the name of the individual member is separate property even though he might have moneys of the joint family in his hands. It is not enough to show that he had family money in his hands wherewith the acquisition might have been made. It is not even enough to show that the family moneys were utilised in the business. When members of a family allow a manager or an individual member to acquire property separately with full knowledge that he has joint family moneys in his hands, it may well be that the family allowed him to use those moneys but profits or property acquired therefrom for himself cannot be claimed as joint family property though the member may be accountable to the family for the moneys so utilised. Such moneys would be in fact advances or loans made by the members of the family to the individual member or the manager. ......"

The only other case relied upon by the appellant is the decision of Wadsworth, J. in *Mammilli Kunhi Raman Kitavu* v. *Vengileri Thanancheri Kunhi Karnavan Kitavu.*[1] This judgment is brief and does not lay down anything new. The learned Judge says that in the absence of evidence that the family possessed property with the income of which the new acquisition might have been made, there is no presumption that the property acquired by the manager is family property. This is only a restatement of the principles which we have already discussed.

On the facts of the case my learned brother has found that the learned Subordinate Judge was right in holding that except the Pappala Thodi properties and items 102 to 104 rest of them belonged to the family, for there is clear evidence of joint cultivation by all the members of the family. I need only refer to the evidence of P.Ws. 1, 3 and 4. P.W. 1 is the second plaintiff and he says that ever since he was ten or fourteen years of age he was attending to the cultivation and that ploughing instruments were kept at the gate house of Pappala Thodi, that the harvest from the lands used to be kept together and thrashed and that no differentiation was made. I am prepared to accept the evidence of P.W. 1 in this respect namely that all the members of the family lived together in commensality, worked together and augmented the family properties and in such a case there can be no doubt that the acquisition was by the family. P.W. 3 who knows the parties very well says that the members to the family were always cultivators and the karnavan and the other members were all together cultivating and that the crops were all taken to Pappala Thodi after harvest. P. W. 4 a Moplah states that he has seen Vadakemadam cultivation and that the defendant No. 3 was ploughing lands and attending to cultivation. Even D.W. 1 states that all the properties were jointly cultivated, harvested and thrashed and all the paddy was kept at Pappala Thodi. In these circumstances it is difficult to agree with the learned Counsel for the appellant that there was no joint living or joint cultivation.

Subject to the modifications mentioned in the judgment of my learned brother both these appeals are dismissed and in the circumstances without costs.

Ramaswami, J.,—These are two connected appeals arising from the decree and judgment of the learned Subordinate Judge of Ottapalam, in O.S. No. 56 of 1946.

Plaintiffs and defendants 1 to 12 are members of an undivided Marumakkathayam tarwad and they are related as shown in the genealogical table appended below :

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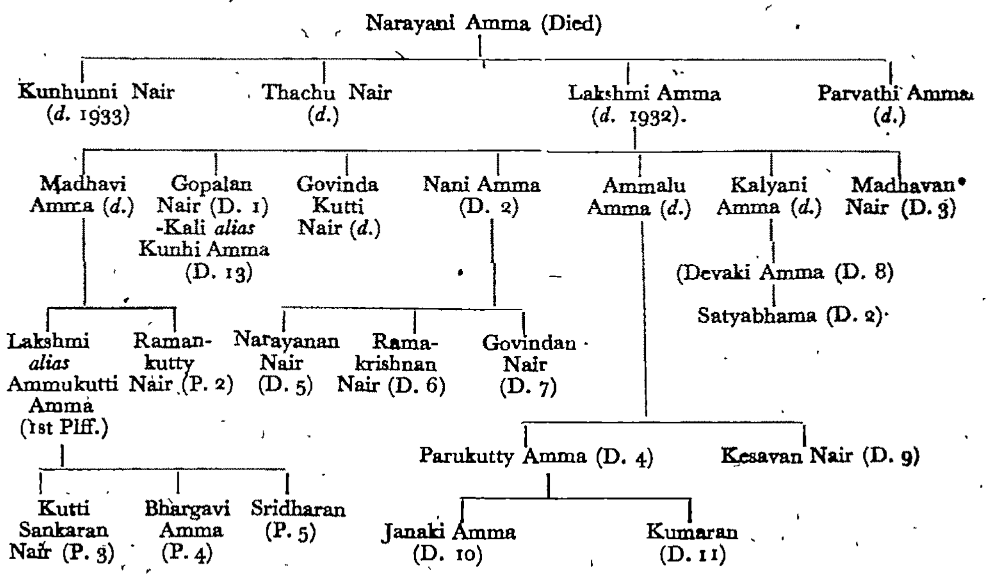
1. (1939) 2 M.L.J. 757.



The first defendant is the karnavan and manager of the tarwad. The suit is for partition and separate possession of the shares of the Anandravans plaintiffs in the tarwad properties.

In these appeals we are confined to three sets of properties known as the Pappala Thodi properties, Korungot Kalam properties and Mozhikunnu properties, items 102 to 104 of the plaint schedule and three debts evidenced by Exhibits B-84, B-47 and B-48.

In regard to these properties the claim of the plaintiffs is that the three sets of properties are tarwad properties, that items 102 to 104 which are in the names of the wife and children of the karnavan 1st defendant are properties purchased by the karnavan out of tarwad funds and therefore have got to be treated as resultant trust and hence partible as tarwad properties, and that the debts evidenced by Exhibits B-84, B-47 and B-48 are not binding upon the tarwad. On the other hand the claim of the karnavan the first defendant who has since died was that the Pappala Thodi, Korungot Kalam and Mozhikunnu properties are his self acquisitions and separate properties and therefore not liable for partition, that items 102 to 104 have been purchased out of the funds of defendants 13, 14 and 16 to 19 and hence not partible and that the three debts are binding upon the tarwad.

The learned Subordinate-Judge held that the Pappala Thodi properties were the separate properties and self acquisitions of the karnavan, that the Korungot Kalam and Mozhikunnu properties are tarwad properties, that items 102 to 104 do not belong to the tarwad but belong to defendants 13, 14 and 16 to 19 and the three debts evidenced by Exhibits B-84, B-47 and B-48 are binding on the tarwad. Hence these two appeals by the Anandravans and Karnavan in regard to the disallowed portions of their claims.

On a review of the entire circumstances of the case we have come to the same conclusion as the learned Subordinate Judge. Here are our reasons.

Before dealing with facts, I wish to dwell upon one topic on which we were addressed at considerable length by the learned Advocate for the appellants, *viz.*, the alleged incorrect presumptions of law which are said to have been applied by the learned Subordinate Judge in regard to separate property acquired by a karnavan.

Where a suit is brought by a member of a tarwad for partition of property alleging that it is joint family property and a karnavan contends that it is his self-acquired property the question arises—upon whom the burden of proof lies.

There is no presumption that because there is a tarwad it possesses tarwad property or any property. When in a suit for partition a party claimed that any particular item of property is tarwad property or when in a suit on a mortgage a party contends that the property mortgaged is tarwad property, the burden of proving that it is so rests on the party asserting it, though circumstances may readily cause the onus to be discharged. To render the property tarwad property, the plaintiff must prove that the tarwad was possessed of some property with the income of which the property in question could have been acquired or from which a presumption could be drawn that all the property possessed by the tarwad is joint family property or that it was purchased with tarwad funds, such as the proceeds of sale of tarwad property or by joint labour. None of these alternatives is a matter of legal presumption. It can only be brought to the cognizance of the Court in the same way as any other fact, *viz.*, by evidence.

When a nucleus of tarwad property is *proved* or *admitted*, a presumption arises that the whole of the property of the tarwad is joint including any acquisition by the karnavan. But no such presumption would arise if the nucleus is such that with its help the property claimed to be joint could not have been acquired. In order to give rise to the presumption, the nucleus must be such that with its help the property claimed to be joint would have been acquired. Such being the presumption, if the karnavan claims any portion of the property as his separate property the burden lies upon him to show that it was acquired by him in circumstances which would constitute it his separate property. He can do this by showing that the income of the existing tarwad property was employed otherwise and secondly by correlating the acquisitions with his own self-earnings and also by proving that these earnings were not blended with the tarwad estate and remained his self-acquired property. On account of the fiduciary position which he occupies, Courts will lay upon him a heavier burden than in the case of any other member of the tarwad and in fact in the case of an Anandravan the presumption would be in favour of the acquired property being his self-acquisition. This larger quantum of proof satisfying both the negative and positive aspects of acquisition out of karnavan's own exertions and without any detriment to the tarwad, *i.e.*, without the aid of the tarwad property is based upon section 111 of the Indian Evidence Act. It will be remembered that the position of a karnavan is fiduciary in respect of the junior members who are known as Anandravans and he is the protector of the tarwad's interest and the guardian of its minor members and therefore he is bound to scrupulously account for the acquisition not having been made to the detriment of the tarwad.

These principles are deducible from the following line of decisions of this Court.

The case-law on the subject as it stood upto 1916 has been summarised in P.R. Sundara Aiyar's 'Malabar and Aliyasantana Law,' 1922 Edition, paragraph 100, as follows :

"As under the Hindu Law, so under the Marumakkatayam and Aliyasanthana systems joint holding is the rule and individual holding the exception and it is for the individual member who sets up separate title to make it out. *Mari Veetil Chatu Nair* v. *Mari Veetil Sekharam Nair*[1], *Virarayan* v. *Valia Rani*[2], *Govinda Panikar* v *Nani*[3], *Thimmakka* v. *Parameshri*[4], *Dharnu Shetty* v. *Dejamma*[5]. The strength of the presumption would no doubt vary according to circumstances. A karnavan who is in possession of family funds, for instance, would be presumed to have made all his acquisitions with them for the benefit of the family and in his case the presumption would be very strong : *Kallati Kunju Menon* v. *Palat Erracha Menon*[6], *Kunhanna Shetti* v. *Timmaju*[7]. The discussion as to a nucleus and the burden of proving its existence or the contrary is common to the ordinary Hindu Law and these systems. If it is proved that there was no family property from which the property in question could have been acquired, that undoubtedly would rebut the presumption of family acquisition but it is not sufficient to show that the family funds alone cannot account for the acquisition [*Thimmakka* v. *Parameshri*[4]]. For it must be borne in mind that when there is a mixing up of the family funds and separate funds the presumption is that the latter is merged in the former. As under the Hindu Law, an inconsiderable contribution from the family funds may not affect the nature of the acquisition. It could not in those circumstances be said that the family property was instrumental to the

1. (1909) 20 M.L.J. 86 : I.L.R. 33 Mad. 250.
2. (1881) I.L.R. 3 Mad. 141.
3. (1911) 36 Mad. 304 (footnote).
4. 1910 M.W.N. 297.
5. (1916) 5 L.W. 259.
6. (1864) 2 M.H.C.R. 62.
7. (1914) 27 M.L.J. 60.

acquisition : Strange, Vol. I, page 213 ; *Lakshman Mayaram* v. *Jamnabai*[1]. As said in Books of Hindu Law " things of ordinary value may be given up for they are mere chaff" (*de minimis non curat lex*) ; for instance in the practice of agriculture, it is said, taking a rope for his plough out of the common stock would not invalidate his pretensions to an exclusive right. Nor would the fact that the money is raised on the credit due to the relation of the manager to the family property be a reason for holding that the property acquired is family property. It would be otherwise if the property is raised by pledging the family property. A member of the family making improvements on the family property or raising crops on the family property cannot of course claim them ; *Kannan* v. *Tenju*[2], and *Vishnu Nambudri* v. *Akkamma*[3]. They will be regarded as accretions to the family property ; it would be otherwise if the lands were held on lease from the family ; acquisitions out of maintenance allowances or out of the income of the family allotted for that purpose should be similarly treated as self-acquisitions. The case may vary if it is only an improvement of the family property in his possession for maintenance for then the simple case would be complicated by the principle of merger."

In *Chathu Nambiar* v. *Sekharan Nambiar*[4], Krishnan, J., held that in the absence of evidence to the contrary, there is a presumption that property acquired by the karnavan of a tavazhi was acquired for the tavazhi and with the tavazhi funds and that this presumption must prevail unless the person who avers that such property is his self-acquisition proves that fact by evidence.

In *Soopiadath Ahmed* v. *Manha Mammad Kunhi*[5] Phillips and Ramesam, JJ., approved the contention before them that there is a very strong presumption that property standing in the name of a member of a Malabar tarwad belonged to that tarwad and added that the presumption has been laid down in *Chathu Nambiar* v. *Sekharan Nambiar*[4], and *Mari Veetil Chathu Nair* v. *Mari Veetil Mulamparol Sekharan Nair*[6], with regard to karnavans, and undoubtedly, with regard to karnavans, the presumption is very strong, for they are in possession of the whole of the property of the tarwad and can deal with it as they like.

In *Kunhi Raman Kitavu* v. *Kunhikarnavan Kitavu*[7], Wadsworth, J., held that in the absence of evidence that the family possessed property with the income of which the new acquisition might have been made, there was no presumption that the property acquired by the manager was family property and followed *Vydianatha Aiyar* v. *Varadaraja Aiyar*[8].

In *Puthiamathathummal Peringadi Assankutti* v. *Peedikayilahath Mammad*[9], Venkataramana Rao, J., deduced the following propositions :

" There is no presumption in law that when a Malabar family is joint, it possesses any joint property or that all the property possessed by it is joint property. When property stands in the name or is in the possession of a member of a family, it is incumbent upon those who assert that it is joint family property to establish it. Where it is proved or admitted that a family possesses sufficient nucleus with the aid of which any member might have made the acquisition, the law raises a presumption that it is joint family property and the onus is shifted on to the individual member to establish that the property was acquired by him without the aid of that nucleus. Whether the presumption should be raised and the burden of proof should be shifted at all and what weight should be given to the said presumption depend on the facts and circumstances of each case. The presumption aforesaid is one which the law raises where nothing is known except the bare fact of a nucleus and acquisition."

In *Kuttan Unni* v. *Kochunni*[10] Sir Lionel Leach, C.J. and Lakshmana Rao, J., held that in a family governed by the Marumakkatayam Law the presumption is that the properties held by the head of it belonged to the tarwad, and the burden of proof lies on him who contends otherwise.

The onus, however, as a determining factor of the whole case can only arise if the Court finds the evidence *pro* and *con* so evenly balanced that it can come to no definite conclusion and then the onus will determine the matter. But if the Court after hearing and weighing the evidence comes to a definite conclusion, the need for placing the onus does not arise. In other words the question of onus at the close of a case only becomes important if the circumstances are so ambiguous that a definite

1. (1882) 6 Bom. 225.
2. (1882) 5 Mad. 1.
3. (1910) 20 M.L.J. 938 : I.L.R. 34 Mad. 496.
4. (1924) 47 M.L.J. 695.
5. (1914) 23 L.W. 574.
6. (1909) 20 M.L.J. 86 : I.L.R. 33 Mad. 250.
7. (1939) 2 M.L.J. 757.
8. (1938) 1 M.L.J. 216 : I.L.R. (1938) Mad. 696.
9. (1939) 1 M.L.J. 308.
10. (1944) 1 M.L.J. 272 : I.L.R. (1944) Mad. 515.

conclusion is impossible without resort to it. [*William Robins* v. *National Trust Co.*[1], *Sine, Darby and Co.* v. *Official Assignee*[2], *Yellappa* v. *Tippanna*[3], *Nand Kishwar Bux* v. *Gopal Bux*[4], *Sree Chidambara* v. *Veeramma Reddi*[5], *E.I.R.* v. *Major Andrew*[6], *Harmes* v. *Kinson*[7].]

In the instant case the learned Subordinate Judge has correctly applied these well settled principles as will be evident from the discussion in paragraph 14 of his judgment. Secondly, the question of onus was thoroughly unimportant in this case because both sides adduced a volume of oral and documentary evidence in support of their respective contentions and the learned Subordinate Judge has grounded his conclusion on the evidence in this case and decided whether the properties in question were tarwad properties or self-acquisitions of the karnavan.

Bearing these principles in mind let us examine the disputed items.

* * * * * *

[His Lordship after discussing the facts of the case, concluded:—]

In the result, subject to the modifications mentioned above, the decree and judgment of the lower Court are affirmed and both these appeals are dismissed and in the circumstances without costs.

K.S. —————— *Appeals dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE GOVINDA MENON, MR. JUSTICE MACK AND MR. JUSTICE RAMASWAMI.

George Swamidoss Joseph .. *Petitioner**

v.

Mrs. Harriett Sundari Edward
falsely called Mrs. Harriet Joseph .. *Respondent.*

Indian Divorce Act (IV of 1869), *section* 7—*Decree of nullity of marriage—Decree absolute if can be passed straightaway—Interval between decree* nisi *and decree absolute—If can be reduced.*

A decree that should be passed by the High Court in its Original Matrimonial Jurisdiction in a petition for nullity of marriage should in the first instance be a decree *nisi* and not a decree absolute.

Sumathi Ammal v. *Paul,* (1935) 70 M.L.J. 321 : I.L.R. 59 Mad. 518 (F.B.) re-affirmed.

So far as decrees for nullity are concerned the Indian Courts must follow the law and practice in England as regards nullity decree, which should be in decree *nisi* form, but the period for making the decree absolute should be six months.

Section 12 (1) of the (English) Matrimonial Causes Act and Matrimonial Causes (Decree Absolute) General Order, 1946, which reduces the period both in cases of dissolution and nullity from six months to six weeks is in contravention of section 16 of the Indian Divorce Act. This however constitutes no obstacle to the Indian Courts making a decree *nisi* for nullity absolute within that period in exceptional cases, or even to their indicating at the time the decree *nisi* is passed, if the Court is satisfied that there is no possibility of appeal and exceptional reasons exist, within what period the decree *nisi* shall be made absolute.

Alvares for *Messrs. Pais, Lobo and Alvares* for Petitioner.

V. Tyagarajan and *N. T. Raghunathan,* amicus curiae.

The Court delivered the following Judgment.—

Govinda Menon, J.—I have had the advantage of reading the Judgment which my learned brother Mack, J., is about to deliver and since it has my entire concurrence,

1. A.I.R. 1927 P.C. 66.
2. (1928) 54 M.L.J. 337 : A.I.R. 1928 P.C. 77 (P.C.).
3. (1929) 56 M.L.J. 287 : L.R. 56 I.A. 13 : I.L.R. 53 Bom. 213 (P.C.).
4. A.I.R. 1940 P.C. 93: I.L.R. (1940) K.P.C. 235.
5. (1922) L.R. 49 I.A. 286 : I.L.R. 45 Mad. 586 (P.C.).
6. A.I.R. 1922 P.C. 195 ; I.L.R. 48 Cal. 757 (P.C.).
7. A.I.R. 1946 P.C. 156 : (1946) 2 M.L.J. 156 (P.C.).

* O.M.S. No. 15 of 1953. 6th August, 1954.

I do not propose to discuss matters dealt with by him in detail. My learned brother has dealt with a topic which occurred to us during the course of the arguments before us as not having been the subject of consideration in any of the previous decisions, namely, the practical difficulty that might arise, in case a decree absolute is passed in the first instance, in a suit for nullity of marriage and one of the parties immediately contracts a second marriage which might become illegal if the decree absolute is set aside in appeal.

I am in entire agreement with the view expressed by my learned brother. It has to be considered whether section 7 of the Indian Divorce Act having been preserved by the Adaptation of Laws Order of 1950, it cannot be followed by the Indian Courts after the declaration of the country as a Republic for the reason that it is not proper for a free country in its administration of justice to have a statute laying down that the laws and regulations of another country should be followed *in toto*. The section is subject to a limitation. It lays down

"subject to the provisions contained in the Act, the High Courts and District Courts shall in all suits and proceedings hereunder act and give relief on principles and rules which in the opinion of the said Courts are as nearly as may be conformable to the principles and rules on which Court for Divorce and Matrimonial causes in England for the time being acts and gives relief."

The result is that if the Act is silent on a particular topic or subject then the Courts in India even now shall give relief on principles and rules prevalent in England *for the time being*. It is urged before us that the Indian Courts will have to follow, in the absence of specific prohibition to contrary, the various alterations and changes that might be introduced in the divorce laws of England from time to time and that such a state of things would not be in consonance with the prestige and dignity of a free country. The point of view can be answered with reference to the Constitution itself: for sub-clause (3) of Article 105 lays down that except in certain respects

"the powers, privileges and immunities of each House of Parliament and of members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of the Constitution."

From this it is clear that even as regards parliamentary procedure and powers and privileges of the House of Parliament and of the members and the committees of each House, we have adopted what was obtaining in the House of Commons of the United Kingdom at the time of the commencement of the Constitution. There is, no doubt, a difference so far as section 7 of the Indian Divorce Act is concerned in that the words "for the time being" occurs in that section. Stone and Mockett, JJ., in *Sumathi Ammal* v. *Paul*[1], have interpreted these words as referring to the changes that may be made in the principles and laws governing divorces and matrimonial practices in England from time to time and that the Indian Courts should follow such changes. There is no doubt an anomaly in that the Indian Courts have to keep pace with the practice in England and to note changes that are made in the principles and rules of the English divorce laws from time to time. But after all the Indian Divorce Act is founded mainly, if not solely, upon the English Act and one does not feel that it is incongruous to keep pace with the changes that are made from time to time in the parent law.

I agree with my learned brother, Mack, J., in his conclusions.

Mack, J.—The following questions have been referred to us for determination on a reference made by one of us, Ramaswami, J., sitting on the Original Side :

"1. Whether the decision of the Full Bench in *Agnes Sumathi Ammal* v. *Paul*[1] laying down that the proper form of a decree to be passed in the first instance in a suit for a declaration of nullity of marriage is that of a decree *nisi* and not a decree absolute requires reconsideration in the light of changed circumstances ; and

2. Whether the general Order made in England, namely, Matrimonial Causes (Decree Absolute) Order, 1946, reducing the period of delay from six months to six weeks applies to decrees passed in the case of declaration for nullity of marriages by the High Court on the Original Side under the provisions of section 7 of the Indian Divorce Act ?".

1. (1935) 70 M.L.J. 321 : I.L.R. 59 Mad. 518 (F.B.).

In *Sumathi Ammal* v. *Paul*[1], Stone and Mockett, JJ., held, Wadsworth, J., (dissenting), that the decree that should be passed by the High Court in its Original Matrimonial Jurisdiction in a petition for nullity of marriage should in the first instance be a decree *nisi* and not a decree absolute. That was the practice on the Original Side of our High Court until Panchapakesa Aiyar, J., deviated from it last year in *Gonsalves* v. *Iswariah*[2] and following a Calcutta decision placed before him, *Steedman* v. *Wheeler*[3], passed straightaway an absolute decree for nullity. The Full Bench in *Sumathi Ammal* v. *Paul*[1] which till then governed the practice on the Original Side of this Court, does not appear to have been placed before the learned Judge, as it should have been by the learned Advocates on the Original Side who appeared in that case.

There has been much difference of opinion on this matter. It would appear that the High Courts of Calcutta, Bombay, Allahabad and Lahore have, as the position stands to-day, taken the view that a decree for nullity need not be in decree *nisi* form and in fact that an absolute decree should be granted straightaway. We do not propose to go too elaborately into the conflicting case-law and the various viewpoints expressed, as we find ourselves in agreement on this point with the view expressed by Stone and Mockett, JJ., in *Sumathi Ammal* v. *Paul*[1] which decided the question referred to them in view of a divergent practice in this matter of other High Courts. We do not therefore propose to repeat here the reasoning given by the learned Judges of the Bench, with whom we find ourselves in agreement. We would like, however, to say as briefly as possible why we are in complete agreement with the view they have taken.

Since that decision in 1935, the Calcutta High Court, it would appear, took the same view as *Sumathi Ammal* v. *Paul*[1], in *Taylor* v. *Wenkenbach*[4], a decision by Costello, J. Das, J., as he then was, however in *Steedman* v. *Wheeler*[3], the decision on which Panchapakesa Aiyar, J., relied, in, if we may say with great respect, a very comprehensive judgment, took the view taken by Wadsworth, J., and held that a decree in a case of nullity should be in absolute form. Das, J., observing that he would be slow to upset a practice which had prevailed in the Calcutta High Court for a number of years unless he was compelled to do so, on a very careful consideration of the relevant provisions of the statute applicable to the case and judicial decisions thereon, came to this conclusion. We have been taken through his judgment, but with respect are unable to agree with his dissent from the view of Stone and Mockett, JJ., in *Sumathi Ammal* v. *Paul*[1].

In Bombay an absolute decree for nullity passed straightaway by the High Court appears to have been the practice of that Court, at any rate, since 1898, judged from the Full Bench decision in *A* v. *B*[5], which took the view that a decree for nullity of the marriage made by a District Court cannot be confirmed by the High Court before the expiration of six months from the pronouncing thereof. That decision differentiated on grounds, which with respect are not apparent to us, between decrees for nullity passed by a High Court and those passed by a District Court, the former being made absolute at once but the latter having to be confirmed by the High Court after a lapse of six months. There are, however, pertinent observations by Ranade, J., in his separate judgment, which appears to us to support the same kind of decree in both cases of dissolution and nullity, when at page 463 he said this :

> " Quite apart from the requirements of strict legal construction, it may be noted that the reasons of expediency, which suggest that such confirmation should not be made in the case of decrees for the dissolution of marriages till after six months have expired, hold equally good in the case of nullity decrees . . . . . There is equal room for collusion in both cases. The same safeguards are, therefore, needed in the one case as in the other."

These observations, as it appears to us give strong support to the Full Bench decision in *Sumathi Ammal* v. *Paul*[6].

1. (1935) 70 M.L.J. 321 : I.L.R. 59 Mad. 518 (F.B.).
2. (1953) 1 M.L.J. 591.
3. I.L.R. (1944) 1 Cal. 258.
4. I.L.R. (1937) 1 Cal. 417.
5. (1898) I.L.R. 23 Bom. 460 (F.B.).
6. (1935) 70 M.L.J. 321 : I.L.R. 59 Mad. 518 (F.B.).

In *Caston* v. *Caston*[1] a Full Bench of the Allahabad High Court held that a decree for nullity made by a District Judge may be confirmed before the expiration of six months from the pronouncing thereof and dissented from the Bombay decision, *A* v. *B*[2] on this point. In *Snow* v. *Snow*[3] Mootham, J., merely cited some decisions of the Allahabad High Court to support an absolute decree straightaway in a case of nullity.

In the old Lahore High Court, Bhide and Tapp, JJ., in *Wilson* v. *Wilson*[4], a case of nullity, granted an absolute decree straightaway on an appeal from a District Judge.

We have indicated a sufficient amount of case law showing a divergence of opinion from the view taken in *Sumathi Ammal* v. *Paul*[5] and the established practice here until it was deviated from in *Gonsalves* v. *Iswariah*[6] with judicial opinion veering in favour of a decree for nullity being passed straightaway. At the time the Indian Divorce Act was enacted in 1869, it followed the lines of the existing English Divorce Act. In fact it would appear that in England decrees for nullity were passed in absolute form straightway until the Matrimonial Causes Act of 1873, obviously intended to rectify a defect on some abuse coming to notice, required a decree of nullity in England also to be in decree *nisi* form, on the same footing as a decree *nisi* for dissolution. There has been no corresponding statutory amendment to the Indian Divorce Act, which, however, under section 7, requires High Courts and District Courts, subject to the provisions of the Indian Divorce Act, to act and give relief on principles and rules which in their opinion are as nearly as may be conformable to the principles and rules on which the Courts for Divorce and Matrimonial Causes in England for the time being act and give relief. Stone and Mockett, JJ., in *Sumathi Ammal* v. *Paul*[5] took the view that the Courts in India were under section 7 bound to follow any change in principle or rules on which the Court for Divorce and Matrimonial Causes in England for the time being acted and gave relief, provided that it involved no contravention of a specific provision of the Indian Divorce Act. There is no specific prohibition against a decree for nullity being in *nisi* form. It does not appear to us to make any difference whether the modification in rules and principles contemplated in section 7 of the Indian Divorce Act is effected in England either by judicial decision or by statute or by the evolution of administrative practice and procedure or by rules or orders made such as those referred to for instance in section 16 of the Indian Divorce Act. As it appears to us, the only criterion is whether such a change in rule or principle contravenes specifically a provision of the Indian Divorce Act or any provision of the Code of Civil Procedure made applicable under section 45 subject to the provisions of the Act. If it does, the Courts of India cannot apply it, if it does not, as we understand section 7, which was a legislative provision to make the practice on the matrimonial side obtaining in India, so far as possible, in contemporaneous accord with that prevailing in England, the change in rule or principle has to be applied, by the Indian Courts. Section 7 of the Act has been preserved by the Adaptation of Laws Order of 1950 and is still valid law. There is no suggestion that it is in any way *ultra vires* of the Constitution. Although section 7 requires in the domain of divorce changing English rules and principles within the scope of the Indian Divorce Act to be adopted by the Indian Courts, we can see nothing in the altered position of India after the attainment of Independence which renders that mandatory obligation imposed on Courts inoperative, although they do of course require satisfactory evidence placed before them of altered rules and principles which govern the practice of a Court of matrimonial causes in England.

There is much to be said for the view taken by Wadsworth, J., which was followed by Das, J, if the Act is approached from the standpoint of strict legal cons-

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1. (1900) 22 All. 270 (F.B.).
2. (1898) 23 Bom. 460 (F.B.).
3. I.L.R. 1949 All. 1.
4. A.I.R. 1931 Lah. 245.
5. (1935) 70 M.L.J. 321 : I.L.R. 59 Mad. 518 (F.B.).
6. (1953) 1 M.L.J. 591.

truction without the liberal construction which we think should be given to section 7 of the Act. Otherwise the whole intention underlying that section would be frustrated and Indian Divorce law would be confined rigidly to the statutory position laid down by the Act in 1869, which the legislature specifically intended should not be the case. It may be that because of the existence of section 7 and the power given to Indian Courts to apply changing principles and rules on which the Court for Divorce and Matrimonial Causes acts in England and gives relief, no statutory amendments to the Indian Divorce Act of 1869 were considered necessary to incorporate one of the changes in the Matriminal Causes Act of 1873 that a decree nullity should in the first instance be in decree *nisi* form. If the Indian Divorce Act is critically scrutinised, it does reveal differential treatment to be accorded to decrees of dissolution of marriage and decrees for nullity, which are provided for in two separate parts. In the Indian Divorce (Amendment) Act, (XV of 1927) by which section 17-A of the Divorce Act was enacted, statutory provision was made for a High Court established by Letters Patent to appoint an officer to perform the functions exercisable by the King's Proctor, with power to show cause why a decree for dissolution of marriage should not be made absolute. It is extremely difficult to say why decrees for nullity were left out of section 17-A, as collusion or connivance between parties under section 47 of the Act is made equally applicable to petitions for a decree of dissolution of marriage or of nullity of marriage or judicial separation, which shall each state that there is no collusion or connivance. Furthermore, the remarriage in section 57 of the Act only provides for remarriage in the event of a decree for dissolution of marriage and not specifically for a decree for nullity. The section requires a period of six months after the date of the High Court confirming a decree for dissolution of marriage made by a District Court or after the date of any decree of a High Court dissolving a marriage and no appeal has been filed.

None of the decisions which have laid down that a decree for nullity passed by a High Court should be straightaway passed in absolute form have, with respect, considered the question from the standpoint of remarriage. There is nothing in the Indian Divorce Act to prevent a party remarrying on an absolute decree for nullity of the marriage being passed. English law and practice to-day allows either party to the marriage to remarry after a decree absolute either of nullity or of divorce (*See* Philip's Divorce Practice, 4th Edn,. at page 204). The right of remarriage after decree absolute of dissolution of marriage was conferred by section 13 of the Matrimonial Causes Act, 1950. A more serious practical objection to an absolute decree for nullity being passed straightaway, particularly in a contested suit with the possibility of an appeal, is that the party succeeding in getting such a decree may proceed to marry straightaway, a course which it would appear is legally open to him, unless the other side immediately restrains him by an injunction from the appellate Court, a step which might be too late. In *Steedman* v. *Wheeler*[1] the opinion was expressed that a plain, simple absolute decree for nullity should be passed under the Indian Divorce Act as in a suit for declaration of nullity of marriage between non-Christian persons under section 42 of the Specific Relief Act. That position has, with respect, now been altered in this State by the passing of the Madras Hindu Bigamy (Prevention and Divorce) Act of 1949, section 5 of which places both categories of cases, whether of dissolution or nullity on grounds of impotence under the Indian Divorce Act, on precisely the same footing and requires a final decree to be passed with, however a remarriage provision forbidding in both these categories of cases either party to marry till after the expiry of six months, and the time fixed for an appeal or the determination of the appeal. A decree for nullity by a single Judge of the High Court is liable to appeal within twenty days. Without any specific prohibition in the Indian Divorce Act on a party to a nullity decree remarrying, we think that an overwhelming case is made out on grounds of expediency and public morality for a decree for nullity also being passed first in decree *nisi* form.

1. I.L.R. (1944) 1 Cal. 258.

The view taken by Stone and Mockett, JJ., in *Sumathi Ammal* v. *Paul*[1] derives considerable support from the Privy Council decision in *Iswariah* v. *Iswariah*[2]. In that case a District Judge acting under section 7 of the Indian Divorce Act increased alimony to the wife after a decree for judicial separation was passed, taking the principles and rules of the English Courts as a guide. The Madras High Court (Phillips and Reilly, JJ.) held that on a true construction of section 37 of the Indian Divorce Act, the Indian Courts had power to do this within the ambit of the section. The Privy Council upheld the view taken by the High Court; but they also considered section 7 of the Act and we cannot do better than endorse the interpretation of section 7 read with section 45 of the Indian Divorce Act given by Machanda in his Law and Practice of Divorce at page 39 in the light of *Iswariah* v. *Iswariah*[2] and *Sumathi Ammal* v. *Paul*[1], that where there are specific provisions in the Act or in the Civil Procedure Code, the Courts have no authority to enlarge or to cut down their scope by application of the rules and principles of the English Divorce Courts. The Courts can neither cut down the provisions of the Act nor can they supply any form of relief not provided by the Act. Subject to this, the Courts may act and grant relief on principles and rules prevailing in the Divorce Courts in England.

The present English Law and Practice of Divorce is summed up in Phillip's Divorce Practice, 4th Edn., at page 202, as follows:

> "By section 12 (1) of the Matrimonial Causes Act, 1950, every decree of divorce or of nullity of marriage must in the first instance be a decree *nisi*, which canot be made absolute until after the expiration of six months from the pronouncement thereof unless the Court, by general or special order, from time to time fixes a shorter time. By the Matrimonial Causes (Decrees Absolute) General Order, 1946, the period between decree *nisi* and decree absolute was reduced from six months to six weeks. There is, however, no limit to the extent to which the Court may abridge the period, and, in a proper case, application may be made to reduce the period of six weeks. It is possible for a Judge at the trial or hearing of a petition for dissolution or nullity of marriage to order that the period between decree *nisi* and decree absolute be shortened. Such orders are rarely made and should be asked for only in exceptional circumstances."

The extent, therefore, to which the law and practice of divorce under the Indian Divorce Act can be brought into harmony with English Divorce Law and Practice is what we have to decide. There is no prohibition in the Divorce Act or in the Civil Procedure Code against a decree for nullity being passed in *nisi* form. Nor is there any section in the statute which requires an absolute nullity decree being passed straightaway. The statute being silent on this point, we have neither hesitation nor difficulty in holding that the English law and practice can and must be applied under section 7 of the Act. On the first point referred to us, we hold, therefore, that the Full Bench decision in *Sumathi* v. *Paul*[1], requires no reconsideration in the light of any changed circumstances, that it lays down good law which must be followed by the Original Side of this Court.

The second point referred to us for determination, *viz.*, whether if the decree were to be in *nisi* form, the period should be reduced from six months to six weeks in conformity with present English practice, is a matter not entirely free from difficulty. My learned brother Ramaswami, J., in his reference has mentioned a decision of mine in O.M.S. No. 19 of 1949, an unreported decision, in which after granting a decree *nisi* for nullity on 13th February, 1951, I made it absolute on 24th April, 1951, after a period of rather more than two months. I may say that I there acted under section 7 of the Act on the legal basis which has now the full concurrence of my learned brothers, and which after reviewing all the authorities placed before us, I am also now quite satisfied is correct. In the case of decrees for dissolution of marriage under section 16 of the Act, as differentiated in the Act from decrees for nullity, the decree in the first instance shall be a decree *nisi*

> "not to be made absolute till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court, by general or special order from time to time directs".

This is a statutory enactment containing a mandatory provision that the interval between the decree *nisi* and the absolute decree in a case of dissolution of

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1. (1935) 70 M.L.J. 321 : I.L.R. 59 Mad. 518 (F.B.).
2. (1931) 61 M.L.J. 367 : L.R. 58 I.A. 350 : I.L.R. 54 Mad. 774 (P.C.).

marriage shall not be less than six months. Section 12 (1) of the Matrimonial Causes Act, 1950, which empowers a Court by general or special order to fix a shorter time clearly appears to contravene specifically section 16 of the Indian Divorce Act and so does the Matrimonial Causes (Decree Absolute) General Order, 1946, reducing the period from six months to six weeks. These impediments which come in the way of adopting English present law and practice to dissolutions of marriages which come within the scope of Part III of the Indian Divorce Act do not exist so far as decrees for nullity are concerned, which are governed by Part IV of the Act. We would answer the question referred to us by saying that so far as decrees for nullity are concerned, the Indian Courts must follow the law and practice in England as regards nullity decrees, which should be in decree *nisi* form, but the period for making the decree absolute should be six months. We think that section 12 (1) of the Matrimonial Causes Act and the Matrimonial Causes (Decree Absolute) General Order, 1946, which reduces the period both in cases of dissolution and nullity from six months to six weeks is in contravention of section 16 of the Indian Divorce Act. This, however, constitutes no obstacle to the Indian Courts making a decree *nisi* for nullity absolute within that period in exceptional cases or even to their indicating at the time the decree *nisi* is passed, if the Court is satisfied that there is no possibility of appeal and exceptional reasons exist, within what period the decree *nisi* shall be made absolute. These answers will bring the law and practice under the Indian Act in the domain of decrees for nullity, without contravening specifically a single one of its provisions in accordance with the principles and rules on which the Court for Divorce and Matrimonial Causes in England now acts and gives relief.

We would like to express in conclusion our great appreciation of the valuable assistance Mr. V. Thiagarajan has given as *amicus curiae* in this matter and the authorities and arguments he has placed before us in so lucid and concise a manner with his usual ability. We also appreciate the assistance rendered by Mr. N. T. Raghunathan, who appeared as Mr. Thiagarajan's junior.

In the exceptional circumstances set out in the application for divorce the period is reduced to the period of six weeks which has already expired. The decree for nullity is made absolute.

K.S. —— *Decree made absolute.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN, MR. JUSTICE BALAKRISHNA AYYAR AND MR. JUSTICE RAJAGOPALA AYYANGAR.

K. Nagarathnammal .. *Petitioner**

v.

S. Ibrahim Saheb and another .. *Respondents.*

Madras Hereditary Village Offices Act (III of 1895), section 10 (5)—*Action of Collector under—District Collector appointing a deputy to a post registered in the name of a minor as the heir of the holder of the hereditary village office—If revisable by the Board of Revenue—Board of Revenue—Powers to interfere with an order of the District Collector.*

Board of Revenue and District Collector —Powers of—Spheres of control by Government and the Board respectively.

Standing Orders of the Board of Revenue—Nature of—Scope and legal effect.

The scheme of the several regulations like Regulations I of 1803, II of 1803 and VII of 1828 is to place on the Board of Revenue the duty and the responsibility for the executive administration of the revenue and it is given the power to discharge that responsibility by punishing those who neglect their duties.

In a like manner, so far as his district is concerned, the responsibility is placed on the Collector. But in order to enable him to discharge his duties, he is given a plenary power of control and superintendence over his subordinate and Assistant Collectors and require them to submit to him their pro-

* W.P. No. 838 of 1952. 3rd December, 1954.

ceedings before they are given effect to and he is given power to confirm, modify or annul their decisions. These powers are very wide and could be exercised in all cases and in the fullest manner.

Venkata Subba Rao v. *Ananda Rao,* (1951) 1 M.L.J. 410, explained and doubted.

Where a statute or rules framed thereunder vest a discretion in an officer subordinate to the Government then that discretion must be exercised by the officer and cannot be exercised by the Government. The power of superintendence which the Government may claim cannot be invoked to justify interference with the statutory discretion of its subordinate officers.

Commissioner of Police, Bombay v. *Gordhandas Bhanji,* (1951) S.C.J. 803: (1952) S.C.R. 135, referred.

Under certain provisions of the Madras Hereditary Village Offices Act there is a specific right of appeal and second appeal in some cases from the orders of the Collector. For example under section 13 of the Act any person entitled to any of the offices specified in section 3 of the Act may sue before the Collector to establish his right to the office. Under section 23 of the Act a right of appeal from such decisions is provided to the District Collector or Board of Revenue. In respect of punishment imposed under section 7 there is a specific right of appeal provided. But what has to be noticed is that no appeal is provided for from an order made under section 10 (5) of the Act. There is no statutory power under which either the Board of Revenue or the Government could interfere with an order passed by the District Collector under section 10 (5) of Act III of 1895.

Village Officers in this State fall into two broad categories : those in respect of whom there are specific statutory provisions and those for whom there is no such provision. Holders of offices governed by the statute cannot in relation to their offices, be dealt with except in the manner provided by the relevant statute. Neither the Revenue Divisional Officer nor the District Collector nor the Board of Revenue can deal with them except in the manner permitted by the statute.

Subba Rao v. *Secretary of State,* (1929) 58 M.L.J. 698, followed.

The other class of Village Officers, that is to say, those not governed by the statutes are not in such a fortified position. They are under the superintendence and control of the District Collector, the Board of Revenue and the Government of the State just like other Government servants.

Secretary of State for India in Council v. *Subba Rao,* (1933) 65 M.L.J. 186: I.L.R. 56 Mad. 749 and *Duraiswami Reddi* v. *Secretary of State for India in Council,* (1939) 2 M.L.J. 6 (F.B.), referred.

The Board of Revenue is not itself a sovereign power and is itself a creation of statute. It derives its power from the legislative authority and it has no power outside the legislation. It has no inherent power outside the Acts and Regulations creating or governing, it, to interfere with the orders passed by the District Collector.

Subba Rao v. *Secretary of State,* (1929) 58 M.L.J. 698, followed.

Where a statute takes over and occupies a field previously not regulated by legislation, the rights and powers conferred and the obligations imposed by the statute must be worked out within the statutory frame-work. If a statute confers a particular right and prescribes a particular mode for its enforcement, then the enforcement of that right must be sought in that mode. If a right of suit or a right of appeal or a right of revision is provided that remedy must be sought in aid. If no appeal or revision is provided for, then the order of the original authority cannot be interfered with and that order would be the first and final order.

Where a statute has made provision in respect of particular matters it is to the statute that one must look for the determination of the right of individuals and not to the vague and indefinite background of the overall powers of the Government. There is no warrant to draw a distinction between persons with antecedent rights and those without antecedent rights when provision as regards both these categories of persons are made in the statute.

(Argument that a person appointed under section 10 (5) of Act III of 1895 has no antecedent right to that office as in the case of persons standing in a particular relationship to the last office-holder and that in such cases the power exercised by the Government is purely administrative and not judicial or quasi-judicial was repelled).

In respect of an appointment made under section 10 (5) of the Act neither a right of appeal nor a right of revision is provided for. The order of the District Collector under that section cannot therefore be interfered with by any higher authority.

Seshagiri Sarma v. *State of Madras,* (1952) 2 M.L.J. 462, referred.

It is open to the Board of Revenue to provide the rules and act in the nature of a supervisory authority over subordinate revenue Collectors. The Standing Orders of the Board of Revenue consist of at least three categories of rules : (1) Rules framed either by the Government or by the Board itself in pursuance of a statutory power, (2) Orders issued by the Government and (3) Orders issued by the Board itself with the approval and very often with the previous sanction of the Government. It is not therefore entirely correct to say that the orders of the Board are all merely executive instructions devoid of statutory force. Where a rule already exists and provides for any specific

matter, when an individual case comes up before the Board it is not open to the Board to decide that case in any manner it thinks fit in contravention of the existing rule. The Board cannot ignore the existing rule and treat the order made in any particular case as an amendment of that rule.

That the Government or the Board of Revenue have the power to amend the rules does not make any difference. Both are bound to dispose of the matters that come up before them in accordance with the rules at the time in force on the subject. The Board possesses both the power to frame rules and the power to pass orders in individual cases. But when a case comes up for which provision already exists under the rules in force, that case must be disposed of in accordance with the rules.

While the Board of Revenue has undoubted power to superintend and a power to frame rules and amend them from time to time in exercise of that power of superintendence, the Board is bound by those very rules when it acts as quasi-judicial tribunal and adjudicates on rights of parties founded on those rules. The duty of the Board to decide individual cases before it in accordance with the rules, no doubt framed by itself, should not be confused with the right of the Board to frame or to amend the rules.

Decision in L.P.A. No. 225 of 1952, discussed, doubted and differed.

The possession of what may be called legislative authority does not necessarily carry with it the power to interfere in particular cases, if the rules on that topic issued in the exercise of the legislative authority do not provide for such interference. The rule-making power cannot be invoked to gives a particular decision in a particular case.

Blackpool Corporation v. *Locker*, L.R. (1948) 1 K.B.D. 349, referred.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of certiorari calling for all the records in connection with the proceedings of the Board of Revenue in B.P. Rt. No. 2705 of 1950, dated 25th April, 1951, appointing the first respondent as the deputy karnam of the village of Thadikombu, Dindigul Taluk, and to quash the said order of the Board of Revenue. Rajagopala Ayyangar, J., before whom the petition first came on for hearing referred it and the petition then came on for hearing before the Full Bench.

N.V.B. Shankar Rao for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*) and the Special Government Pleader (*V. V. Raghavan*) and *S. V. Venugopalachari* for Respondents.

The Order of the Court was delivered by

Balakrishna Ayyar, J.—On 24th March, 1950, Komaravelu Pillai, the permanent hereditary karnam of the village of Thadikombu in Dindigul taluk died leaving him surviving a widow by name Nagarathnammal and a minor son, Vellaswami, aged about 12 years. By an order made on 4th September, 1950, the Sub-Collector Dindigul, registered Vellaswami as the permanent karnam and appointed one Ibrahim Saheb to be his deputy during the period of his minority. Against this order appointing Ibrahim Saheb as deputy, Nagarathnammal, preferred an appeal to the District Collector, Mathurai. Her prayer to the Sub-Collector appears to have been that one Nagaratnam, a relation of hers, should be appointed deputy. By an order, dated 28th October, 1950, the District Collector set aside the appointment of Ibrahim Saheb on the ground that it was undersirable to appoint a Muslim as deputy of a Hindu minor. As Nagarathnammal had intimated that she was willing to nominate Nagaratnam, the District Collector directed the Sub-Collector to examine the qualifications of the nominee and to appoint him if he was found suitable. Ibrahim Saheb thereupon filed a revision petition to the Board of Revenue. Nagarathnammal appeared by counsel before the Board and raised the objection that it had no jurisdiction to interfere with the order of the Collector. But by its order, dated 25th April, 1951, the Board overruled the objection of Nagarathnammal to its jurisdiction and set aside the order of the Collector and confirmed the appointment of Ibrahim Saheb as deputy. Nagarathnammal then preferred a revision petition to the Government, and the Government allowed the petition without notice to Ibrahim Saheb who thereupon came to this Court by a Writ Petition No. 173 of 1952 calling in question the order of the Government on the ground that it was passed without notice to him and therefore in contravention of the principles of natural justice. The writ petition was allowed on that ground and the matter remitted to Government for fresh disposal in accordance with law.

When the matter thus went back to the Government, they took the view that they had no revisional powers and declined to interfere. The result was that the order of the Board appointing Ibrahim Saheb as deputy stood. Nagarathnammal has therefore come to this Court with this petition to quash the order of the Board on the ground, that it had no jurisdiction to interfere with the order of the District Collector. That petition came on in the first instance before one of us, namely Rajagopala Ayyangar, J. He observed :

"The question, therefore, is whether the Board of Revenue have or have not the power of revision which they have purported to exercise in their order now impugned, dated 25th April, 1951. There are two decisions of this Court both of them of Benches which have a bearing upon this question, the first one being *Seshagiri Sarma* v. *State of Madras*[1], and the other which is still unreported being one rendered in L.P.A. No. 225 of 1952. In the earlier decision the learned Chief Justice and Venkatarama Aiyar, J., have taken the view that the Board of Revenue have no revisional powers over Collectors in respect of their judicial or quasi-judicial functions. In the latter case, a directly opposite conclusion was reached by Govinda Menon and Basheer Ahmed Sayeed, JJ. It is possible that there might be some small points of difference or distinction between the present case and those dealt with by the two judgments but I do not think that without preferring the one decision to the other the present writ can be disposed of. The proper course, it appears to me to follow, is to place the papers before my Lord the Chief Justice for directions either to refer the case to a Bench or to a Full Bench for resolving the conflict between these two Bench decisions and there will be a direction accordingly."

That is how the matter now comes before us. The question we have to decide is whether the Board of Revenue has power to interfere with an order made by the the District Collector under section 10 (5) of Madras Act III of 1895—the Madras Hereditary Village Offices Act, 1895—appointing a deputy to a post registered in the name of a minor. To answer this question it is necessary at the outset to examine the statutes that have a bearing on the powers of the Board and the Collector. The earliest of these is Regulation I of 1803. Up to that time the Board had a considerable amount of judicial authority in the determination of certain cases of a civil nature. The Regulation formally abrogated this judicial authority of the Board of Revenue in those districts where Zilla Courts had been established. Thereafter the preamble proceeds to state the further object of the Regulation :

"and whereas it is important..............that the powers and authorities entrusted to the said Board of Revenue in respect of the executive administration of the revenues, should be defined and published ;"

These words make it plain that the intention of the Regulation was to define the power of the Board in so far as it related to the executive administration of the revenues. Section 4 of the Regulation specifies the duties of the Board to be "the general superintendence of the revenues from whatever source they may arise." Section 5 runs :

"The Board of Revenue have had, and are hereby declared, to have authority to superintend and control all persons employed in the executive administration of the public revenue........as far as the said superintendence and control may relate to the executive administration of the revenue under the Regulations now enacted, or to be hereafter enacted."

It will be noticed that the section, though it confers on the Board power and authority to superintend and control all persons employed in the executive administration of the public revenues, imposes one important qualification thereon, and it is this : the power of superintendence and control is limited to the executive administration of the revenue. In other words, under the guise of superintendence and control of persons employed in the executive administration of the revenue, the Board cannot give instructions to them in respect of other matters ; as for instance the spread of literacy. Section 33 of the Regulation explicitly places on the Board of Revenue the responsibility of seeing that the executive officers employed under it discharge their duties diligently. The section runs :

"The Board of Revenue shall be responsible that the executive officers employed under them discharge the duties of their respective stations with assiduity, and shall require them to pay a ready and implicit obedience to all orders and regulations, and shall punish neglect in the subordinate officers of revenue, at their discretion, according to the powers vested in them for that purpose."

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1. (1952) 2 M.L.J. 462.

While fixing responsibility on the Board for maintaining discipline among the officers subordinate to it, the requisite power to discharge the responsibility is also conferred on the Board by empowering it to punish the officers subordinate to it. The limitation on this power is the requirement that it shall be exercised "according to the powers vested in them for that purpose" which might be by statute or rule or otherwise.

We have next Regulation II of 1803. The Preamble recites :

> "and whereas the said system (the system of internal Government established for the administration of the public revenue) further requires that the power and authority heretofore vested in the immediate Collectors of the revenue should be curtailed ; wherefore the following Regulation has been passed for the purpose of defining the authority committed to Collectors, and for describing the modes of procedure, required in the discharge of their duty."

Section 5 states :

> "Collectors shall be under the immediate control of the Board of Revenue, and shall obey all orders communicated to them by the authority of that Board."

Section 9 enacts :

> "Collectors have had, and are hereby declared to have, authority to superintend and control, under the orders of the Board of Revenue, all persons employed in the executive administration of the public revenue............as far as the said superintendence and control may relate to the executive administration of the revenue under the regulations now enacted, or to be hereafter enacted."

It will be noticed that this section is practically the same as section 5 of Regulation I of 1803 with the "Collectors" taking the place of the "Board".

The next Regulation that has to be referred to is Regulation VII of 1828. It is headed :

> "A Regulation for declaring the powers of Subordinate and Assistant Collectors in charge of particular divisions of districts and for facilitating proceedings under Regulation IX, 1822."

The Preamble runs :

> "Whereas the efficient discharge of the functions of Collectors requires that Subordinate and Assistant Collectors should be empowered to exercise within their divisions all the powers of the Collector, but subject, nevertheless, to their revision and correction."

The first paragraph of section 3 states :

> "A Subordinate or Assistant Collector in charge of a particular division of a district shall *ex officio* have authority to exercise within the division under his charge all the powers granted to Collectors by the Regulation now in force, or that may be hereafter enacted unless the contrary shall be expressly declared in any Regulation."

We would emphasise the last words of the section—"unless the contrary shall be expressly declared in any Regulation"—which mean that, in the absence of express provision to the contrary, all the powers conferred by any statute on a Collector may be exercised within the limits of his territorial jurisdiction by a Sub-Collector or Assistant Collector in charge of a division. But the powers so granted are subject to the control of the District Collector—a control very comprehensive in its scope. The third paragraph of section 3 makes this unmistakably plain :

> "The proceedings of Subordinate and Assistant Collectors acting under the preceding clause shall be subject, in all cases, and in the fullest manner to the superintendence, control and revision of the Collector, who shall have power either to direct, generally, that the proceedings of any of his Subordinates or Assistants shall be regularly submitted to himself before the decision, order or sentence is carried into execution, and to confirm, modify or annul them, or issue any further orders in the cases, as he may see fit ; or in any particular case to direct that the decision, order or sentence of any of his Subordinates or Assistants shall not be carried into execution and to pass such further orders as he may see fit."

It will be appreciated that the scheme of these Regulations is this. The duty and the responsibility for the executive administration of the revenue is placed squarely on the Board and it is given the power to discharge that responsibility by punishing those who neglect their duties. In like manner so far as his district is concerned, the responsibility is placed on the Collector ; but in order to enable him to discharge his duties, he is given a plenary power of control and superintendence over his Subordinate and Assistant Collectors. It will be noticed that the third paragraph of section 3 of Regulation VII of 1828 states that the proceedings of

the Subordinate and Assistant Collectors shall be subject, in all cases, and in the *fullest* manner to the superintendence, control and revision of the Collector. He has been given power to require Sub-Collectors and Assistant Collectors to submit to him their proceedings before they are given effect to and he is given power to confirm, modify or annul their decisions.

At the bottom of the revenue hierarchy are the village officers. So far as they are concerned their appointment, removal, etc., are governed by two statutes. One is Act II of 1894 which deals, generally speaking, with village establishments in zamindaries. With that Act we are not here concerned. The other is Act III of 1895 which deals with village establishments in ryotwari areas. section 3 of this Act enumerates the village offices to which it applies, and the enumeration includes village munsifs and karnams. The first paragraph of section 10 provides :

"When a vacancy occurs in any of the village officers forming class (1) in section 3, the Collector shall fill up the vacancy in accordance with the provisions of the following sub-sections."

One of these is Sub-section (2) which says :

"The succession shall devolve on a single heir according to the general custom and rule of primogeniture governing succession to impartible zamindaries in Southern India."

Sub-section (5) provides :

"When the person who would otherwise be entitled to succeed to an office is a minor the Collector shall register the minor as the heir of the last holder and appoint some other person qualified under sub-section (1) to discharge the duties of the office until the person registered as heir, on attaining majority, or within three years thereafter, is qualified under sub-section (1) to discharge the duties of the office himself, when he shall be appointed thereto."

Under section 13 any person who considers that he is entitled to any of the offices specified in section 3 may sue before the Collector to establish his right to the office. Under section 23, an appeal lies to the District Collector from every decision given by the Collector under section 13 and to the Board of Revenue if the decree was made by the District Collector. In certain cases a second appeal is also provided for. Under section 7 (*b*), the Collector is given power to fine, suspend, dismiss or remove village officers. Under sub-section (2) the Tahsildar or Deputy Tahsildar is also given certain punitive powers though they are of a more limited kind. In respect of every punishment imposed under section 7 by the Collector, an appeal lies to the District Collector, and, in certain cases, to the Board of Revenue. But what has to be noticed—and that is the point we desire to emphasise here—is that no appeal is provided for from an order made under section 10 (5).

Village Officers in the State fall into two broad categories : those in respect of whom there is specific statutory provision and those for whom there is no such provision. In the case of certain specified village offices in ryotwari areas, claims to them by way of hereditary right are recognised by statute, which confers some special rights on the claimants to and incumbents of such offices. If the claim which such a person thinks he has to a particular office is not conceded, he can maintain a suit before the Collector to establish his claim. From the decision of the Collector, an appeal and in certain cases, a second appeal lies. Village officers who are not governed by these statutes have no such right. A village officer to whom Act II of 1894 or Act III of 1895 applies cannot be punished except in the manner provided for by the Acts ; and when he is punished, he has got a right of appeal as provided in the Acts. To put it in another way, holders of offices governed by Act II of 1894 or Act III of 1895 cannot in relation to their offices be dealt with except in the manner provided by the relevant statute. Neither the Revenue Divisional Officer nor the District Collector nor the Board can touch them except in the manner that the statute permits. The other village officers, that is to say, village officers not governed by either of those Acts are not in so fortified a position.

They are under the superintendence and control of the District Collector, the Board and the Government just like other Government servants.

We will next examine the case-law on the subject. The earliest of the decisions cited before us is reported in *Subba Rao* v. *Secretary of state*[1]. The facts there were these :

"The plaintiff was a karnam of the ryotwari village of Voonagatla. On 4th October, 1921, the Revenue Divisional Officer, Ellore, dismissed him. He appealed to the District Collector who modified the order into one of suspension for one year. He preferred a second appeal to the Board of Revenue, the result of which was that the Board on 8th July, 1922, restored the order of the Revenue Divisional Officer dismissing him. . The plaintiff maintained that that order was *ultra vires* and invalid. The above proceedings were then taken under Act III of 1895. The original dismissal was under section 7 and the appeals were under section 23."

Wallace, J., observed :

"It is quite clear, I think, that no second appeal lay in this case . . . . The learned Government Pleader, however, contends that the order was passed in the exercise of powers of revision possessed by the Board. He claims that the Board could have acted, and, therefore, must be presumed to have acted either in the exercise of revisional powers under section 23 or in the exercise of inherent executive powers outside the scope of Act III of 1895. As to the powers of revision under section 23, the statute itself does not confer on the Board any power of revision. But it is argued that as the Board is constituted the superior appellate authority, it follows that it has a general power of revision. Reliance is placed on a sentence quoted from the rluing in In re *Chinnayya Gounder*[2], which states the well-known proposition that appellate jurisdiction includes the power to interfere in revision. But in order that that proposition may apply, a revisional power must have been conferred by the statute on the tribunal. If revisional power has been conferred, then it is exercisable over all tribunals against whose orders an appeal is provided. I am not referred to any authority which lays down that, where a statute confers a right of appeal and is silent about a right of revision, it has conferred a right of revision apparently unlimited in extent and absolute in authority, so that for example, as in this case, the mere conferment of a right of appeal on the Board *ipso facto* confers on it a right to enhance the sentence of a lower tribunal without notice to the party affected. Such a contention is tantamount to saying that, where a statute provides a right of appeal and also provides a power of revision, the latter provision is not an enabling provision but is a restricting provision limiting the unlimited powers of revision otherwise possessed by the Tribunal."

The learned Judge then went on to examine the history of the legislation on the subject and at page 701 observed as follows :

"In all this history I see no room for the contention that the Board of Revenue possesses some powers outside this legislation. It has all along derived what power it possessed from the legislating authority, and not being itself the sovereign authority it has not inherent in it the powers of the sovereign. Such a theory really implies that although the statute says by section 23 that a dismissal of an appeal to the District Collector in a case where the order on appeal is not one of dismissal, shall be final, yet that order is not final, because the Board possesses undefined and unrestricted inherent powers to interfere with it."

On page 702, the learned Judge expressed his conclusion :

"I am not, therefore, prepared to support the learned Government Pleader in his argument that the Board has an inherent power outside the Acts and Regulations to interfere with and enhance the order of suspension passed by the District Collector."

We are in full agreement with this reasoning and conclusion.

There was an appeal from the decision of Wallace, J., which was dismissed. The decision is reported in *Secretary of State for India* v. *Subba Rao*[3]. Bardswell, J., who delivered the judgment of the Bench, observed :

"It is however contended by the learned Government Pleader that the Board was in fact acting in the exercise of its revisional powers, though it did not in any way indicate that it was so doing, and that it got such powers from section 5 of Regulation I of 1803 which section has never been abolished. Wallace, J., has dealt with that contention in his judgment and I would with all respect, express myself as in entire agreement both with the conclusion which he has come to and the reasons that he has given therefor."

The next case on the point appears in *Doraiswami Reddiar* v. *Secretary of State for India in Council*[4]. The facts there were as follows : The plaintiff was appointed headman of a village by the Revenue Divisional Officer ; and that order was confirmed by the District Collector. Against the Collector's order, the second defendant preferred what was called a second appeal to the Board of Revenue. The Board took the view that the second defendant's claims should be preferred to those of the plaintiff, and proceeded to appoint him to the office. The plaintiff then

1. (1929) 58 M.L.J. 698.
2. (1921) 41 M.L.J. 577.
3. (1933) 65 M.L.J. 186 : I.L.R. 56 Mad. 749.
4. (1939) 2 M.L.J. 6.

filed a suit for a declaration that he was the legal holder of the office of headman and the appointment of the second defendant made by the Board was illegal. At page 8, Wadsworth, J., formulated the question for determination in these terms :

> "The only question therefore is whether the order of the Board of Revenue on this so-called second appeal by the second defendant is a legal order which would have the effect of putting the plaintiff in the position of one seeking to establish his right to succeed to an office, or is it an unlawful attempt to invade the established rights which the plaintiff has already acquired."

At page 9 the learned Judge stated :

> "The only power which can be claimed by the Board of Revenue is based on section 5 of the Board of Revenue Regulation (I of 1803) whereby, the Board is given authority to superintend and control all persons employed in the executive administration of the public revenue . . . . I do not wish to say anything which might be taken as indicating that in no circumstances can the Board of Revenue by virtue of its powers under section 5 of the Board of Revenue Regulation set aside a statutory order of its subordinate in the case of a gross error attended by serious consequences for which no other remedy is provided by law. But I am emphatically of opinion that these general powers of superintendence did not authorise the Board of Revenue to arrogate to itself a power of interference in revision or in second appeal from a statutory order, when machinery of the statute itself confers no such power and contemplates the utilisation of another remedy which is accessible to the person aggrieved, more specially in a case in which the consequences of any error are purely personal to the rival claimants."

We next have the case in *Seshagiri Sarma* v. *State of Madras*[1]. The facts there were as follows : In 1935, one Krishnamurthi, who was then a minor, was registered as the village headman of a village in Itchapuram taluk and one Seshagiri Sarma was appointed as his deputy under section 10 (5) of Madras Act III of 1895. In 1948 Krishnamurthi was removed from his office, as he had failed to pass the requisite tests and qualify himself. In the vacancy that thus arose one Surayya was registered as the office holder. He too was a minor, and Seshagiri Sarma was again appointed as his deputy. Subsequently the mother of the minor complained to the Revenue Divisional Officer and by an order made on 9th November, 1949, the Revenue Divisional Officer removed Seshagiri Sarma from office and appointed one Barla Appadu in his stead. Against the order of the Divisional Officer, Seshagiri Sarma appealed to the District Collector who set aside the order of the Revenue Divisional Officer and restored Seshagiri Sarma to the position which he had been occupying. Appadu then carried the matter to the Board of Revenue but the Board refused to interfere. Appadu then petitioned to the Government, who, by their order, dated 17th January, 1951, directed that Appadu be restored as deputy, ousting Seshagiri Sarma. Seshagiri Sarma thereupon came to this Court for the issue of a writ. That case was heard by the learned Chief Justice and Venkatarama Aiyar, J., and in the course of the judgment, the learned Chief Justice observed :

> "We have no hesitation in holding that the Government had no power whatever to pass any order in this matter . . . . . There is no provision in that Act (Act III of 1895) conferring any power on the Government to interfere with the orders of any of the Subordinate Revenue Authorities entrusted with specified powers by the provisions of that Act. . . . . We do not desire to say anything about the powers of the Government to interfere with the orders of the Board of Revenue generally because we are convinced that the Board of Revenue itself had no power to interfere with the order passed by the District Collector in a case like the present . . . . . In this case the order of the Revenue Divisional Officer removing petitioner and appointing another as the person to discharge the duties of the office during the minority of the registered heir was liable to be revised by the District Collector. The District Collector in the exercise of this power set aside the order of the Revenue Divisional Officer and restored the petitioner to his original position. This order of the District Collector was not subject to any appeal or revision and we are unable to discover any statutory power under which either the Board of Revenue or the Government could interfere with his order."

The legal position appears to be plain. Where a statute takes over and occupies a field previously not regulated by legislation, the rights and powers conferred and the obligations imposed by the statute must be worked out within the statutory frame-work. If a statute confers a particular right and prescribes a particular mode for its enforcement, the enforcement of the right must be sought in that mode. If it is to be enforced by a suit, then suit must be filed ; if it is to be vindicated by an appeal, then an appeal must be preferred to the specified authority. If no appeal

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1. (1952) 2 M.L.J. 462.

is provided for but only a right of revision, then that remedy must be sought in aid. Conversely, if no appeal or revision is provided for, then the order of the original authority cannot be interfered with and that order would be the first and final order. It has been noticed that under Act III of 1895 a right to sue is given to establish title to certain offices. A right of appeal and in some cases a right of second appeal are given in respect of certain punitive orders. Only a single right of appeal is given in respect of certain other punishments. In respect of an appointment made under section 10 (5), neither a right of appeal nor a right of revision is provided for; the order of the District Collector cannot therefore be interfered with by any higher authority. The question may be asked: Has the District Collector power to interfere with an order passed by the Divisional Officer, *i.e.*, the 'Collector,' under section 10 (5)? The decision in *Srinivasa Aiyangar* v. *Jagannatha Aiyangar*[1], helps in answering this question. The facts of that case are set out at page 489 of the report. There was a vacancy in the office of Village Munsif. The Revenue Divisional Officer at first registered the first defendant (then a minor) in the vacancy. That registration was subsequently cancelled, and the plaintiff was permanently appointed under section 10 (3). The first defendant then filed what purported to be an appeal before the District Collector. The Collector himself was under an erroneous impression, that there was a right of appeal and he reversed the order of the Revenue Divisional Officer and appointed the first defendant in his place. The question was raised whether the order of the District Collector which was certainly *ultra vires* as an appellate order, could be treated as *intra vires*, as an order in revision. The Court observed:

"The first paragraph of section 3 of Regulation VII of 1828 expressly states that it applies to 'all the powers granted to Collectors by the Regulation now in force or *that may hereafter be enacted*.'"

"It is only by virtue of this Regulation that a Revenue Divisional Officer gets authority to exercise the powers of 'Collector' under Act III of 1895. Consequently the District Collector's power of revision created by the same Regulation, unless it is expressly taken away, must be held to continue."

They, therefore, held that the Collector had power to interfere.

The next case we would refer to is in *Venkata Subba Rao* v. *Ananda Rao*[2]. The facts there may be thus summarised. On 21st April, 1932, *X*, who was the hereditary Village Munsif, was dismissed by the Revenue Divisional Officer, who thereafter registered *Y*, a son of *X* to the office. Following the procedure laid down in sub-section (5) of section 10 of the Act, the Divisional Officer appointed a Muslim to be the deputy of *Y*. In 1937, *Y* attainted majority and qualified himself by passing all the prescribed tests. He then applied to the Deputy Collector for permission to enter upon his duties. The Revenue Divisional Officer sought the advice of the District Collector, who felt that the officer who dismissed *X* from service should have given a direction under sub-section (4) of section 10 and should not have registered the minor as entitled to the office. Ultimately the Collector made an order on the 27th November, 1937, cancelling the order registering *Y*. *Y* exhausted all his remedies by way of appeal and otherwise and eventually on the 20th November, 1943, *Y* filed a suit for a declaration that the orders of the District Collector were illegal and *ultra vires*. Satyanarayana Rao, J., held that the Collector had no jurisdiction to make the order cancelling the registration of *Y* under section 5 (10) of the Act. With the actual decision itself one can have no quarrel; but with the reasons which the learned Judge gave we find it difficult to agree. Dealing with the third paragraph of section 3 of Regulation VII of 1828, the learned Judge observed:

"The power conferred under this paragraph is of a two-fold character. The Collector under this clause may direct generally that the proceedings of any of his subordinates or Assistants shall be regularly submitted to himself before the decision, order or sentence is carried into execution and if so submitted he is empowered to confirm, modify or annul these proceedings or even may issue any further orders in the case as he may think fit. Instead of making a general direction he may require that in a particular case the decision, order or sentence of any of his subordinates or Assistants shall not be carried into execution and he may pass such further orders as he may think fit. In either case, it should be noticed that the power is conferred to interfere with the order in the manner provided by the section only before the order is carried into execution. If once an order is carried

1. (1938) 2 M.L.J. 488.
2. (1951) 1 M.L.J. 410.

into execution, it is but natural that the Collector should not undo what has been done by his subordinate. The power, therefore, cannot obviously be exercised after the order of his subordinate has been carried into execution whether the proceedings come to his notice by virtue of a general direction or a particular direction."

With all respect to the learned Judge we do not think that this reasoning is correct. The preamble to the Regulation states that the powers of Collectors are conferred on Sub-Collectors and Assistant Collectors subject to revision and correction by Collectors. As already mentioned, the third paragraph of section 3 states in unmistakable terms that the proceedings of Sub-Collectors and Assistant Collectors shall be subject, *in all cases*, and *in the fullest manner*, to the superintendence, control and revision of the Collector. The expressions " in all cases " and " in the fullest manner " seem to be designed and are sufficient to confer on the District Collector plenary powers of supervision and control. The clauses that follow, instead of being intended to limit the power conferred by the earlier part of the paragraph, seem to be intended to emphasise it. Under that paragraph the Collector is given power not merely to revise an order already made but also to see in advance an order intended to be issued before it actually goes out. The Collector is given power not merely to correct a mistake which a Sub-Collector or an Assistant Collector may have made but to step in before he makes a mistake. Sub-Collectors and Assistant Collectors would be generally recent entrants to Government service, and, at the time this Regulation was passed would have been all of them foreigners with little or no knowledge of local conditions. Power was conferred in the amplest manner on Collectors to prevent the consequence of mistakes which their inexperience might produce. To say that, when once the orders of a Sub-Collector have been put into effect, the District Collector will have no more power in relation to those orders, would be drastically to curtail the power of the District Collector and to emasculate the section. One illustration will suffice. Supposing in a taluk the collection of land revenue is not proceeding as fast as it normally does and the Sub-Collector thinks that the process should be speeded up. To attain that object he might issue instructions to Tahsildars and other subordinate officers to effect distraints of moveables or to attach immoveables and also to arrest defaulters under Act II of 1864. Would it be right to say that because those orders of the Sub-Collector have been given effect to, that is to say, the distraints have been made, immoveable properties have been attached and persons arrested, the District Collector has no power to interfere, even if he considered the Sub-Collector's orders to be unduly harsh and oppressive. In fact, one would have thought that it was exactly in such a situation that the District Collector had authority to interfere. As we have already stated, the actual decision of Satyanarayana Rao, J., was right because since more than five years had elapsed after the original order of the Revenue Divisional Officer it would be hardly right to say that the order passed by the Collector in November, 1937, was in the execrise of any powers of revision.

Of the cases cited, one more may be referred to here. That is reported in *Commissioner of Police, Bombay* v. *Gordhandas Bhanji*[1]. That decision proceeds on the basis, that where a statute or rule framed thereunder vests a discretion in an officer subordinate to the Government, then that discretion must be exercised by the officer and cannot be exercised by the Government. In other words, the power of superintendence which the Government may claim cannot be invoked to justify interference with the statutory discretion of its subordinate officers—a view which confirms what we have already set out.

We shall deal next with the decision of Govinda Menon and Basheer Ahmed Sayeed, JJ., in L.P.A. No. 225 of 1952, *Thimmiah* v. *The Commissioner of Land Revenue, Board of Revenue, Madras*. As it has been specifically referred to in the order of reference made by Rajagopala Ayyangar, J., we have to observe even at the outset that that case fell outside the scope of Act III of 1895 and the rules framed thereunder and on that ground it is clearly distinguishable from *Seshagiri Sarma* v. *State of Madras*[2].

1. (1951) S.C.J. 803 : 1952 S.C.R. 135 (S.C.).
2. (1952) 2 M.L.J. 462.

The facts in *Thimmiah's case* were as follows. Veerabhadra Gowda was appointed to act as the Village Munsif of Madakkal, when that post fell vacant on the resignation of the permanent Village Munsif. The office was not governed by the provisions of Madras Act III of 1895. Subsequent to his appointment, there were complaints against Veerabadra and the Sub-Collector of Hosur terminated his appointment. Veerabadra appealed to the District Collector who confirmed the order of the Sub-Collector. On second appeal to the Board of Revenue, the order of termination of service was modified to one of suspension till 31st October, 1951. When the Sub-Collector directed the removal of Veerabadra, he appointed Thimmiah to the office of the Village Munsif. Against that appointment of Thimmiah, Veerabadra preferred an appeal to the Collector who dismissed the appeal. Veerabadra then moved the Board of Revenue *in revision*. By this time the Board had modified the punishment imposed upon Veerabadra to one of suspension till 31st October, 1951. The Board set aside the order of the Sub-Collector appointing Thimmiah which was confirmed by the Collector and the Board ordered the appointment of Veerabadra to the post of Village Munsif. Thimmiah moved this Court under Article 226 of the Constitution for the issue of a *writ of certiorari* to quash the orders of the Board. That was dismissed and it was against that dismissal that Thimmiah preferred L.P.A. No. 225 of 1952.

The learned Judges dismissed the appeal preferred by Thimmiah. They rejected the contention that Thimmiah could not invoke the writ jurisdiction of this Court, because he had submitted to the adjudication of the dispute between himself and Veerabadra by the tribunal that is, the Board of Revenue, the jurisdiction of which he challenged in this Court. The learned Judges observed :

" In our opinion, the petitioner's submission to the jurisdiction of the Board is not the kind of acquiescence which would debar him from raising the question before a superior tribunal. If the petitioner had moved the Board of Revenue for an order in his favour and after having failed in such proceedings had come up to this Court challenging the Board's jurisdiction to entertain his application, then the matter would have been different."

The learned Judges further held that Veerabadra's appointment was justified in the circumstances of that case. They observed :

" When the appellant Thimmiah was appointed to the office by the Sub-Collector the third respondent Veerabadra Gowda was under a bar, having been removed from the office for misconduct. This bar continued so long as his removal was in force. But when the Board modified the punishment of removal into one of suspension upto 31st October, 1951, Veerabadra Gowda must be deemed to have been restored to the office from the 1st November, 1951, onwards. Therefore Thimmiah's appointment can enure only so long as the disqualification of Veerabadra Gowda continued. It cannot be disputed that Thimmiah's appointment was subject to defeasance as a result of a second appeal by Veerabadra Gowda and such being the case Thimmiah cannot be said to have been removed and Veerabadra Gowda appointed in a vacancy."

Neither of these findings really affected the consideration of the other question which the learned Judges posed, *viz.*, had the Board jurisdiction to entertain revision petitions from the orders passed by the authorities, immediately subordinate to it, which question the learned Judges answered, " In our opinion there can be no doubt that the Board possessed such a power." With all deference to the learned Judges, we regret our inability to accept that as a correct statement of law.

The learned Judges referred to section 5 of Madras Regulation I of 1803 and also to section 5 of Madras Regulation II of 1803, and observed :

" Therefore, it is open to the Revenue Board to provide the rules and act in the nature of a supervisory authority over subordinate Revenue Collectors."

We respectfully agree with that observation. The provision for appeals in paragraph 4 of Board's Standing Order 156 was thus well within the powers of superintendence of the Board conferred on them by these Regulations. Paragraph 4 of Board's Standing Order 156 runs :

"*Appeals against punitive orders*: No appeal will be allowed against an order imposing a petty fine on the holder of a non-hereditary village office. An appeal will be allowed against an order imposing any other punishment on such officer. An appeal will be allowed to the Board of Revenue against an order passed by the Collector on appeal by a holder of non-hereditary village office of karnam or

headman enhancing the punishment imposed by the original order to removal or dismissal and a second appeal against an order passed by the Collector on appeal confirming the punishment of removal or dismissal imposed of the original order."

The learned Judges rightly pointed out that the rules did not specifically provide for the exercise of any revisional jurisdiction by the Board of Revenue. They observed :

" All that paragraphs 3 and 4 of the Standing Order 156 lay down is that in particular cases an aggrieved party will have a right of appeal and second appeal. But the specific grant of a right of appeal would not take away from the Board the statutory right which it has of superintendence under section 5, Regulation I of 1803 and the reciprocal subservience of the Collector under section 5 of Regulation II of 1803."

The learned Judges further observed :

" . . . . if the Board today makes a specific provision for revision on the same lines as paragraphs 3 and 4 of Standing Order No. 156, then nothing can be said against the interference."

What, however, we have to say is that the power to frame a rule or to amend it should not cloud the real issue. Was not the jurisdiction of the Board of Revenue limited in *Thimmiah's case* to decide the questions before it in accordance with the rules as they stood then ?

With all respect to the learned Judges who decided *Thimmiah's case*, we have to observe that they appear to have been under a misapprehension as regards the true scope and legal effect of the standing orders of the Board. They stated :

" After all, the Standing Orders of the Board of Revenue are merely collections of resolutions made by the Board for its own conduct of business as well as for regulating the procedure in the matter of collection of revenue by subordinate revenue tribunals and executive functionaries."

They observed further :

"As we have already remarked, Standing Orders of the Board are merely executive instructions by the Board to its subordinate officers whereby they lay down the procedure to be adopted in certain cases."

Actually, however, that is not so. The Standing Orders of the Board of Revenue consist of at least three categories of rules : (1) Rules framed either by the Government or by the Board itself in pursuance of a statutory power. Thus, for instance, section 20 of Madras Act III of 1895 confers on the Board power to make rules on various matters with the approval of the Government after previous publication. Such rules are incorporated in the Board's Standing Orders. We have mentioned Madras Act III of 1895 only by way of illustration. There are several other statutory provisions incorporated in the Board's Standing Orders. (2) The Board's Standing Orders next consist of a large number of orders issued by the Government. (3) The third category consists of orders issued by the Board itself with the approval and very often with the previous sanction of the Government. All these have been arranged in the Board's Standing Orders in a manner that should make reference to them easy. It is not therefore entirely correct to say that the orders of the Board are all merely executory instructions devoid of statutory force.

In the course of their judgment, the learned Judges observed :

" The fact that there is no executive order enabling a party to come by way of revision would not take away from the Board the statutory right conferred upon it under section 5 of Madras Regulation I of 1803. The mere fact that the Board has thought fit under its superintending powers to interfere is itself an instance of the issue of an executive instruction."

We do not suppose that in making these observations the learned Judges intended to refer to matters for which statutory provisions exist ; for example, Madras Act III of 1895 and the rules framed thereunder. As we have already pointed out, the case which the learned Judges had to decide was not governed by any statutes. But even with reference to matters not governed by statutory provisions or rules but governed only by the Standing Orders of the Board of Revenue, the passage we have extracted above is liable to be misunderstood. We are unable to subscribe to the view that where a rule already exists and provides for any specific matter, still when an individual case comes up before the Board, it is open to the Board,

notwithstanding the existence of that rule, to decide that case in any manner it thinks fit, even in contravention of the existing rule. In other words, the Board cannot ignore the existing rule by treating the order made in that particular case as an amendment of the rule. That the Government or the Board has the power to amend the rule should make no difference, both are bound to dispose of the matters that come up before them in accordance with the rules at the time in force on the subject. We doubt whether the learned Judges anticipated that such a construction would be placed on their observations. We only want to make it clear that such a construction would not be right. The Board possesses both the power to frame rules and the power to pass orders in individual cases. But when a case comes up, for which provision already exists under the rules in force, that case must be disposed of in accordance with the rules. No doubt, it is open to the Board to revise or amend the rules it has framed. But till the rules are revised or amended, the existing rules must be honoured and given effect to. We wish to emphasise the position, that the decision in any given case must be in accordance with the rules in force on the date of the decision. Otherwise the difference between what may be by way of analogy called legislative (rule-making functions of the Board) and its judicial and *quasi*-judicial functions would be blurred and the door thrown open to charges of arbitrariness. What we have said about the Board also applies to the Government.

Thus, while the Board has undoubted power to superintend and a power to frame rules and amend them from time to time in exercise of that power of superintendence, the Board is bound by those very rules when it acts as *quasi*-judicial tribunal and adjudicates on rights of parties founded on those rules. The rights of the parties before the Board and the corresponding liability of the Board to decide questions before it in accordance with the rules, no doubt issued by the Board itself should not be confused with the right of the Board to frame or to amend rules. The distinction is real and that, if we may say so with respect, appears to have been lost sight of by the learned Judges who decided *Thimmiah's case*.

Before parting with this rule, we might refer to the judgments in W.P. Nos. 696 of 1953 and 473 of 1954 rendered by one of us on 21st September, 1954, which appear to sustain the powers of the Government to interfere with appointments to a non-hereditary office of village munsif. We understand that a Letters Patent Appeal has been preferred against one of these judgments, which is pending. While not desiring to say anything which might embarrass the learned Judges who might dispose of the appeal, we deem fit and proper to state that the attention of the Court was not then drawn either to the terms of Board's Standing Order No. 156, nor to the decision in L.P.A. No. 225 of 1952, in which the relevant Standing Order and its legal effects were dealt with.

In this connection we can usefully refer to *Blackpool Corporation* v. *Locker*[1]. Under certain war-time regulations and enactments, the Minister of Health in Great Britain ' enacted ' a considerable measure of delegated legislation under which power was given to local authorities to requisition premises. The Corporation of Blackpool requisitioned a house in contravention of the rules. The action of the Corporation was challenged. But it was contended for the local authority that subsequent to the original attempt at requisition of the house, the Minister had either himself requisitioned the house or ratified the act of the local authority. The Minister was stated to have done so in the exercise of his original statutory authority. The Court held that in fact the Minister did not requisition or purport to requisition the house. What is germane to the case before us is the observation made by Scott and Asquith, L.JJ.

> "The Minister only retained those powers which in his ' sub-delegated legislation ' he had expressly or impliedly reserved for himself and since he had not in his sub-delegated legislation reserved to himself the power of requisition, he could not himself then requisition the house."

The point of the case is this : that the possession of what may be called legislative authority does not necessarily carry with it the power to interfere in particular cases,

1. L.R. (1948) 1 K.B.D. 349.

if the rules on that topic issued in the exercise of legislative authority do not provide for such interference.

That the rule-making power cannot be invoked to give a particular decision in a particular case will be apparent from one example. Section 5 (*vi*) of the General Sales Tax Act empowers the Government to fix a single point for the levy of tax on hides and skins. After having issued a rule on the point fixing the liability on, let us say, the last purchaser, the Government cannot—assuming for our purpose that the Government have been given the power by the Act to frame rules—give final decisions in individual cases of assessment that the liability shall not be on the last purchaser but on his vendor.

The principles laid down by Scott and Asquith, L.JJ., should, in our opinion, govern also the rules framed by the Board of Revenue with reference to non-hereditary officers, though appointments and punishments of those officers are not governed by any statute. The powers of superintendence of the Board are statutory and are traceable to section 5 of Regulation I of 1803.

In support of his contention that the Board had the power to interfere in the manner that it did, the learned Advocate-General referred to the case in *Secretary of State* v. *Raghavalu*[1]. The facts there were as follows: The Sub-Collector of Ongole dismissed the Village Munsif of Chimakurti village in the Guntur district whose office was governed by Act III of 1895. Acting under section 10 (4) of the Act, he appointed one Raghavalu to the office. This was in December 1922. On 30th March, 1923, the Collector of Guntur removed Raghavalu from the post to which he had been appointed by the Sub-Collector. Raghavalu exhausted his remedies by way of petitions to the Revenue Authorities and finally brought a suit for a declaration that his removal was illegal. The District Munsif dismissed the suit. In appeal the Subordinate Judge decreed the suit. The matter was brought in appeal to this Court. Pandalai, J., in allowing the appeal observed:

> "The person put in to do the duties of the dismissed officer is not appointed to an office governed by the Act. He is put in to do the duties of the office which is a different thing. The Act does not provide for a subsidiary class of hereditary officers other than those for whom the Act is intended, consisting of their substitutes and their heirs . . . . . A person appointed under section 10 (4) is a person appointed only to do the duties of the office and when the section says that the Collector may direct that until the death or return to duty of such last holder, the duties of the holder shall be performed by some person, it only prescribes the period of time during which that provision has to be made but does not mean that the person who is appointed is to hold for that period . . . . ."

And finally:

> "The act does not govern the case and the respondent has no grievance."

We consider that the view taken by the learned Judge about the position of an appointee under section 10 (4) namely, that he is a person to whom the Act does not apply is not correct.

Of the various other arguments urged by the learned Advocate-General only this one need be noticed. He said Act III of 1895 confers a right to certain offices on certain individuals who stand in a particular relationship to the last office-holder; the order of the appointment made by the Revenue Divisional Officer in respect of these persons amounted only to a formal recognition of this right, which is really antecedent to the order of appointment; a person appointed under section 10 (5) has no such antecedent right; he derives his right to the office only from and by virtue of the order of appointment made by the Revenue Divisional Officer. In relation to persons possessing or claiming to possess antecedent rights, the power exercised by the Revenue Divisional Officer and the authorities superior to the Revenue Divisional Officer would be in the nature of a judicial or *quasi*-judicial process, and it would be right to say that so far as such persons are concerned, the requirements of the statute must be complied with; but persons who have no such antecedent rights would be amenable to the general superintending power possessed by Collectors and the Board and the Government; therefore, and by virtue of this power, the Board and the Government can interfere. He went on:

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1. A.I.R. 1931 Mad. 607.

All the administrative and executive acts of any authority under the Government are subject to the overall control of the Government; the power of the Government to interfere and revise the orders of these subordinate authorities is derived from the power of the Government to govern. Where the power exercised by the authorities subordinate to the Government may be described as judicial or *quasi*-judicial process, Government may not have power to intervene. But where it is not of such a nature but is purely administrative in character, the Government have power to interfere.

We are unable to accept this distinction. That in the past an argument of this kind does not appear to have been put forward—at least the cases cited before us do not show that it was done—is, of course, not a reason for declining to entertain the argument of the learned Advocate-General. There is no interdict on fresh or new ideas. But for drawing a distinction between the persons with antecedent rights and those without antecedent rights, when provision as regards both these categories of persons are made in the statute, there is no warrant whatsoever. The contention is opposed to what seems to us to be a sound rule, that where the statute has made provision in respect of particular matters, it is to the statute that we must look for the determination of the rights of individuals and not to the vague and indefinite background of the overall powers of the Government. Whatever validity the argument may have had at a time when the Government constituted both the executive and the legislative authority of the State, it can have none at a time when the Government is really only the executive organ of the State.

The conclusion we have reached is that neither the Board nor the Government have power to interfere with the order made by the District Collector. A writ will, therefore, issue quashing the order of the Board. The petitioner will have her costs from first respondent. Advocate's fee. Rs. 150.

R.M. *Writ issued.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE BALAKRISHNA AYYAR AND MR. JUSTICE RAJAGOPALA AYYANGAR, JJ.

The State of Madras represented by the Deputy Commissioner of Commercial Taxes of the Madras Division .. *Petitioner**

v.

Messrs. K.H. Chambers, Ltd. .. *Respondents.*

Madras General Sales-tax Act (IX of 1939), *section* 5 (vi) *and General Sales-tax Rules, rule* 5—*Turnover and Assessment Rules, rules* 4, 15, 16—*Hides and skins—Untanned hides and skins ultimately exported outside the State—Tax on the purchase of untanned hides and skins by a licensed dealer in hides and skins under rules* 4 (2) (*d*) *and* 16 (2) *of the Turnover and Assessment Rules—Validity—Article* 14 *and Article* 286 (1) *of the Constitution of India—If violated.*

The provision of law which directly governs the case of untanned hides or skins which are ultimately exported outside the State is rule 16 (2) (*ii*) of the Turnover and Assessment Rules framed under the Madras General Sales-tax Act. By this provision the tax is levied on the dealer who was the last dealer not exempt from taxation under section 3 (3) of the Act, who buys them in the State and on the amount for which they were bought by him. The tax is levied on them as dealers who bought untanned hides or skins in the State on the amount for which they were bought by them. The said amounts are included in their total turnovers. In the case of untanned hides and skins exported outside the State by a licensed dealer, the dealer is taxed as the purchaser and not as the seller.

Under Article 286 of the Constitution of India the prohibition against the levy of sales-tax is in respect of transactions of sale or purchase in the course of import or export. A purchase for the purpose of export could not be regarded as an act done in the course of the export of the goods and such a purchase for export is not an activity so integrated with the exportation that the former could be regarded as done 'in the course of' the latter. The prohibition in Article 286 (1) (*b*) is limited to the period covered by the actual exportation of the goods and the power of the State to impose tax at any stage before or after is not affected.

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* Tax Revision Case No. 276 of 1953, etc. 10th December, 1954.

Under section 5 (*vi*) of the Madras General Sales-tax Act the sale of hides and skins, whether tanned or untanned, are liable to tax only at such single point in the series of sales by successive dealers as may be prescribed. Rule 16 of the Turnover and Assessment Rules prescribes the point. For reasons of practical convenience the rule-making authority desired to fix the single point when the series of sales had come to a termination. Rule 16 (2) (*i*) provides for the sale of untanned hides and skins to a tanner and rule 16 (2) (*ii*) provides for such hides and skins which are exported. For the purpose of fixing the single point in the series of sales, the two events, namely, the sale to a tanner and export outside the State are taken as the termini of the series of sales. Hence the transaction of sale preceding the export sale cannot be said to be a sale in the course of export.

State of Travancore-Cochin v. *S. V. C. Factory, Quilon*, (1953) 2 M.L.J. 123 : (1953) S.C.J. 471 (S.C.) followed.

State of Bombay v. *United Motors (India) Ltd*, (1953) 1 M.L.J. 743 : (1953) S.C.J. 373 (S.C.) ; *and Syed Mohammed and Co.* v. *State of Madras*, (1952) 2 M.L.J. 598, referred.

State of Madras v. *Rallis (India) Ltd., Madras*, (1954) 2 M.L.J. 312, held wrongly decided.

Sales-tax levied on the last taxable purchaser of hides and skins under the Madras General Sales-tax Act does not contravene Article 286 (1) (*b*) of the Constitution of India and the levy is valid.

The imposition of sales-tax on licensed dealers under rule 16 (2) (*ii*) of the Turnover and Assessment Rules does not contravene Article 14 of the Constitution. A classification of merchants into those who take out licenses and those who do not is one resting on a rational basis and must be upheld. The scheme of assessment under the Madras General Sales-tax Act certainly makes a difference between a licensed dealer and an unlicensed dealer. But so far as the final export is concerned neither the licensed dealer nor an unlicensed dealer can be taxed. Nor are they taxable under the rules, read with Article 286. It is not correct to say that while the unlicensed dealer escapes taxation in view of Article 286, the licensed dealer has to pay tax. He is not liable to pay any tax in respect of the export sale. It is the prior purchase that is taxable.

Different results would follow in different circumstances, namely, where an unlicensed dealer sells to a licensed dealer and where an unlicensed dealer sells to an unlicensed dealer and where a licensed dealer sells to a licensed dealer. It may be that in one or other of those contingencies there might be difficulty in assessment. This is inevitable. But that fact alone would not justify the conclusion that there is an unwarranted discrimination.

Per *Rajagopala Ayyangar, J.*—The result of the decisions of the Supreme Court as regards the scope of Article 286 of the Constitution of India in reference to the levy of sales-tax by the States is that a purchase for the purpose of export even though such purchase is effected to implement orders for the export of those goods is not " a sale or purchase in the course of export " within the meaning of the exemption in Article 286.

According to the Madras General Sales-tax Act and the rules, raw hides and skins are a commodity in respect of which the rule as to single point taxation applies and the tax is levied upon the last taxable purchaser who deals with the commodity in its raw state. The tax is really one on the transaction of purchase anterior to the export, the factum of the export figuring merely as marking the final stage of a series of purchases by one licensed dealer from another, on the occurrence of which the taxable event, namely, the last purchase is determined. The purchase of raw hides and skins for the purpose of export could not claim constitutional tax immunity as even the last purchase which preceded the actual export would not be a sale or purchase in the course of export.

Under the scheme of the Indian Constitution and the distribution of legislative and taxation powers under it, there is no prohibition on Parliament to tax exports and the entire control over exports and imports as well as duties on such exports and imports are excluded from the purview of the State.

Petition under section 12 B (1) of the Madras General Sales-tax Act praying that the High Court will be pleased to revise the order of the Sales-tax Appellate Tribunal at Madras, dated 30th April, 1953 and made in Tribunal Appeal No. 923 of 1952 preferred against the order of the Commercial Tax Officer of North Madras, dated 23rd September, 1952 and made in Appeal No. 153 of 1952-53. (A. 3/99 of 1950-51 Deputy Commercial Tax Officer, Harbour Division).

The Advocate-General (*V. K. Thiruvenkatachari*) and the Assistant Government Pleader (*K. Veeraswami*) for Petitioners in T.R.C. Nos. 276, 118, 132, 136, 185, 244 and 27 of 1953.

K. V. Venkatasubramania Ayyar, Dr. V. K. John of Messrs. John and Row, E. R. Krishnan, K. Venugopala Aiyangar, Messrs. Pais, Lobo, and Alvarez, S. Venkatakrishnan and *K. M. Bhashyam Aiyangar* for Respondents.

T.R.C. No. 351 of 1953.

Messrs. Pais, Lobo and Alvarez and *S. Venkatakrishnan* for Petitioner.

The Assistant Government Pleader (*K. Veeraswami*) for Respondent.

The Court expressed the following opinion :

Rajamannar, C.J.—The only question before this Full Bench is whether the decision in the *State of Madras* v. *Rallis* (*India*) *Ltd.*, *Madras*[1], requires reconsideration. The learned Judges who decided that case, Satyanarayana Rao and Rajagopalan, JJ., at the request of the learned Advocate-General who wished to canvass the correctness of that decision, directed the papers to be posted before another Bench. It came on thereafter before me and Umamaheswaram, J., and we thought it desirable that the matter should be heard before a Full Bench.

The question relates to the levy of sales tax under the Madras General Sales Tax Act in respect of transactions in untanned hides and skins. The provisions relating to untanned hides and skins in the Act and in the rules made under the Act may be first set out. Section 3 provides that every dealer shall pay for each year a tax on his total turnover for such year, and the tax shall be calculated at the rate of three pies for every rupee in such turnover. A dealer whose total turnover in any year is less than ten thousand rupees is not liable to pay any tax for that year. [Section 3, sub-section (3)]. For the purposes of section 3 and other provisions of the Act, turnover is to be determined in accordance with such rules as may be prescribed. There is a proviso which enacts that in respect of the same transaction of sale, the buyer or the seller, but not both, shall be taxed. Section 5 in so far as it is material, runs thus :—

"Subject to such restrictions and conditions as may be prescribed, including conditions as to licences and licence fees.... (vi) the sale of hides and skins, whether tanned of untanned shall be liable to tax under section 3, sub-section (1) only at such single point in the series of sales by successive dealers as may be prescribed."

The definitions of "dealer" and "turnover" are as follows :

"*Section* 2 (*b*) : 'dealer' means any person who carries on the business of buying or selling goods".

Section 2 (*i*) : 'turnover' means the aggregate amount for which goods are either bought by or sold by a dealer, whether for cash or for deferred payment or other valuable consideration provided that the proceeds of the sale by a person of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover ;"

Two sets of rules have been made by the Government in exercise of the powers conferred by the Act, namely, the Madras General Sales Tax Rules, 1939, and the Madras General Sales Tax (Turnover and Assessment) Rules, 1939. The following are the relevant rules or parts of rules among the General Sales Tax Rules :

"*Rule* 5. (1) Every person who—

* * * *

(*c*) deals in hides and or skins whether as a tanner or otherwise,

"shall, if he desires to avail himself of the exemption provided in sections 5 and 8 or of the concession of taxation only at a single point or of taxation at the rate specified in section 5, submit an application in Form I for a licence".

The licence fee should be paid in advance on an estimated turnover, subject to final assessment on the actual turnover. The following are the relevant rules and parts of rules of the Turnover and Assessment Rules :

"4. (1) Save as provided in sub-rule (2) the gross turnover of a dealer for the purposes of these rules shall be the amount for which goods are sold by the dealer.

(2) In the case of the undermentioned goods the gross turnover of a dealer for the purposes of these rules shall be the amount for which the goods are bought by the dealer

* * * *

(*c*) untanned hides and skins bought by a licensed tanner in the State, and

(*d*) untanned hides and skins exported outside the State by a licensed dealer in hides or skins."

"15. (1) Rules 6 to 13 shall not apply to licensed tanners and other licensed dealers in hides or skins in respect of their dealings in hides or skins ; but the provisions of this and the following rule shall apply to them in respect of such dealings.

"(2) Every tanner or other dealer in hides or skins whose net turnover for a year has been or is expected to be not less than Rs. 10,000 shall submit to the assessing authority, on or before the last

1. (1954) 2 M.L.J. 312.

day of November, 1939 (or the 25th day of the month following that in which he commences business) and thereafter on or before the 25th day of every month, a return in Form A-4 or, as the case may, be, in Form A-5 showing his transactions for the preceding month. Along with the return, he shall also submit a receipt from a Government treasury or a cheque in favour of the assessing authority for the full amount of the tax payable for the month to which the return relates."

"16. (1) In the case of hides and skins the tax payable under section 3 (1) shall be levied in accordance with the provisions of this rule.

(2) No tax shall be levied on the sale of untanned hides or skins by a licensed dealer in hides or skins except at the stage at which such hides or skins are sold to a tanner in the State or are sold for export outside the State.

(i) In the case of all untanned hides or skins sold to a tanner in the State, the tax shall be levied from the tanner on the amount for which the hides or skins are bought by him.

(ii) In the case of all untanned hides or skins which are not sold to a tanner in the State but are exported outside the State, the tax shall be levied from the dealer who was the last dealer not exempt from taxation under section 3 (3) who buys them in the State on the amount for which they were bought by him.

(3) Sales by licensed dealers of hides or skins which have been tanned within the State shall be exempt from taxation provided that the hides or skins have been tanned in a tannery which has paid the tax leviable under the Act. If such hides or skins have been tanned in a tannery which is exempt from taxation under section 3 (3), the sale of such hides or skins shall be liable to taxation as under the next sub-rule below dealing with hides or skins tanned outside the State.

(4) Sales by licensed dealers in hides or skins which have been tanned outside the State shall be exempt from taxation except at the stage of sale by the dealer who is the first dealer not exempt from taxation under section 3,

(3) who sells them within the State. The tax shall be levied from such dealer on the amount for which he sells such hides or skins.

(5) Sale of hides or skins by dealers other than licensed dealers in hides or skins shall, subject to the provisions of section 3, be liable to taxation on each occasion of sale."

Form A-5 for the return of turnover in the case of dealers in hides or skins is as follows :—

"To

The Assessing Authority.

Sir,

I/We furnish below a statement showing my/our transactions for the month of.....

"Name (s) and postal address (es) of dealer (s)............

Place or places of business..........

STATEMENT.

(*a*) For dealers in untanned hides or skins—

Amount for which goods have been sold to tanneries.	Amount for which goods have been sold to other dealers in the State.	Amount for which goods have been sold on export outside the State.	Amount for which goods falling under (column (3) were purchased by the dealer(s).
(1)	(2)	(3)	(4)

(*b*) is for dealers in tanned hides or skins, with which we are not concerned.

We are concerned in this case with untanned hides or skins which are ultimately exported outside the State. So, the provision which directly governs such a case is rule 16 (2) (*ii*) of the Turnover and Assessment Rules. By the said provision, the tax shall be levied from the dealer who was the last dealer not exempt from taxation under section 3 (3) who buys them in the State on the amount for which they were bought by him. It is common ground that the assessees in the case before us are not dealers exempt from taxation under section 3 (3). The tax, therefore, has been levied on them as dealers who were the last dealers who bought untanned hides or skins in the State on the amount for which they were bought by them. The said amounts were included in their total turnovers. The assessees claim that the tax so levied is in contravention of Article 286 (1) (*b*) of the Constitution, which says :—

"No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

"(*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India."

The learned Judges in the *State of Madras* v. *Rallis* (*India*) *Ltd.*,[1] held that the amount of purchase price which, according to rule 16 (2) (*ii*) should be included in the total turnover is exempt from tax, because of Article 286 (1) (*b*) of the Constitution. The reasoning of the learned Judges was this : In the case of untanned hides and skins sold by a licensed dealer for export outside the State, the stage of the event which attracts the tax is—when the goods are sold for export outside the State, though the turnover is to be calculated on the amount for which the goods were purchased by him. The taxable event being the sale for export outside the State, the assessee could be taxed only when the goods were sold for export outside the State. It cannot be disputed that if the transaction which is to be subjected to tax were the export sale by the licensed dealer, such sale would be exempt from taxation under Article 286 of the Constitution, as the sale was for export outside the State. The further reasoning may be stated in the words of Satyanarayana Rao, J., who delivered the judgment of the Bench :—

> " It is not disputed that, if the transaction, which is to be subjected to tax, is the sale by the licensed dealer, as the sale was for export outside the State, it is exempt from taxation under the Constitution. But what is contended on behalf of the Government is that the taxable event is not the sale for export outside the State, but the purchase by the licensed dealer with a view to sell them for export outside the State : as the decision in *State of Travancore-Cochin* v. *S. V. C. Factory*[2] ; held that such a purchase was not exempt under Article 286 the assessee could not claim the exemption. If the correct interpretation of the rules is, as contended by the Government Pleader, that the stage at which, or the transaction which, attracts the tax is not the sale by the licensed dealer for export outside the State but the purchase by him with a view to sell it for export outside the State, the stand taken by the Government Pleader will be tenable. But, in our opinion,, the language of the rule does not admit of any serious doubt, as it is clear and establishes that it is the sale by the licensed dealer for export outside the State that attracts the tax and not the purchase by the licensed dealer with a view to export the goods outside the State . . . . In view, therefore, of the clear language of the rules, the only inference possible is that it is the sale for export outside the State that attracts the tax and not the purchase by the licensed dealer with a view to export outside the State."

The fact that the turnover was computed on the amount for which such goods were bought by the dealer was no ground for shifting the stage at which the tax is to be levied from one transaction to the other.

The learned Advocate-General contended that the learned Judges in the *State of Madras* v. *Rallis* (*India*) *Ltd.*, *Madras*[1], were in error in holding that it is the sale by the licensed dealer for export outside the State that attracts the tax and not the purchase by the licensed dealer with a view to export the goods outside the State, because they overlooked the scheme of the Turnover and Assessment Rules, according to which in the case of untanned bides and skins exported outside the State by a licensed dealer, the dealer is taxed as the purchaser and not as the seller [*Vide* rule 4 (2) (*d*)]. The same provision is also found in rule 16 (2) (*ii*) which expressly states that the tax is levied on the last dealer (not exempt from taxation) as buyer. He relied upon the ruling of a Bench of this Court, to which I was a party, in *Govindarajulu Naidu & Co.*, v. *State of Madras*[3], which was a case of untanned hides and skins exported outside the State. That decision has been upheld by the Supreme Court in *Govindarajulu Naidu & Co.*, v. *State of Madras*[4]. Reference was also made by him to the decision in *Syed Mohamed & Co.*, v. *State of Madras*[5], which was heard, and disposed of by the same Bench, and which has since been affirmed by the Supreme Court in *Syed Mohammad & Co.* v. *State of Andhra*[6].

Dr. John, for some of the assessees maintained the correctness of the decision in the *State of Madras* v. *Rallis* (*India*) *Ltd.*, *Madras*[1]. His argument was that a distinction should be kept in mind between the person to pay the tax, the amount on which the tax is leviable, and the stage or point or occasion when the tax is imposed, and what is important for the purpose of the present discussion, was the stage or point or occasion, and not the amount. He also stressed on the circumstances

1. (1954) 2 M.L.J. 312.
2. (1953) S.C.J. 471 : (1953) 2 M.L.J. 123 (S.C.).
3. (1952) 2 M.L.J. 614.
4. Civil Appeal No. 186 of 1953.
5. (1952) 2 M.L.J. 598.
6. (1954) S.C.J. 390 : (1951) 1 M.L.J. 619 (S.C.).

that the person who exported the goods was also the purchaser of the goods. He cited to us observations from the judgments in the *First and Second Travancore Cases.*[1]

The argument of Mr. K. V. Venkatasubramania Ayyar, for other assessees, was far more elaborate and comprehensive. His contentions were as follows:

The main question for decision is, is the transaction which is included for the purpose of arriving at the turnover, a transaction *in the course* of export? This question should be decided not only with reference to the situation when the transaction takes place, but also with reference to the situation in which it is viewed in the taxing enactment. Where a transaction is an export sale *in the strictest sense, that is to say, a sale* " consumated by the process of exportation," the bar under Article 286 clearly arises. Sales or purchases completed before the commencement of the export journey, but factually integrated with the export process, will also fall under Article 286 (1) (*b*) as being transactions in the course of export. Even where the sale or purchase is unrelated to export, when it takes place but is made taxable by the goods being subsequently exported, the constitutional prohibition is attracted by what may be called statutory retrospective integration, *i.e.*, integration effected by the provision of the Sales Tax Act and the rules thereunder. Even if the expression " in the course of" is understood to involve a time factor and exclude transactions dissociated from export when they took place, the purchases by the exporter himself would be covered by that expression, because the taxability of the purchase is dependent on the subsequent export, and any distinction between the exporter as purchaser and the exporter as seller must make the constitutional exemption illusory. Of course, if the prior purchase were independently taxable even without reference to the export, exemption cannot be claimed on the strength of an export which took place later. In addition to these main contentions Mr. Venkatasubramania Ayyar also raised another contention that the imposition of sales tax on licensed dealers under rule 16 (2) (*ii*) would be in contravention of Article 14 of the Constitution, inasmuch as in respect of untanned hides and skins exported, a licensed dealer will be liable to tax, whereas an unlicensed dealer would escape from it by reason of Article 286.

Mr. Venkatasubramania Ayyar relied on certain decisions of the Supreme Court of the United States in support of his contention. They may be dealt with before the decisions of this Court and the Supreme Court bearing on the question. The earliest case is *Coe* v. *Errol*[2]. That case was not concerned with anything like a sales tax. The question was whether certain timber logs and lumber were subject to taxation in the State of New Hampshire on the ground that they were property within the State on the first day of April. They belonged to residents of the States of Maine and Massachusetts and had been cut in forests in New Hampshire and were prepared for exportation to the State of Maine. The question as stated by Bradley, J., who delivered the judgment of the Court was whether the products of a State, namely, timber cut in the forests, were liable to be taxed like other property within the State, although intended for exportation to another State and partially prepared for that purpose, by being deposited at a place of shipment. The tax was impugned on the ground that it was in violation of Article I, section 10, paragraph 2, of the Constitution, which runs thus :

" No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The answer was that they could be taxed like any other property within the State. The learned Judge arrived at the true rule to be adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. He stated the rule in the following terms :

" Such goods do not cease to be part of the general mass of property in the State, subject as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State or have been started upon such transportation in a continuous route or journey."

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1. (1952) S.C.J. 527 : (1953) 1 M.L.J 1 and (1953) S.C.J. 471 : (1953) 2 M.L.J. 123 (S.C.).

2. 29 Law. Ed. 715.

The learned Judge proceeded to give the reason in support of this rule thus :

" Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing."

On the facts, he found that the logs had not been shipped and had not started on their final voyage to the State of Maine. They were therefore taxable in New Hampshire. The decision itself, therefore, has no bearing whatever on the question which falls for decision in the cases before us. But Mr. Venkatasubramania Ayyar relied upon the following observation made by Bradley, J., in the judgment :

" Of course they cannot be taxed *as* exports ; that is to say, that cannot be taxed by reason or because of their exportation or intended exportation ; for that would amount to laying a duty on exports, and would be a plain infraction of the Constitution, which prohibits any State, without the consent of the Congress, from laying any imports or duties on imports or exports ;"

The decision in *Richfield Oil Corporation* v. *State Board of Equalisation*[1], was strongly relied. on. In that case, the levy of a State sales tax in respect of a sale to a purchaser in a foreign country, although the actual delivery was made in the State, was held to be obnoxious to the constitutional prohibition contained in the Import-Export clause of the Constitution. The assessee was engaged in producing and selling oil in California. He entered into a contract with the New Zealand Government for the sale of oil. The delivery was made to the order of Naval Secretary, Naval Office, Wellington, into New Zealand Naval tank steamer "Nucula" at Los Angeles, California. The Corporation carried the oil by pipeline from its refinery in California to storage tanks at the harbour, where "Nucula" appeared to receive the oil. When the ship was ready to receive the oil, the assessee pumped it from the storage tank into the vessel. The shipping documents designated the assessee as the shipper and the consignee as the Naval Officer in Auckland. It was assessed to a retail sales tax measured by the gross receipts from the transaction. The question was whether the levy of the tax violated the provisions of Article 1, section 10, clause 2 of the Constitution, that is, the Import-Export clause. That depended upon whether at the time the tax accrued, the oil was an export. It was held that the tax was unconsitutional as it was imposed upon an export. The *ratio decidendi* is to be found in the following passage in the judgment :—

" The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad. It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use ".

Several decisions of the Supreme Court on the said clause were reviewed, including the decision in *Coe* v. *Errol*[2].

In my opinion, these and similar decisions in America do not afford us real assistance in construing the provisions of the Madras General Sales Tax Act and Article 286 (1) (*b*) of the Constitution. The tax impugned in each one of the American decisions is, or is tantamount to, a tax on commodities, whereas the sales tax in Madras is a tax on the turnover, which is determined by the amount involved in the individual transactions of sale. The question in America always is, whether a particular tax is a tax on imports or exports, directly or indirectly. The constitutional prohibition is of imports or exports. But in Article 286 the prohibition is in respect of transactions of sale or purchase in the course of import or export. Whereas in America it becomes very material to determine whether at a particular point of time an article has or has not entered into the stream of export, in Madras it becomes unnecessary to embark on such an enquiry. The following observations of the learned Chief Justice of India in *The State of Travancore-Cochin* v. *The Bombay Company, Ltd., Alleppey*[3], indicate how little the American decisions help us in this matter.

1. 91 Law Ed. 80.
2. 29 Law Ed. 715.
3. (1953) 1 M.L.J. 1 at 5.

"Our attention was called, in the course of the debate, to various American decisions which hold that the power 'to regulate' inter-State commerce vested exclusively in the Congress by Article 1, section 8 (3) of the American Constitution (the Commerce Clause) excludes by implication the States' power of taxation only when the goods enter 'the export stream', and until then such goods form part of 'the general mass of property in the State' subject, as such to its jurisdiction to tax, and that this principle was also applicable to cases arising under Article 1, section 9 (5) and section 10 (2) (the import-export clause), see e.g., *Empress Siderurgia* v. *Merced, Co.*[1]. These clauses are widely different in language, scope and purpose, and a varying body of doctrines and tests have grown around them interpreting, extending or restricting, from time to time, their operation and application in the context of the expanding American commerce and industry, and we are of opinion that not much help can be derived from them in the solution of the problems arising under Article 286 of the Indian Constitution".

I am, therefore, unable to agree with Mr. Venkatasubramania Ayyar that any of the propositions advanced by him are directly supported by any of the American decisions.

The decision of our Supreme Court, however, have a more material bearing on the question now in issue. Though the two decisions of our Court referred to at the Bar, in *Govindarajulu Naidu & Co* v. *State of Madras*[2] and *Syed Mohamed & Co.* v. *State of Madras*[3], are earlier than the Supreme Court decisions it will be useful to refer to the latter first. The earliest of the Supreme Court cases is that of *State of Travancore-Cochin* v. *Bombay Company, Ltd., Alleppey*[4]. What was actually decided in that case was that sales and purchases which themselves occasioned the export or import of the goods out of or into the territory of India fall within Article 286 (1) (*b*) of the Constitution. Even though property in the goods may pass to a foreign buyer and the sale in that sense may be said to have been completed within the State before the goods commenced their outward journey, such a sale must nevertheless be regarded as having taken place in the course of the export and would be exempted under Article 286 (1) (*b*). There were several appeals before the Court relating to the imposition of tax on transactions in various commodities. The appeals relating to the tax imposed on transactions in cashew-nuts could not be satisfactorily disposed of without further material facts on record, and they were therefore remitted to the High Court for findings on certain points. Three appeals, however, were heared and finally disposed of, relating to coir products, lemon grass oil, and tea. The learned Judges of the Travancore-Cochin High Court had construed the words "in the course of" in Article 286 (1) (*b*) very widely. According to them, the series of transactions which necessarily precede export or import of goods would come within the purview of the clause. On this interpretation, local purchases made for the purpose of export were held by the learned Judges to be integral parts of the process of exporting. The learned Chief Justice of India set out four different views which might be taken as to the scope and meaning of Article 286 (1) (*b*), which included the view taken by the Judges of the High Court. But it was not necessary to pronounce finally as to which view was correct, because even taking the narrowest of the views, it was clear that the sales in question which occasioned the export fell within the scope of the exemption under Article 286 (1) (*b*).

The appeals relating to transactions in cashew-nuts which had been remanded came up for final disposal before the Supreme Court with the findings of the High Court, and their final decision is reported in *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew-nut Factory, Quilon*[5]. The only question debated before them was whether in addition to the export sale and import purchase which had been held in their previous decision to be covered by the exemption under Article 286 (1) (*b*), two other categories of sale or purchase would also fall within the scope of that exemption, of which we are concerned with one, namely:

"The last purchase of goods made by the exporter for the purpose of exporting them to implement orders already received from a foreign buyer or expected to be received subsequently in the course of

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1. 337 U.S. 154.
2. (1952) 2 M.L.J. 614.
3. (1952) 2 M.L.J. 598.
4. (1952) S.C.J. 527 : (1953) 1 M.L.J. 1 (S.C.).
5. (1953) S.C.J. 471 : (1953) 2 M.L.J. 123 (S.C.).

business, and the first sale by the importer to fulfil orders pursuant to which the goods were imported or orders expected to be received after the import."

The Court held, by a majority, that this category of sale was not covered by the exemption. As in Madras, in Travancore-Cochin also, the gross turnover of a dealer for the purpose of assessment of sales tax is the amount for which the goods are bought by him in the case of cashew-nut and its kernel. The learned Chief Justice of India summed up the conclusions arrived at by the majority of the Court as follows :

"(1) Sales by export and purchases by import fall within the exemption under Article 286 (1) (*b*). This was held in the previous decision.

(2) Purchases in the State by the exporter for the purpose of export as well as sales in the State by the importer after the goods have crossed the customs frontier are not within the exemption.

(3) Sales in the State by the exporter or importer by transfer of shipping documents while the goods are beyond the customs frontier are within the exemption, assuming that the State-power of taxation extends to such transactions."

It is true that there is no rule in Travancore-Cochin corresponding to rule 16 (2) (*ii*) in Madras. But the decision is of great value because of the interpretation of the expression "in the course of" occurring in Article 286 (1) (*b*). Patanjali Sastri, C.J., observed :

"What is exempted under the clause is the sale or purchase of goods taking place in the course of the import of the goods into or export of the goods out of the territory of India. It is obvious that the words 'import into' and 'export out of' in this context do not mean the article or commodity imported or exported.

The word 'course' etymologically denotes movement from one point to another, and the expression 'in the course of' not only implies a period of time during which the movement is in progress but postulates also a connected relation. . . . .

A sale in the course of export out of the country should similarly be understood in the context of clause (1) (*b*) as meaning a sale taking place not only *during* the activities directed to the end of exportation of the goods out of the country but also as *part* of or connected with such activities. The time factor alone is not determinative. The previous decision proceeded on this view and emphasised the integral relation between the two where the contract of sale itself occasioned the export as the ground for holding that such a sale was one taking place in the course of export. It is, however, contended that on this principle of connected or integrated activities a purchase for the purpose of export must be regarded as covered by the exemption under clause (1) (*b*). We are unable to agree."

The learned Chief Justice also explained the phrase "integrated activities", which was also used in the argument before us. It is only when a sale which occasions the export cannot be dissociated from the export without which it cannot be effectuated and the sale and the resultant export form parts of a single transaction that the two activities could be said to be integrated. In his opinion, a purchase for the purpose of export could not be regarded as an act done in the course of the export of the goods. In view of the distinct character and quality of the two transactions, it was not correct to speak of a purchase for export as an activity so integrated with the exportation that the former could be regarded as done "in the course of" the latter. Das, J., took a contrary view. In his view, a purchase made by an exporter to implement his agreement for sale with the foreign buyer should be regarded as having taken place in the course of export.

I may now refer to the decision of this Court, to which I was a party, in *Govindarajulu Naidu & Co.* v. *State of Madras*[1]. At the outset, it may be mentioned that in essence the facts of that case are identical with the facts in the present cases. Mr. Venkatasubramania Ayyar mentioned that the facts as stated by Venkatarama Ayyar, J., were not quite accurate in some particulars, but the value of the decision is not affected by the mistake, if any. The facts, as stated by Venkatarama Ayyar, J., are certainly similar to the facts in the cases before us. The assessees there were taxed as the last purchaser of untanned hides and skins, who also exported the goods, and the tax was imposed on the price which they paid to their sellers. Exemp-

1. (1952) 2 M.L.J. 614.

tion was claimed by them in respect of such purchases, as being made in the course of export. It was held that the exemption could not be claimed under Article 286 (1) (*b*). After an exhaustive discussion of American case-law, Venkatarama Ayyar, J., held, and I agreed with him, that the prohibition in Article 286 (1) (*b*) is limited to the period covered by the actual exportation or importation of the goods and that the power of the State to impose tax at any stage before or after is not affected. The decision of this Court was confirmed by the Supreme Court in Civil Appeal 186 of 1953. One of the points raised in the appeal, namely, that "the purchase of untanned hides and skins made by the appellants were with a view to their ultimate export and were therefore exempt from taxation on the ground of their being purchased in the course of export" was considered to be fully covered by the decision of the Supreme Court in the *Second Travancore case*[1]. So we have a direct decision negativing the claim to exemption based on Article 286 (1) (*b*) in respect of transactions taxed in accordance with rule 16 (2) (*ii*) of the Madras General Sales Tax (Turnover and Assessment) Rules. The tax there, as in the cases before us, was levied from the dealer who was the last dealer who bought the untanned hides and skins in the State on the amount for which they were bought by him.

I must confess that but for the authoritive pronouncement of the Supreme Court in the *Second Travancore case*[1], I would have felt considerable difficulty in the construction of Article 286 (1) (*b*) in its application to sales or purchases immediately preceding the actual export, which are related to the export factually. For instance, when a dealer in the State, to perform a contract of sale, entered into with a foreign buyer, purchases the goods which he subsequently exports, it may be held that the purchase was in the course of the export. Indeed, one of the learned Judges of the Supreme Court, Das, J., took that view, though the majority took a contrary view. But the learned Chief Justice of India, who delivered the judgment on behalf of the majority, took up this very question and held that such a purchase would not be covered by the exemption. This is conclusive on this question.

It will be seen that the decision in the *Second Travancore case*[1], and the Madras case referred to above furnish a complete answer to one part of the argument of Mr. Venkatasubramania Ayyar based on a factual integration between the last purchase and the succeeding export sale. But learned counsel contended that the other part of his argument remains and invites our decision, as it was not dealt with either by this Court before or by the Supreme Court in any of its judgments. The contention was developed thus : The taxability of the last purchase transaction is dependent on the subsequent export. The export is a condition precedent to the liability to the tax. The export is the taxable event, because the levy is only at the stage of the export and by reason of the goods being exported. The fact that the amount included in the turnover is the price paid by the purchaser in the transaction prior to the export does not affect the legal position. The decision of the Supreme Court in the *Second Travancore case*[1], can be distinguished on the ground that there the taxability was not dependent on the subsequent export. The purchase was taxable by itself and not because the goods which formed the subject-matter of the purchase were subsequently exported. But rule 16 (2) (*ii*) of the Madras Rules expressly makes taxation dependent on export.

The argument appears plausible. But after careful consideration of the relevant sections of the Madras Act and the Rules made thereunder, I am of opinion that the contention must be rejected. The correct position appears to me to be this : Under section 5 (*vi*) of the Act, the sales of hides and skins whether tanned or untanned, are liable to tax only at such single point in the series of sales by successive dealers as may be prescribed. Rule 16 of the Turnover and Assessment Rules prescribes the point. Evidently, for reasons of practical convenience, the

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1. (1953) S.C.J. 471 : (1953) 2 M.L.J. 123 (S.C.).

rule-making authority desired to fix the single point when the series of sales had come to a termination. There were two ways in which such series of sales of untanned hides and skins could come to an end. One was by the untanned hides and skins going into a tannery that is to say, when they will cease to be untanned hides and skins any longer. The other way was when the untanned hides and skins were exported outside the State. Thereafter, there could be no further transaction of sale in the series. In rule 16 (2) (*i*) a provision is made for the sale of untanned hides and skins to a tanner, and in rule 16 (2) (*ii*), for such hides and skins which are exported. Then, the rule proceeds to fix the liability to tax. In the case of untanned hides or skins sold to a tannery, the tax is to be levied from the tanner on the amount for which the hides and skins were bought by him. In the case of hides and skins exported, the tax is levied from the dealer who was the last dealer who bought them in the State on the amount for which they were bought by him. If such last dealer was exempt from taxation under section 3 (3) of the Act, the dealer before him, who was not so exempt, was liable on the amount for which they were bought by him. The tax is not levied from the last purchaser because the goods were subsequently exported, any more than the tax is levied from the tanner because he bought the hides and skins for tanning. For the purpose of fixing the single point in the series of sales, the two events, namely, the sale to a tanner and export outside the State, were taken as the termini of the series of sales. If this be the correct position, I fail to see how the transaction of sale preceding the export sale can be said to be a sale in the course of export. Under rule 4 (2) of the Turnover and Assessment Rules, in the case of untanned hides and skins exported outside the State by a licensed dealer in hides and skins, the gross turnover of the dealer is the amount for which the goods are bought by the dealer. It will be seen that in the case of such hides and skins, the last purchaser is made liable just as in the case of untanned hides and skins bought by a licensed tanner in the State the last purchaser, *i.e.*, the tanner is likewise made liable. Petitioners' counsel relied on the expression "at the stage" in rule 16 (2) of the Turnover and Assessment Rules. That rule runs thus :—

"No tax shall be levied on the sale of untanned hides or skins by a licensed dealer in hides or skins except at the stage at which such hides or skins are sold to a tanner in the State or are sold for export outside the State."

But I do not see how that expression helps the petitioners' contention. It is only when that stage is reached in the series of sales by successive dealers that the tax is levied. But the substantial fact which cannot be overlooked is that it is not the transaction of the export sale on which the tax is levied. The only question, therefore, is whether the prior transaction of sale or purchase is a transaction of sale or purchase in the course of export. It certainly cannot be, according to the interpretation of the phrase "in the course of" by the learned Chief Justice in the *Second Travancore case*[1], to which I have referred above.

As pointed out by the learned Chief Justice of India in another case, *State of Bombay* v. *United Motors (India) Ltd.*[2], the sales tax is imposed, in ultimate analysis, on receipts from individual sales or purchases of goods effected during the accounting period, and not on the goods which are the subject matter of such sales or purchases at a given point of time. Otherwise it may be necessary to determine whether at the material point of time the goods could be said to fall within the category of exports or imports. Even assuming that the Madras sales-tax can be deemed to be practically a tax on the commodities, I still fail to see how the petitioners are entitled to succeed. Can it be said that the commodities have been taxed as exports? I think not. The amount which has to be included in the turnover does, in my opinion, have a material bearing on the question. That will certainly indicate the transaction which attracts the liability to tax. It is reasonable to accept an argument which leads to the position that while one transaction is the subject matter of the tax, the amount of tax is the amount in respect of another transaction.

1. (1953) 2 M.L.J. 123 : (1953) S.C.J. 471 (S.C.).
2. (1953) 1 M.L.J. 743 at 757 : (1953) S.C.J. 373 (S.C.).

During the course of argument, I asked Mr. Venkatasubramania Ayyar whether logically his contention would not lead to the conclusion that even if the rule had been that in the case of exported untanned hides and skins the first of the series of sales which ended with the export is the taxable transaction, even such first transaction would get the benefit of the exemption under Article 286 (1) (*b*), and learned counsel was compelled to agree, though he was not quite happy about the result.

Mr. Venkatasubramania Ayyar next contended that in any event rule 16 (2) (*ii*) makes the exporter liable though in the capacity of a buyer. Therefore, the tax must be deemed to be a tax on the transaction in the course of the export. This is not so always, as pointed out by the learned Advocate-General because if the exporter is a dealer exempt under section 3 (3), then he would not be liable but his predecessor would be, who certainly would not be the exporter. With respect to the learned Judges who decided *State of Madras* v. *Rallis (India) Ltd. Madras*[1], I cannot agree with their construction of rule 16 (2) (*ii*). Even if it be correct that it is the sale for export outside the State that attracts the tax and not the purchase by the licensed dealer, it does not follow that the last purchase which after all is the actual transaction which is taken into account for the purpose of determining the turnover is a purchase in the course of export. The learned Judges do not say how it follows. Indeed, they do not discuss anywhere the meaning to be attached to the expression "in the course of". Nor do they refer to the decision of this Court in *Govindarajulu Naidu & Co.* v. *State of Madras*[2], which also arose on similar facts. In my opinion *State of Madras* v. *Rallis (India) Ltd., Madras*[1], was wrongly decided.

There only remains the contention of Mr. Venkatasubramania Ayyar that there is a contravention of Article 14 of the Constitution because the unlicensed dealer who exports untanned hides and skins cannot be taxed on his export sale because of Article 286 (1) (*b*) but the licensed dealer who exports is taxed on his prior purchse. I fail to see how there is any discrimination here. As was observed in *Syed Mohamed & Co.* v. *State of Madras*[3], a classification of merchants into those who take out licences and those who do not is one resting on a rational basis and must be upheld. The scheme of assessment under the Madras General Sales Tax Act certainly makes a difference between a licensed dealer and an unlicensed dealer. For instance, a sale of untanned hides and skins by an unlicensed dealer is included in the seller's turnover under rule 4 (1), whereas a sale by a licensed dealer of such goods is included in the buyer's turnover. So far as the final export is concerned, neither the licensed dealer nor the unlicensed dealer can be taxed. Nor are they taxable under the rules, read with Article 286. It is not correct to say that while the unlicensed dealer escapes taxation in view of Article 286, the licensed dealer has to pay the tax. He is not liable to pay any tax in respect of the export sale. It is the prior purchase that is taxable. Different results would follow in different circumstances namely where an unlicensed dealer sells to a licensed dealer, when an unlicensed dealer sells to an unlicensed dealer, and when a licensed dealer sells to a licensed dealer. It may be that in one or other of these contingencies there might be difficulty in assessment. This is inevitable, but that fact alone would not justify us in holding that there has been unwarranted discrimination. Ultimately, the burden of the sales tax falls on the consumer, as the dealer paying the tax, whether he be licensed or unlicensed, generally passes on the tax. We do not see any substance in this contention.

The cases will be posted in the usual course before the Bench dealing with Tax Revision Cases.

Balakrishna Ayyar, J.—I agree.

Rajagopala Ayyangar, J.—I entirely agree with the judgment which has just now been delivered by my Lord the Chief Justice and the reasons given by him for

1. (1954) 2 M.L.J. 312.
2. (1952) 2 M.L.J. 614.
3. (1952) 2 M.L.J. 598 at 614.

holding that the decision reported in *State of Madras* v. *Rallis* (*India*) *Ltd. Madras*[1], is incorrect and has to be overruled. I would have been content to have left the matter there but I feel that out of regard to the learned Judges who decided the case above mentioned I must add my reasons for the conclusions of the Full Bench.

As my Lord the Chief Justice has in his judgment set out the relevant provisions of the Madras General Sales-tax Act as well as the Rules made thereunder, it is unnecessary for me to repeat them here. The sole question for our consideration is whether the tax on the purchase of untanned hides and skins by a licensed dealer in hides and skins levied by reason of rules 4 (2) (*d*) and 16 (2) of the Turnover and Assessment Rules is invalid by reason of contravention of Article 286 (1) of the Constitution.

Before dealing with the decisions of the Supreme Court interpreting Article 286 it might be useful to refer to the language of the relevant portion of Article 286 and to a question which has been mooted in relation to it. Article 286 runs :—

"286 (1) : No law of a State shall impose, or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place.

(*a*) outside the State ; or

(*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India ;".

The point that has been formulated is this : Are the expressions sale or purchase to be read distributively so as to apply both to imports as well as to exports or is the Article to be read as prohibiting the imposition by a State of a tax on the sale of goods in the course of export of goods out of the territory of India and a tax on the purchase of such goods when it takes place in the course of import of goods into the country. Mr. Venkatasubramania Ayyar learned counsel for the petitioners in some of these cases contended that taxes on both sales as well as purchases were exempt if made either in the course of export or import and I am inclined to agree that this is the proper interpretation of the Article.

I shall now endeavour to set out what has been finally decided by the Supreme Court in the two Travancore cases which have dealt with the proper construction of Article 286 (1) (*b*) and the transactions which are protected from taxation under this Article. The first Travancore case, that is, *State of Travancore-Cochin* v. *Bombay Co., Ltd. Alleppey*[2], was concerned with a tax on sales anterior to export and the sale which was there in controversy was one which occasioned the export. Such a sale was held to be a sale in the course of export of goods out of the territory of India. The learned Chief justice thus stated the ratio of the decision :

"We are clearly of opinion that the sales here in question, which occasioned the export in each case, fall within the scope of the exemption under Article 286 (1) (*b*). Such sales must of necessity be put through by transporting the goods by rail or ship or both out of the territory of India, that is to say, by employing the machinery of export. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction. Of these two integrated activities, which together constitute an export sale, whichever first occurs can well be regarded as taking place in the course of the other ".

The second Travancore case, that is, *State of Travancore-Cochin* v. *S.V.C. Factory, Quilon*[3] considered the entire Article afresh and the conclusions of the majority of the Judges were summed up in these terms :

"(1) Sales by export and purchases by import fall within the exemption under Article 286 (1) (*b*). This was held in the previous decision. (2) Purchases in the State by the exporter for purpose of export as well as sales in the State by the importer after the goods have crossed the customs frontier are not within the exemption. (3) Sales in the State by the exporter or importer by transfer of shipping documents while the goods are beyond the customs frontier are within the exemption, assuming that the State-power of taxation extends to such transactions ".

We are here concerned with the second of the conclusions set out above. In the earlier portion of the Judgment the matter was dealt with thus :—

1. (1954) 2 M.L.J. 312.
2. (1953) 1 M.L.J. 1 : (1952) S.C.J. 527.
3. (1953) 2 M.L.J. 123 : (1953) S.C.J. 471 (S.C.).

"The only question debated before us was whether in addition to the export sale and import-purchase, which were held in the previous decision to be covered by the exemption under clause (1) (*b*), the following two categories of sale or purchase would also fall within the scope of that exemption.:

(1) The last purchase of goods made by the exporter for the purpose of exporting them to implement orders already received from a foreign buyer or expected to be received subsequently in the course of business, and the first sale by the importer to fulfil orders pursuant to which the goods were imported or orders expected to be received after the import.

(2) Sales or purchases of goods effected within the State by transfer of shipping documents while the goods are in the course of transit. What is relevant to the present context is category 1 and as regards this the learned Judges said :

"As regards the first mentioned category, we are of opinion that the transactions are not within the protection of clause (1) (*b*) "."

The resultant position is that a purchase for the purpose of export even though such purchase is effected to implement orders for the export of these goods is not "a sale or purchase in the course of export" within the meaning of the exemption in Article 286. Under the Travancore Sales-tax Act, the sales tax was levied in the case of cashew upon the purchaser and the effect of this decision therefore is that a tax on the purchase made by the purchaser who exports the goods is not within the constitutional exemption.

In view of this Mr. Venkatasubramania Ayyar frankly conceded that if the tax on hides and skins in the present case were levied upon the petitioners merely as purchasers they would clearly be not exempt. But his contention was that the petitioners were taxed under the rules not because of their purchase of these goods *simpliciter* but on account of the fact that the goods which they purchased were in fact exported by them.

It will be seen that this is not the ground upon which the learned Judges in *State of Madras* v. *Rallis* (*India*) *Ltd.*[1], have held the purchase tax to be invalid. The basis of that judgment is that in truth and in effect it is the sale by the licensed dealer for export that is taxed and not his purchase, though the turnover for computing the quantum of the tax is fixed on the basis of his purchase price. Dealing with the effect of the rules, Satyanarayana Rao, J. says :

". . . . the only inference possible is that it is the sale for export outside the State that attracts the tax and not the purchase by the licensed dealer with a view to export outside the State. Though the transaction which attracts the tax is the sale, the turnover, however has to be computed on the amount for which the goods are bought by the dealer and this is made clear by rule 4 and also rule 16 (2) (*ii*)."

With the greatest respect to the learned Judges, I cannot agree with this interpretation of the Rules. The taxable event is really the purchase and the quantum of the turnover reflects this. It is no doubt true that unless the goods were exported, the tax liability would not fasten but that has no effect upon the critical event which is the basis of the tax. According to the Madras General Sales Tax Act and the Rules, raw hides and skins are a commodity in respect of which the rule as to single point taxation applies and the tax is levied upon the last taxable purchaser who deals with the commodity in its raw state. It is by reason of this principle that export figures as a fact to determine the last buyer. In other words, the tax is really one on the transaction of purchase anterior to the export, the factum of the export figuring merely as marking the final stage of a series of purchases by one licensed dealer from another, on the occurrence of which the taxable event, namely, the last purchase is determined. In fact, Mr. Venkatasubramania Ayyar learned counsel for the petitioners appreciating this aspect of the matter did not seek to support the judgment in *State of Madras* v. *Rallis* (*India*) *Ltd.*, *Madras*[1], on its reasoning but put forward his case on quite a different ground. He conceded that on the decision of the *Second Travancore case*[2], the purchase of raw hides and skins for the purpose of export could not claim constitutional tax immunity and that if there was a multiple point taxation in respect of each purchase of the commodity, as in the cashew case before the Supreme Court, he could not succeed, as even the last purchase which preceded the actual export would not be a sale or purchase in the course of export.

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1. (1954) 2 M.L.J. 312. 2. (1953) 2 M.L.J 123 : (1953) S.C.J. 471 (S.C.).

The proposition of law however on which learned counsel based his arguments was that even where a sale or purchase is unrelated to export when it takes place but is made taxable by reason only of the goods being subsequently exported, the constitutional prohibition is attracted by the statutory non-factual and retrospective integration effected by the taxing enactment and it is on this theory that he contended that the tax levied upon the purchase of raw hides and skins under rule 16 (2) conceding it to be really one on the purchase of goods was really a tax on the purchase or sale of goods in the course of export within Article 286 (1) (*b*).

This argument was rested on passages in certain American decisions dealing with the scope of the Import-Export clause of the American Constitution.

Most of the American decisions are concerned with the validity of State as distinguished from Congressional taxation. The inhibition in the case of the States is of a twofold character, the first flowing from the commerce clause, Article 1 section 8 (3) :

"The Congress shall have power to regulate commerce with foreign nations and among the several States."

and this provision which vests in Congress an exclusive power of regulation over interstate and foreign commerce has been held to be a limitation on State power even in the absence of implementing legislation by Congress and to create of its own force an area of trade free from State interference.

The second is the Import-Export clause, Article 1 section 10(2) :

"No State shall without the consent of Congress lay any imposts or duties on imports or exports except what may be absolutely necessary to execute its inspection laws ; and net produce of all duties and imposts laid by any State on imports and exports shall be for the use of the treasury of the United States."

There is further a constitutional embargo laid upon Congress levying any duty on exports for Article 1 section 9 (5) provides .

"No tax or duty shall be laid on articles exported from any State."

In regard to the commerce clause, I understand the result of the decisions, to be that in imposing taxes for State purposes, a State is not exercising any power which the Constitution has conferred upon the Congress. It is only when the tax operates to regulate commerce between the States or with foreign nations to an extent which infringes the authority conferred upon Congress that the tax can be said to exceed constitutional limits., Vide *Mcgoldrick* v. *Berwind-White*[1]. At the same time it has been held that forms of State taxation whose tendency is to prohibit interstate or foreign commerce or place it at a disadvantage as compared to or in competition with intrastate commerce, any State tax which discriminates against such commerce are familiar examples of the exercise of State taxing power in an unconstitutional manner because of its obvious regulatory effect upon commerce between the States. The position is thus summed up by Stone, J. in *Mcgoldrick* v. *Berwind-White*[2].

"Certain types of tax may, if permitted at all so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already exacted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which interstate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce".

The ratio of the decision appears to be that a State tax which discriminates between goods circulating in the State and those exported outside is tantamount to an infringement of the exclusive power of Congress to regulate commerce under Article 1 (8).

1. 84 Law. Ed. 565.
2. 84 Law. Ed. 565 at 571.

Decisions of this type therefore furnish no useful guide for the determination of the proper rule of construction of the Indian Constitution.

In my judgment the American decisions dealing with the Import-Export clause do not afford us any assistance either. The distinction between the scope of the prohibition enacted by the commerce clause and this has been clearly expressed by Douglas, J. in *Richfield Oil Corporation* v. *State Board of Equalization*[1]:

"The two constitutional provisions while related, are not coterminous. To be sure, a State tax has at times been held unconstitutional both under the Import-Export Clause and under the commerce Clause....But there are important differences between the two. The invalidity of the one derives from the prohibition of taxation on the import or export ; the validity of the other turns nowise on whether the article was or had ever been, an import or export....Moreover, the commerce clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. It is well established that the commerce clause is a limitation upon the power of the States, even in the absence of action by Congress....As we shall see, the question as to what is exportation is somewhat entwined with the question as to what is interstate commerce. But the two clauses, though complementary, serve different ends. And the limitations of one cannot be read into the other."

A contention that the tax there in question—which was one on the gross receipts of a retailer—was a tax on tangible property in the State and for the privilege of conducting a business of sale of goods was rejected on the basis that it is not the characterisation of the tax by the State that determined its nature but its operation and effect. It was while dealing with this argument to sustain the validity of the tax that the passage on which Mr. Venkatasubramania Ayyar relies

"Appellant concedes that the prohibition of the Import-Export Clause would be violated if the goods were taxed as exports or because of their exportation or if the process of exportation were itself taxed"

occurs. Similar passages in earlier decisions were also referred to by learned counsel and relied on.

For instance, Bradley J. speaking of taxes on exports said in *Coe* v. *Errol*[2] :

"Of course they cannot be taxed as exports that is to say they cannot be taxed by reason or because of their exportation or intended exportation for that would amount to laying a duty on exports and would be a plain infraction of the Constitution which prohibits any State without the consent of the Congress from laying any imposts or duties on imports or exports".

Similarly in *Brown* v. *Houston*[3], the same learned Judge said :

"A duty on exports must either be a duty levied on goods as a condition or by reason of their exportation or at least a direct tax or duty on goods which are intended for exportation".

Learned Counsel for the petitioners sought to derive from the passages authority for the position that if the factum of export enters in any manner into the process attracting the tax, the same was within the prohibition enacted by Article 286(1) (*b*) of the Constitution.

In my opinion these passages do not furnish any useful analogy for the interpretation of Article 286.

The American Courts have held that a tax which discriminates against exported goods is virtually a tax on exports. The passages above-mentioned stem from this concept of such a discriminatory tax being a prohibited impost. Under the scheme of the Indian Constitution and the distribution of legislative and taxation powers under it, there is no prohibition on Parliament to tax exports and the entire control over exports and imports as well as duties on such exports and imports are excluded from the purview of the States. It is not the contention of Mr. Venkatasubramania Ayyar that a tax upon the purchase in the present case even if the act of exportation of the goods is an incident calling the levy into operation, is an export duty. If this were so the relevant article in the Constitution that such a tax could contravene is not Article 286 but Entries 41 and 83 of Schedule VII List I read with Article 246. Learned Counsel did not raise any argument upon this basis.

1. 91 Law. Ed. 80 at 88.
2. 116 U.S. 517 : 29 Law. Ed. 715.
3. 114 U.S. 622 : 29 Law. Ed. 257.

I am clearly of the opinion that the sales tax levied on the last taxable purchaser of hides and skins under the Madras Genral Sales Tax Act does not contravene Article 286(1) (*b*) of the Constitution and that the levy is valid. I agree with the order of my lord in these Tax Revision Cases.

R.M. ——— *Opinion expressed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction).

PRESENT:—MR. JUSTICE RAMASWAMI.

In the matter of the debts of B. V. Gam *alias* W. B. Vinayakam (deceased) and *in the matter of* the Indian Succession Act.

Srinu Bai .. *Petitioner**

Practice—Succession duty paid—Nature of—Applicant subsequently discovering that the duty paid was unnecessary—Refund—If could be ordered—Power of Court to order refund—Nature of.

The duty paid by an applicant for the issue of a succession certificate is only a court-fee paid for the services rendered by the Court in the matter of adjudication about the title of the applicant as heir. It is an indisputable proposition that the Court can in fit cases order refund of court-fee paid in excess, under section 151, Civil Procedure Code. But the fact that an applicant discovers after the issue of the succession certificate that he had included an item unnecessarily cannot warrant the exercise of the inherent powers. Court-fee cannot be refunded on the ground that a relief has become unnecessary on account of change of circumstances or that a relief was unnecessarily asked for.

Petition on the Original Side of the High Court, Madras, praying for refund of excess duty paid for obtaining a succession certificate on the ground that the same was paid because of a *bona fide* error.

A. K. Muthuswami Aiyar for the Petitioner.

The Court delivered the following judgment :—

This is a novel application for refund of Court-fee of Rs. 600.

The facts are : The petitioner applied for a succession certificate to collect certain debts due to her deceased husband including a sum of Rs. 20,000 due on a draft by Messrs. Prudential Co-operative Central and Urban Bank, Limited, Madras, and paid succession duty for all items including this item. On the necessary formalities prescribed having been complied with, this petition was posted for hearing and on no objection forthcoming, succession certificate was granted as prayed for. This was on 19th October, 1946. It is stated that five years thereafter, a succession certificate in regard to this item was applied for in the Court of the District and Sessions Judge, Secunderabad Division, *on an objection raised by the Prudential Co-operative Central and Urban Bank, limited, Secunderabad, that the succession certificate issued by the Madras High Court will not be operative in Secunderabad* being outside the jurisdiction of the Indian Union Court and therefore the succession certificate should be applied for in the Hyderabad State. On this, an application was made to the District and Sessions Court, Secunderabad Division, and a succession certificate was granted by that Court on 13th March, 1951. The petitioner has thereupon filed the present application in the High Court stating that the sum of Rs. 600 paid on this item in the Madras High Court, for obtaining the succession certificate, was paid due to a *bona fide* mistake and error and prays for a refund of the same.

There is no decision of this Court bearing on this point, apart from the decision cited before me, in regard to the indisputable proposition that this Court, in fit cases, can order refund under section 151, Civil Procedure Code : *See* for instance *Thammayya Naidu* v. *Venkataramanamma*[1], wherein it was held that, even in cases not covered by sections 13, 14 and 15 of the Court-Fees Act, this Court can, under section 151, Civil Procedure Code, order refund of Court-fee paid in excess. The catena of decisions of this Court collected by Krishnamurthi and Mathrubutham,

* Application No. 3594 of 1953 in O.P. No. 180 of 1946. 3rd February, 1954.

1. (1932) 62 M.L.J. 541 : I.L.R. 55 Mad. 641.

in their very useful publication, "Guide to the Law of Court-Fees in Madras" (Third Edition) at page 144 (paragraph) 3, have no application to the facts of this case and the only decision in point which has been cited before me is *Ahmed Ebrahim* v. *Bombay Government*[1]. I am unable, with respect, to follow this decision because the facts of that case were different from the facts of this case and under section 151, Civil Procedure Code, where it is a question of discretion to order refund, interference by way of exercising extraordinary powers under section 151, Civil Procedure Code, must be dependent upon the circumstances of each case; and secondly, beyond pointing out that the Court can order refund under section 151, Civil Procedure Code, in a case of this nature, there is neither discussion nor citation of previous authorities. I therefore prefer to dispose of this matter on first impressions.

On a careful review of the circumstances of the case, I have come to the conclusion that the refund asked for cannot be granted. Here are my reasons.

If the excess paid is treated as a kind of tax, though included in the Court Fees Act for the sake of convenience, the power to refund must rest with the revenue authorities. But such levy has been held to be Court-fee for the service rendered by the Court in the matter of adjudication about the title of the applicant as heir: See *In the matter of the Estate of C. Govindaswamy*[2]. In this very case, if there had been objections to the grant, the Court would have had to decide the controversy before the grant of the certificate. Court-fee is paid in ordinary cases even where the claim is not disputed and no portion is refunded where the defendant admits the claim and suffers a decree. The fact that the applicant had included an item unnecessarily cannot warrant the exercise of the inherent powers because it was clearly his duty to have made proper enquiries before putting in the application. Supposing the item in question had been the only item in the certificate and supposing the merits of the claim had also been decided, it cannot be seriously argued that simply because it had not been acted upon by the debtor, the party is entitled to the refund. If such were the position, the time spent by the Court and Office in the matter of the grant of certificate would not be covered by any fee. The practice in the matter of the grant of Letters of Administration with regard to the share of an undivided co-parcener may also be referred to for analogy. Court-fee is levied in such cases though the grant is unnecessary; see in the matter of *Desu Manavala Chetty*[3], *Annapuranamma* v. *Atchutharamayya*[4]. So also where Letters of Administration are applied for in respect of moneys standing in the name of the applicant's son but alleged to belong really to the applicant, duty is payable though the Letters are not strictly necessary: see *In the Goods of Tarunkumar Ghosh, deceased*[5]. Thus, the levy is made irrespective of the fact whether the grant is necessary or not. It cannot be said that the case falls within the rule laid down in *In re Chidambaram Chettiar*[6], because the mistake here is not in the payment of Court-fee in excess of legal requirements, but in the inclusion of an item of debt in the application by mistake. Where a relief in a suit becomes unnecessary on account of change of circumstances, refund of Court-fee paid on the said relief is not granted: see *Ramakrishnayya* v. *Seshamma*[7]. It has been held that, even where the legislature takes away by amendment of the law, the right to the relief claimed in the suit, the Court-fee cannot be refunded: see *Secretary of State* v. *Veerayya Vandayar*[8]. The decision of this Court in Civil Revision Petition No. 657 of 1949 that refund cannot be granted on the ground that a relief was unnecessarily asked for, is also useful by analogy. For these reasons, it would be a bad precedent if refund is granted in such cases.

But a certificate can be issued, if one is necessary, as to the exact circumstances under which the relief asked for originally, has turned out to be unnecessary, so that the petitioner may apply to the Government for a refund *ex gratia* as was done

1. I.L.R. (1943) Bom. 25: A.I.R. 1943 Bom. 50.
2. (1937) 2 M.L.J. 899.
3. (1908) 19 M.L.J. 591: I.L.R. 33 Mad. 93 (F.B.).
4. A.I.R. 1927 Mad. 1101.
5. (1934) I.L.R. 62 Cal. 114.
6. (1934) 67 M.L.J. 321: I.L.R. 57 Mad. 1028.
7. (1934) 68 M.L.J. 369.
8. (1939) 51 L.W. 105.

in In re *Nagarathnam*[1]. Such a certificate is unnecessary here as the facts of this case can be brought to the notice of the revenue authorities without such a certificate.

Therefore, looked at from any point of view, this application deserves to be and is hereby dismissed.

R.M. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

Guruviah Naidu and Company, *In re* .. *Petitioner**.

Madras General Sales Tax Act (*IX of* 1939), *section* 16-A—*Validity—Scope of.*

Section 16-A of the Madras General Sales Tax Act is *ultra vires* of the Constitution and of the provisions of the Criminal Procedure Code. It is repugnant to the ordinary rights of a man facing a trial for an offence.

In as much as section 16-A of the Madras General Sales Tax Act has the effect of depriving an accused of his rights under section 5 (2), 435 and 439 of the Criminal Procedure Code it must be held to be repugnant to the existing law, *viz.*, Criminal Procedure Code.

If section 16-A of the Act has the effect of saying that an accused person, namely, the assessee, shall not be entitled to say anything in defence to disprove the offence with which he has been charged, then such a situation cannot but be deemed to be offending against Articles 14 and 20 of the Constitution.

Section 16-A of the Madras General Sales Tax Act could not be operative in so far as the claim for sales tax and the liability to pay such tax is questioned under the provisions of the Constitution. In such circumstances the assessee is entitled to question before the Criminal Court the validity of the assessment and his liability to pay the same.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the orders of the Court of the Additional First Class Magistrate, No. II, Salem, dated 29th February, 1952 and made in S.T.R. Nos. 108 and 111 of 1952, respectively.

K. S. Jayarama Aiyar and *C. K. Venkatanarasimham* for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) and the Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Judgment of the Court was delivered by

Basheer Ahmed Sayeed, J.—In Criminal Revision Cases Nos. 88 and 89 of 1953, the accused have been convicted under section 15 (*b*) of the Madras General Sales Tax Act and each of them has been sentenced to pay a fine of Rs. 25, in default to undergo simple imprisonment for fifteen days. The sales tax amounts of Rs. 3,126-4-0 and Rs. 4,000-6-6, respectively, have been directed to be recovered from them as if they were fines. In Criminal Revision Case Nos. 90 and 91 of 1953, the accused have been convicted under the same section and each of them sentenced to pay a fine of Rs. 75, in default to undergo simple imprisonment for fifteen days. In addition, the sales-tax amounts due, *viz.*, 3,577-6-0 and Rs. 1,522-7-3 respectively, have been directed to be recovered from them as if they were fines.

The facts in each of these cases are the same and accordingly the order of the learned Magistrate in each of these cases is also, in substance, the same. The witnesses examined for the prosecution are also the same and the defence raised before the learned Magistrate in each of the cases was also the same. These revision cases against the said orders of the learned Magistrate have been posted together before this Bench for being dealt with in a batch for the reason that they raise common grounds on which the accused seek to set aside the orders of the learned Magistrate.

The accused are merchants dealing in hides and skins in Salem. Their business consists in the purchase of skins and hides and exporting the same to foreign

1. (1950) 1 M.L.J. 222.

* Cr.R.C. 88 of 1953. 12th Feb. 1954.

countries. In Criminal Revision Case No. 88 of 1953 the accused were called upon to pay sales tax in the sum of Rs. 3,126-4-0 which represented the balance payable out of the sum of Rs. 5,519-13-0 to which the accused were assessed for the year 1950-51. This assessment is said to have been made on the purchases of skins made by the accused in pursuance of orders placed with them by the foreign companies for the supply of the same. In Criminal Revision Case No. 89 of 1953, the same accused as in Criminal Revision Case No. 88 of 1953 were assessed to sales tax for the months of April to September, 1951, by the Assistant Commercial Tax Officer, Salem, in the total sum of Rs. 4,000-6-6 said to be due from the company on the skins purchased by them. In Criminal Revision Case No. 90 of 1953, there was a provisional assessment against the accused for the months of May to September, 1951, in respect of sales tax due for the skins purchased by them. Similarly in Criminal Revision Case No. 91 of 1953, the accused was assessed by the Assistant Commercial Tax Officer, Salem Town, to an aggregate sum of Rs. 2,652-5-9 for the year 1950-51. The prosecution in this case, is in respect of the sum of Rs. 1,522-7-3 representing the balance of the assessment due and payable by the accused.

The charge against all these accused is that they, having been legally assessed to sales tax, failed to pay either the whole or part of the said tax, in spite of an order of assessment having been served on them, as also a notice of demand calling upon them to make payment of the tax due within the stipulated period of time, and that such failure on the part on the accused brings them within the scope of section 15 (*b*) of the Madras General Sales Tax Act. Section 15 (*b*) is to the effect that any person who fails to pay within the time allowed any tax assessed on him or any fee due from him under the Act shall, on conviction by a Presidency Magistrate or a Magistrate of the First Class, be liable to a fine which may extend to Rs. 1,000 and in the case of a conviction under clause 15 (*b*), (*d*), (*f*) or (*g*) the Magistrate shall specify in the order the tax, fee or other amounts which the person convicted has failed or evaded to pay or has wrongfully collected and the tax, fee or amount so specified shall be recoverable as if it were a fine. It is not disputed in these cases that there was a tax assessed on the accused in each of the cases, that a time was prescribed within which the tax was to be paid and that the accused failed to pay the tax so assessed and demanded.

In the lower Court, all the accused raised a single legal defence, *viz.*, that the skins or hides were purchased by them in the course of their export out of the territory of India, and that under the provisions of Article 286 (1) (*b*) of the Constitution of India, the State is not empowered to impose a tax on goods so purchased in the course of export out of the territory of India, that the sales and purchases in question were not liable to any tax, that the assessment levied by the Commercial Tax authorities was invlaid and therefore the accused were not liable to pay the sales tax so assessed. The prosecution, however, contended that it was not open to the accused to raise any question as to the validity of the assessment levied by the Commercial Tax authorities under the Act in a prosecution laid against them for non-payment of the tax assessed and that section 16-A of the Madras General Sales Tax Act was a bar against the raising of any such question. The learned Magistrate, relying upon the decision of Panchapakesa Ayyar, J., in *Gigina Pasha Saheb, In re*[1] and also of Ramaswami, J., in *Hajee Meeran* v. *The Public Prosecutor*[2] to the effect that section 16-A is not *ultra vires* of the Constitution, decided against the accused, holding that it was not open to the accused to question before a Criminal Court the validity of the assessment made by the Commercial Tax authorities and overruling the objection of the accused that section 16-A of the Madras General Sales Tax Act was invalid as it was opposed to Article 286 (1) (*b*) of the Constitution of India, the same having been enacted before the Constitution. The learned Magistrate, therefore, declined to go into the question of the validity or otherwise of the assessments in respect of which the accused were prosecuted in the light of Article 286 (1) (*b*) or other Articles of the Constitution.

1. (1950) 1 M.L.J. 231. 2. Crl.R.P. No. 11 of 1952.

In view of the arguments advanced before us by Mr. K.S. Jayarama Ayyar appearing on behalf of the petitioners and by the learned Advocate-General appearing for the State, it seems to be necessary that we should bear in mind the scheme of the Act, before we could consider the various points raised by the learned counsel for the petitioners on the question of the validity of the convictions. Section 3 of the Madras General Sales Tax Act (Act IX of 1939) is the section that seems to levy sales tax on the sale of goods. It enacts that subject to the provisions of the Act, (*a*) every dealer shall pay for each year a tax on his total turnover for such year; and (*b*) the tax shall be calculated at the rate of three pies for every rupee in such turnover. There is a proviso to sub-clause (*b*) which it is not necessary to extract here, as it is not strictly relevant to the case before us. Sub-clause (2) of the same section provides that subject as aforesaid, the sale of any of the goods mentioned in the various items given under this sub-clause shall be subject to a tax at the rate specified in respect thereof, at such single point in the series of sales by successive dealers as may be prescribed; and the tax shall be paid by the dealer concerned on his turnover in each year relating to such goods, and shall be in addition to the tax for which he is liable under sub-section (1) on his total turnover for the year. Sub-section (3) of section 3 provides:

"A dealer whose total turnover in any year is less than ten thousand rupees shall not be liable to pay any tax for that year under sub-section (1) or sub-section (2)."

Sub-section 4 says that the turnover shall be determined in accordance with such rules as may be prescribed, and sub-section (5) provides that the taxes under sub-sections (1) and (2) shall be assessed, levied and collected in such manner and in such instalments, if any, as may be prescribed. There are two provisos to this sub-section (5) which set out that either the buyer or the seller in respect of the same transaction of sale shall be taxed and not both. Proviso (*ii*) is in the following terms:

"Where a dealer has been taxed in respect of the purchase of any goods in accordance with the rules referred to in clause (i) of this proviso, he shall not be taxed again in respect of any sale of such goods effected by him."

Sub-section (6) says that subject to such rules as may be prescribed, the assessing authority may assess a dealer for any year as if his transactions in such year had been the same as in the previous year. That this section is the charging section is common ground between the parties. The 'turnover' on which the sales-tax is to be levied has been defined in section 2 (*i*) of the Act. It is in the following terms:

"Turnover means the aggregate amount for which goods are either bought by or sold by a dealer, whether for cash or for deferred payment or other valuable consideration provided that the proceeds of the sale by a person of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise shall be excluded from his turnover."

The word 'dealer' has also been defined in section 2 of sub-clause (*b*) as meaning any person who carries on the business of buying or selling goods. The important point to be noticed in regard to the definition of the term 'turnover' is that it comprises the aggregate amount for which the goods are either bought by or sold by a dealer. That is to say, the emphasis is on the words 'either bought by or sold by.' It is not necessary to refer to the other sections of the Madras General Sales Tax Act which prescribe the exemptions and reductions in taxes and also the rules which prescribe the method of calculation and the ascertainment of the taxes due from dealers like the petitioners dealing in hides and skins. It is common ground in the cases before us that the petitioners have sent the returns in Form A-4 and also the cheques along with the terms as required by the sections of the Madras General Sales Tax Act and the rules prescribed thereunder. There is no question of their having contravened any of these provisions in the present revision cases.

For a complete understanding of the scheme of the Act, it is further necessary that reference should be made to the other sections of the Act which are also relevant for the consideration of the points raised in these petitions and they are sections 9, 10, 11, 12, 12-A, 12-B and 12-C. Section 9 deals with the procedure to be

followed by the assessing authority in the case of dealers whose turnover is ten thousand rupees or more in a year and the obligation on the dealer to submit his return relating to his turnover in the manner prescribed by the rules made under the Act. Section 10 provides for the payment and recovery of tax as assessed for prescribing the time for payment and how that tax could be recovered. Sections 12, 12-A, 12-B, and 12-C provide for appeals and revisions being preferred by the assessee objecting to the assessment made on him under the sections of the Act and for revision of the orders of the authorities *suo motu* where no appeals are allowed under the conditions set out in the said sections.

It will be noticed that the above sections provide the machinery that has been devised for enabling any dealer who is assessed to sales tax to vindicate his rights so far as the asssessment levied against him in respect of his dealings is concerned. The most material sections that have still to be considered in this connection are sections 15 and 16-A of the Act. Section 15 deals with offences and penalties and it is enacted in the following terms:

"Any person who (*a*) wilfully submits an untrue return or fails to submit a return as required by the provisions of this Act, or the rules made thereunder, or (*b*) fails to pay within the time allowed, any tax assessed on him, or any fee due from him, under this Act or (*c*) prevents or obstructs inspection or entry by any officer authorised under section 14, in contravention of the terms thereof, or (*d*) fraudulently evades the payment of any tax assessed on him, or any fee due from him, under this Act, or (*e*) fails to submit an application for registration as required by section 8-A, sub-section (1), or (*f*) collects any amount by way of tax under this Act, in contravention of the provisions of section 8-B, sub-section (1) or (*g*) fails to pay the amounts specified in section 8-B, sub-section (2), within the prescribed time, or (*h*) wilfully acts in contravention of any of the provisions of this Act, shall, on conviction by a Presidency Magistrate or a Magistrate of the First Class, be liable to a fine which may extend to one thousand rupees, and in the case of a conviction under clause (*b*), (*d*), (*f*) or (*g*), the Magistrate shall specify in the order the tax, fee or other amount which the person convicted has failed or evaded to pay or has wrongfully collected, and the tax, fee or amount so specified shall be recoverable as if it were a fine."

Under the Sales Tax Act, as in the District Municipalities Act or the Madras City Municipal Act, in addition to the other powers vested in the taxing authorities to collect the taxes due to the Municipalities or the Government, an agency has also been created and that agency is the magistracy above a certain grade. The Sales Tax Act vests this power to collect sales tax in a Presidency Magistrate or a Magistrate of the First Class as per section 15 of the Madras General Sales Tax Act. A provision in the taxing Act to this effect is nothing strange nor unusual and the power of the legislature to enact such a provision whereby the magistracy is set up as the agency for the collection of taxes due to public authorities and the Government is not liable to be questioned. Actually, such a power is not questioned before us by the learned advocate appearing on behalf of the petitioners. The scheme of the Act therefore seems to be that, if an assessee is taxed to sales-tax and if that tax remains unpaid after notice of demand served upon the assessee, the taxing authorities can make use of the magistracy to realise or collect the taxes due from the assessee. All that the taxing authority has to do in order to realise the unpaid tax is to file a petition before the concerned Magistrate alleging that the tax is due, and, to prove that the tax claimed is due from the assessee, he having failed to pay the same, in spite of a notice or demand prescribing a time within which it should have been complied with, and the Magistrate is thereupon empowered to convict the assessee and impose a fine on him to the maximum extent of Rs. 1000. In addition to such imposition of fine, the Magistrate is also empowered to specify in the order, the tax, fee or other amount which the person convicted has failed or evaded to pay, and if he does so, the amount so specified by the Magistrate shall be recoverable as if it were a fine. It is rightly urged by the learned Advocate-General that the prosecution in the present case had done nothing beyond what is contemplated under section 15 of the Act. It may be true that if such a provision is not in existence, it will be found difficult for the Government and the public authorities to realise the taxes and fees due to them and the legislature has perhaps felt that there should be provided some coercive process by means of which taxes and fees and other legitimate dues to Government should be collected in the interests of the administration of the State. If the legislature had been content with

this, then there would have been no room for the petitioner to take up the stand they have done before us. But the legislature went further and enacted a further section, *viz.*, Section 16-A. It is to the following effect:

" The validity of the assessment of any tax, or of the levy of any fee or other amount, made under this Act, or the liability of any person to pay any tax, fee or other amount so assessed or levied shall not be questioned in any Criminal Court in any prosecution or other proceeding, whether under this Act or otherwise."

It is not denied in these cases that the petitioners, as dealers in skins and hides have been assessed to sales tax in respect of their dealings and these petitioners or some of them, at any rate, have made payments in part and have failed to pay the balance of the assessed tax. Though the taxes in some cases have been finally assessed and in some provisionally assessed, still it is common ground that notices have been served upon all of them, as required by section 10 of the Act calling upon them to make the payments within the date prescribed in the said demand notices. It is argued that when once they have failed to pay the taxes assessed on them, the latter part of section 15 is attracted, *viz.*, that, if the assessee fails to pay within the time allowed, any tax assessed on him, or any fee due from him, under this Act, he shall, on conviction, be liable to a fine and the tax which he has failed or evaded to pay shall be recoverable from him as if it were a fine.

Before we proceed further, it is essential that one other section bearing on the scheme of the Act should also be noticed, and that is section 22 of the Madras General Sales Tax Act, 1939. The Sales Tax Act had been enacted before the coming into force of the Constitution of India in January, 1950. In the Constitution, in Part XII relating to Finance, Property, Contracts and Suits, an Article laying down restrictions as to the imposition of tax on the sale or purchase of goods was enacted. This is Article 286 (1) and is in the following terms:

" No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods, where such sale or purchase takes place—

(*a*) outside the State; or

(*b*) in the course of the import of the goods into or export of the goods out of, the territory of India."

The explanation to this sub-clause (1) as also sub-clause (2) together with the proviso thereto as well as sub-clause (3) may be omitted for purposes of this judgment. After the enactment of this Article, in pursuance of the Fourth Adaptation Order, dated 2nd July, 1952, a new section, namely, section 22, became incorporated in the Madras General Sales Tax Act. This new section 22 is in the following terms:

" Nothing contained in this Act shall be deemed to impose, or authorise the imposition of, a tax on the sale or purchase of any goods, where such sale or purchase takes place—

(*a*) (i) outside the State of Madras, or

(ii) in the course of the import of the goods into the territory of India or of the export of the goods out of such territory, or

(*b*) except in so far as Parliament may by law otherwise provide, after the 31st day of March, 1951, in the course of inter-State trade or commerce, and the provisions of this Act shall be read and construed accordingly."

The *Explanation* to this section may be omitted, as it has no relevance to the points that arise in the present cases.

The first point that has been raised in these revision cases before us by Mr. Jayarama Ayyar appearing on behalf of the petitioners, is that the petitioners are not liable to sales tax in view of section 22 of the Madras General Sales Tax Act which in substance, is the same as Article 286 (1) (*b*) of the Constitution. The petitioner's contention is that their purchase and sale of the skins and hides was in the course of export of the goods out of the territory of India and, the imposition of a tax on the sale or purchase of such goods by the State Government is *ultra vires* of the Constitution. That is to say that the State Government is not entitled, through its taxing officers, to levy any taxes of the kind claimed by it from the petitioners on the transactions in question. This was one of the points raised by the petitioners before the

learned Magistrate when the cases were tried by him. In order to prove that their purchase and sale was in the course of export of the goods out of the territory of India, the petitioners examined some witnesses on their behalf who deposed as to the nature of the transactions which were carried on by the petitioners. The learned Magistrate who heard the evidence, however, did not record any finding as to whether the transactions in respect of which the sales tax was demanded by the taxing authorities came within the scope of Article 286 (1) (*b*) of the Constitution or otherwise. Apart from setting out the contentions raised by the advocates on behalf of the petitioners and the State in that connection, the learned Magistrate did not discuss the evidence on the basis of which the petitioners sought to prove that their transactions were covered by Article 286 (1) (*b*) of the Constitution or section 22 of the Madras General Sales Tax Act. What the learned Magistrate did was simply to accept the contention of the learned Assistant Public Prosecutor that the validity of the assessment made could not be questioned as being opposed to the provisions of Article 286 (1) (*b*) of the Constitution, in view of section 16-A of the Madras General Sales Tax Act, and to dismiss, as being untenable the contention of the petitioners that that provision of the Madras General Sales Tax Act was invalid in as much as it was enacted before the Constitution. Holding that section 16-A of the Madras General Sales Tax Act was not shown to be contrary to Article 286 (1) (*b*) of the Constitution or any other Article thereof, the learned Magistrate convicted and sentenced the petitioners as stated above. In the absence of any proper enquiry into the question as to whether the petitioners have purchased or sold the goods in question in the course of the export of the goods outside the territory of India and in the absence of any discussion of the evidence on this point, it is rather difficult for us to come to any conclusion as to whether or not the transactions are really exempt from sales tax and whether the assessment order is *ultra vires* of Article 286 (1) (*b*) or section 22 of the Act. Though Mr. Jayarama Ayyar wanted us to go into the question of the validity of the tax imposed on the petitioners, we do not think it proper to enter upon any enquiry on this question which it was the duty of the lower Court to do, and especially, when the lower Court has not given any findings on this aspect of the case. Mr. Jayarama Ayyar then argued that the petitioners should at least have been given an opportunity to prove and argue that the tax levied on them in respect of the transactions carried on by them was not legal and that it offended against section 22 of the Act and Article 286 (1) (*b*) of the Constitution. There is, no doubt, force in this contention. How far such an opportunity should have been given and how far the Magistrate was bound to decide the question of the validity or otherwise of the tax levied on the petitioners would necessarily depend upon the question as to how far section 16-A which is said to debar the petitioners from claiming any such right is valid and *intra vires* of the Constitution, and that is the question before us.

It has been, however, argued by the learned Advocate-General on behalf of the State that, even assuming that the petitioners had the right to question the validity of the tax imposed on them, still on the evidence recorded by the learned Magistrate, in view of the recent decisions of the Supreme Court in *State of Travancore-Cochin* v. *The Bombay Co. Ltd.*,[1] and *State of T.C.*, v. *S. V. C. Factory, Quilon*[2] the transactions in question are not entitled to exemption either under section 22 of the Madras General Sales Tax Act or under Article 286 (1) (*b*) of the Constitution. It is true that the Supreme Court has held in *State of Travancore-Cochin* v. *The Bombay Co. Ltd.*,[1] as follows :

"Whatever else may or may not fall within Article 286 (1) (*b*), sales and purchases, which themselves occasion the export or the import of the goods, as the case may be, out of or into the territory of India come within the exemption and that is enough to dispose of these appeals."

The Supreme Court has further observed at page 1118 as follows :

"We (the learned Judges) are clearly of opinion that the sales here in question, which occasioned the export in each case, fall within the scope of the exemption under Article 286 (1) (*b*). Such sales

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1. (1953) 1 M.L.J. 1 : (1952) S.C.J. 527 : 1952 S.C.R. 1112 at 1120.
2. (1953) 2 M.L.J. 123 : (1953) S.C.J. 471.

must of necessity be put through by transporting the goods by rail or ship or both out of the territory of India, that is to say, by employing the machinery of export. A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods of a common carrier for transport out of the country by land or sea. Such a sale cannot be disassociated from the export without which it cannot be effectuated, and the sale and-resultant export form part of a single transaction. Of these two integrated activities, which together constitute an export sale, whichever first occurs can well be regarded as taking place in the course of the other. Assuming without deciding that the property in the goods in the present cases passed to the foreign buyers and the sales were thus completed within the State before the goods commenced their journey as found by the Sales Tax authorities, the sales must, nevertheless, be regarded as having taken place in the course of the export and are, therefore, exempt under Article 286 (1) (*b*). That clause, indeed, assumes that the sale had taken place within the limits of the State and exempts it if it took place in the course of the export of the goods concerned."

In *State of T. C.* v. *S. V. C. Factory, Quilon*[1] these observations were sought to be taken advantage of and it was argued that the last purchase of goods made by the exporter for the purpose of exporting them to implement orders already received from a foreign buyer or expected to be received subsequently in the course of business, and the first sale by the importer to fulfil orders pursuant to which the goods were imported or orders expected to be received after the import would also fall within the scope of the exemption provided under Article 286 (1) (*b*) of the Constitution. The majority of the learned Judges of the Supreme Court, however, discountenanced this argument in their observations at pages 474 and 475. These observations explain what exactly was intended by the observations made in the previous decision already referred to. At page 478, while summing up the conclusions, the majority of the learned Judges observed that :

"(1) Sales by export and purchases by import fall within the exemption under Article 286 (1) (*b*).

(2) Purchases in the State by the exporter for the purpose of export as well as sales in the State by the importer after the goods have crossed the customs frontier are not within the exemptions ; and

(3) sales in the State by the exporter or importer by transfer of shipping documents while the goods are beyond the customs frontier are within the exemption, assuming that the State power of taxation extends to such transaction."

With respect we have to observe that these decisions of the Supreme Court, leave no room for holding that the last purchases made by the dealers can be brought within the scope of the exemption contemplated by Article 286 (1) (*b*) of the Constitution. It is made clear that only the last sales made to the foreign buyer would be exempt as they alone would be considered to be in the course of export outside the territory of India.

The orders of the Deputy Commercial Tax Officer as also those of the Commercial Tax Officer in the present cases disclose that the dealers were liable to pay taxes on the purchase of untanned hides and skins made by them during the concerned period, and that consequently they were assessed to sales tax in respect of the concerned transactions, rejecting the pleas raised by them that they were purchased in the course of export outside the territory of India. If the facts were as set out by the taxing officers, the decisions of the Supreme Court referred to above would apply to the facts of the case and Article 286 (1) (*b*) would not be applicable to the purchases made by the petitioners so as to enable them to claim the benefit of the exemption from payment of sales-tax. But the grievance of the petitioners is that they have not been permitted to raise this question of the validity of the assessment in the light of this Article and plead the same in defence. There is foundation for the grievance. For, when the constitutionality of the very assessment order was raised, the petitioners should not have been shut out from raising that point before the Court, though it was only a criminal Court. It would have then become incumbent upon the prosecution to prove that the claim of the State was valid, constitutional and therefore enforceable against the petitioners. This raises the important question as to burden of proof. The contention on behalf of the State seems to be that the mere existence and proof

1. (1953) 2 M.L.J. 123 : 1953 S.C.J. 471.

of an assessment order by the prosecution should be a sufficient discharge of the burden that lay on the prosecution and that it would not be necessary on the part of the prosecution further to prove that the tax claimed from the assessee was validly levied, that it was legitimately due under the Act and that the assessee was bound and liable to pay the same. Reliance in this connection has been placed upon the decision of one of us in In re *Narasingamuthu*[1] in support of the contention advanced on behalf of the State. In that decision, the dealer was prosecuted for failure to submit the A return as required by rule 11 (1) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, which was an offence punishable under sections 15 (*a*) and (*c*) of the General Sales Tax Act and was fined a sum of Rs. 200, in default to suffer simple imprisonment for a period of six months. The question there was whether the assessee prosecuted was a dealer within the meaning of the term as defined in the General Sales Tax Act. It was observed in the course of the decision that the question as to burden of proof had become a matter of importance and also whether proceedings under the provisions of the General Sales Tax Act for the recovery of the penalties for non-compliance with the provisions of the Statute by the assessee were purely criminal in nature had also to be determined. After elaborately examining the scope of the previous decisions both in the Indian Courts and in the Courts in the United Kingdom, it was held :

> " The standard of proof required from the prosecution in offences under the Indian Penal Code, or other enactments of a similar kind, was a rigid and rigorous one quite distinct from what is ordinarily expected from a plaintiff in a civil action where the burden of proof is on the plaintiff.
>
> " When a criminal Court was approached by the revenue, or local or public authorities for the enforcement of a penalty for non-payment of a tax or tithe the proceedings are not, purely of a criminal nature but are quasi-criminal."

Reference was also made to sections 145 and 488, Criminal Procedure Code, as also to sections 10 and 16 of the Madras General Sales Tax Act to illustrate the opinion that the proceedings under the Madras General Sales Tax Act were not entirely criminal. It must, however, be remembered that this decision was not based upon the consideration of the validity of section 16-A of the Madras General Sales Tax Act which is the main question that has to be considered in the present cases. Further, apart from the question of the burden of proof that arose in that decision, various other points, such as the right of the accused to be given an opportunity to explain the circumstances against him, the right of the Magistrate to question the accused in that connection under section 342, Code of Criminal Procedure and the question of the revisional jurisdiction of the Courts in what are called quasi-criminal proceedings and whether the accused was entitled to give evidence himself as a witness, etc., did not arise for consideration in that case. In this view, therefore, we do not think that this decision is of any great assistance to the learned Advocate-General in his arguments against the point raised by the learned counsel for the petitioners.

The substantial point that has been argued by the learned counsel for the petitioners is that section 16-A of the Madras General Sales Tax Act is *ultra vires* of the Constitution. Section 16-A is as much a part of the General Sales Tax Act as section 22 is itself a part of the Act. In so far as section 22 of the Act says that nothing in this Act shall be deemed to impose, or authorise the imposition of a tax on the sale or purchase of any goods where such a sale or purchase takes place in the course of the import of the goods into the territory of India or of the export of the goods out of such territory, it is urged that the application of section 16-A must be limited only to cases which do not come under section 22 of the Act. The contention is that when the validity of the tax under section 22 was itself questioned—section 16-A cannot be availed of to deprive the petitioners of their right to test the justness or otherwise of the claim to sales tax. That is to say, if the tax claimed is not leviable under section 22 of the Act, then the tax imposed upon the petitioners

1. (1948) 2 M.L.J. 93 : I.L.R. (1949) Mad. 357.

cannot be said to be one imposed under the Act. On the other hand, it must be considered to be an assessment *de hors* the Act and as such, the imposition is outside the scope of the General Sales Tax Act and it should be open to the assessee to question the validity of the assessment. Mr. Jayarama Ayyar further argued that, even if section 16-A is considered to be a valid section, what cannot be questioned in a criminal Court is the tax that has been validly imposed under the provisions of the Act and not taxes which are invalid under the law and which happen to be contrary to section 22 of the Act itself. According to him, section 16-A being subject to section 22, section 16-A cannot be a bar against the petitioners raising the question of the validity of the assessment against them by the taxing authorities. Emphasis is laid on the terms " under this Act " and that the assessment should be properly made " under this Act " and that the liability of any person to pay the tax should also arise "under the Act ", counsel's contention being that the tax now in question is not leviable in view of section 22 of the Madras General Sales Tax Act. The real point sought to be made out is that both the validity of the assessment as also the liability of the person to pay the tax could be raised in the criminal Court, when the petitioners are called upon to show cause why they should not be punished for failure to pay a tax which is not imposed under the Act. Mr. Jayarama Ayyar has invited our attention to a series of decisions of this Court which have arisen in connection with the levy of municipal and income taxes. In *Fischer* v. *Twigg*[1] it has been held that an imposition expressly prohibited by law cannot be deemed to be made under the Act. In *Municipal Council, Cocanada* v. *The Standard Life Assurance Company*[2], it has been ruled that there is no difference in principle between the exaction of a tax which has not been legally imposed and the exaction of a tax from a person who is not taxable under the Act. In *Municipal Council, Cuddalore* v. *Krishnan Nambiar*[3] it has been held that a suit to recover the tax is barred only if the provisions of the taxing law have been in substance and effect complied with. In *Raja of Ramnad* v. *Secretary of State for India*[4] it has been held that section 52 of the Indian Income-tax Act bars a suit for refund of income-tax paid, only in cases where the tax is legally payable in respect of the income and not where the income is exempt from assessment. In *Secretary of State for India* v. *Meyappa Chettiar*[5] at pages 215 to 219, this Court has held that the assessing officer (income-tax) had power to determine the question of the plaintiff's residence in British India and the consequent receipt of the profits in question in British India and that, a suit to set aside the assessment in such circumstances would be barred by section 67 of the Income-tax Act. In *Public Prosecutor* v. *Kondappa*[6], it was held that :

> " In a prosecution under rule 33 (2) of the rules in Schedule IV to the Madras Local Boards Act, for non-payment of profession tax, it is open to the accused to question the legality of the assessment, notwithstanding rule 31. The finality referred to in rule 31 is only for the purpose of the Act and where the legality of the assessment is questioned, whether in a civil suit or in a criminal proceedings, there will be no bar arising under the rule or under section 228 of the Act.
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> In *Raleigh Investment Company* v. *Governor-General in Council*[7] which was a case which arose under the Income-tax Act, the term ' assessment made under this Act ' occurring in section 67 has been defined to be ' an assessment finding its origin in an activity of the assessing officer acting as such. The circumstance that he has taken into account an *ultra vires* provision of the Act is in this view immaterial in determining whether the assessment is ' made under the Act.' ' The phrase describes the provenance of the assessment ; it does not relate to its accuracy in point of law ' ".

Relying on these cases, Mr. Jayarama Ayyar's contention is that section 16-A of the Act could not be operative in so far as neither the claim for sales tax from the petitioners was valid nor were they liable to pay the tax under the Act and that the petitioners in such circumstances were entitled to question both the validity of the assessment and their liability to pay the same before the criminal Court. This argument could hold good, in our view, for the simple reason that

1. (1897) I.L.R. 21 Mad. 367.
2. (1900) 10 M.L.J. 401 : I.L.R. 24 Mad. 205 at 213.
3. (1927) 54 M.L.J. 147 : I.L.R. 50 Mad. 987.
4. (1928) 55 M.L.J. 770 : I.L.R. 52 Mad. 12.
5. I.L.R. (1937) Mad. 211.
6. (1947) 1 M.L.J. 317.
7. (1947) F.L.J. 45 : (1947) 2 M.L.J. 162: (1947) F.C.R. 59, 72 to 76 (F.C.).

not merely the applicability of section 22 of the Act but also the constitutional provisions of Article 286 (1) (*b*) have been raised and are required to be gone into before a decision could be made in regard to the prosecution for non-payment of the tax claimed.

It is true that, before the 1st January, 1948, when section 16-A of the Madras General Sales Tax Act took effect, everything under the Act itself was liable to be questioned before a criminal Court or a civil Court. But, after section 16-A was enacted, it appears as though the assessment made under the Act, or the liability to pay such assessment made under the Act, was not open to question. That is to say according to the terms of section 16-A, the assessment and the liability which have been determined so far as they are within the scope of the Act or under the provisions of the Act, cannot be subject to any legal scrutiny before any criminal Court or other proceeding, whether under the General Sales Tax Act or otherwise. In the present cases, as we have already held, it is difficult to say that the levy of tax has been under the Act or otherwise, unless that question is gone into and the petitioners are enabled to put their case before the criminal Court.

It has, however, been argued by the learned Advocate-General that the prosecution for non-payment of the sales tax is not really in the nature of a prosecution for a criminal offence. It is more akin to the execution of a decree against a debtor and the debtor appearing on notice before the civil Court and showing cause as to why the decree against him should not be executed. In other words, the criminal Court has been constituted to be a mere collecting agency on behalf of the State ; and when once there is an order of assessment fixing the time for payment of the assessment and if default is committed and the prosecution is launched for the collection of the defaulted amount of tax, the assessee could not have any right to question the validity of the assessment, or the liability to pay the tax, claimed from him before that Court. Just as the executing Court cannot go behind the validity of the decree or otherwise, even so before the criminal Court, the assessee cannot raise any defence as to the validity or otherwise of the assessment. In such cases, all that the prosecution has to prove under section 15 (*b*) is that there has been an assessment made against the assessee that the tax was due from the assessee and that it had not been paid. The offence for which the present petitioners are prosecuted being only the default in payment of the assessed tax, it was not necessary for the prosecution to prove anything beyond these facts and it was therefore not open to the criminal Court to go into the question of the validity or otherwise of the tax or the liability of the petitioners to pay the same. For, it is only the stage of collection that is before the criminal Court and at that stage, the assessee cannot be allowed to have the right to question the validity of the assessment itself and therefore it is that the provision in section 16-A of the Madras General Sales Tax which is intended only to facilitate collection of the tax levied, cannot be considered to be *ultra vires* of the powers of the Legislature or the Constitution of India, as contended for by the learned counsel for the petitioners. It is also contended by the learned Advocate-General that the method of collection of a tax is incidental to the levy of the tax by the State and the right of the Legislature to make the default an offence and its right to devise a machinery to collect the defaulted tax cannot be questioned before the very collecting agency constituted by the Legislature. To allow this, it is argued, would defeat the very object intended by the Legislature, *viz.*, easy collection of the defaulted taxes.

The levy of the sales tax on sale or purchase of goods is provided for by the Constitution in item 54 of the State List in the VII schedule, and it is intelligible that when that power has been exercised by the Legislature, it is only incidental to that power that the Legislature should also provide for the method of collection. We agree that it is only the method of collection that has been provided for in section 15 of the Madras General Sales Tax Act and the function of collection is entrusted to the criminal Court which seeks to enforce the assessment order made by the taxing authorities. But the matter is not left there. On the other hand, in the matter of such enforcement of the order, it has been provided that,

when once the order has been made it shall not be open to the assessee from whom the tax has become due to question the validity of the order of assessment or the liability imposed upon the person to pay the tax and that is section 16-A of the Madras General Sales Tax Act. The argument of the learned Advocate-General is that, even without section 16-A, the scheme of the Act would be complete in so far as it has given the power to the criminal Court to enforce the assessment order that has been made against the assessee and under which the tax has become due from him. It is true that the language of the different clauses of section 15 of the Act does enable the criminal Court when once it is moved under that section, to enforce the order and impose the fine prescribed on conviction. But this argument entirely misses the point as to how any person could be precluded from raising the issue that the order sought to be enforced is a wrong order and that it does not exist in law so as to impose any liability on the person against whom it is directed, especially when he is sought to be punished, whatever might be the form or nature of punishement; and this is what is sought to be achieved by the enactment of section 16-A.

It is pointed out further by the learned Advocate-General that the Madras General Sales Tax Act has provided all the necessary processes to enable the assessee to question the validity of the tax at any stage when it is sought to be levied, and if those processes are gone through and when the tax had become due under the Act, it will no more be open to the assessee to go behind the finality of the tax levied and question it when it comes to a stage of collecting the same. The machinery provided to enable the assessee to question the legality of the tax, or his liability to pay the same, is contained in sections 11 to 12-C of the Act which have already been referred to in the earlier part of this judgment and the question now is whether, in the case of such machinery having been provided, for affording the fullest opportunity to the assessee to agitate the question of the validity of the levy of tax from stage to stage, commencing from the proceedings before the Assistant Commercial Tax Officer right up to the High Court in appeal or revision, it will still be open to the assessee to question the validity of the assessment, or his liability to pay the same, as the case may be, before a criminal Court which is concerned only with the collection of the tax by the enforcement of the order of assessment passed by the taxing authorities. It is argued that it has been uniformly held by this Court that, when a statute provides a complete machinery which enables the assessee to seek all the remedies by way of an appeal, a revision and so forth, to obtain a final decision on the validity of the imposition of any tax or his liability to pay the same, it is not open to him to seek any further remedies outside the four corners of the special statute, unless there is gross injustice or the taxing authorities act without jurisdiction. It is pointed out that cases may arise where the assessee has availed of all the remedies so provided in the special statute, and there may be also other cases where the assessee might not have chosen to take advantage of all the remedies provided for him to vindicate his rights in respect of the tax claimed from him. In the former set of cases, when an order of assessment has become final in terms of the statute, it will not be open to the assessee to object to the tax when it comes to the stage of collection. Even if he has failed to take advantage of all the remedies provided for in the taxing statute, even then it cannot be said that his failure to take such advantage of the remedies should entitle him to be heard once again by the Court or authority which seeks to enforce the assessment order in the process of collecting the tax. The contention is that the assessee cannot be allowed to take advantage, in such cases, of his own failure to resort to the remedies made available to him by the very statute under which he is sought to be taxed. It may be noted however that in the present cases, the records do not show that the petitioners have taken any advantage of the various remedies that have been made available to them under the Madras General Sales Tax Act before the order of assessment to sales tax became final. Whether they have done so or not, it is argued that they cannot be heard before the criminal Court to say that the tax has not been validly or properly levied against them, or that they are not liable to pay the same. This argument, in our opinion, appears to be sound only so far

as the objections to the assessment order have reference to the provisions of the Act under which the taxing authority claims to have acted in levying the tax but it is not tenable when the assessee raises the question as to the propriety of the assessment order itself with reference to provisions of law under which the taxing measure itself has come into existence and more especially when the very basis of the power to levy the tax is assailed for want of jurisdiction or as being in derogation of constitutional rights. When such questions as the propriety of the order, or the legality of the section which shuts out any legitimate defence being put forth, are raised, then simply because the matter arises before the criminal Court, the assessee cannot be denied the right which is available to him ordinarily as an accused person. It is, however, urged that the very object of providing the elaborate remedies contained in the Act will be defeated if a criminal Court or a civil Court is to traverse once again the same ground as has been traversed by the various special Tribunals set up under the taxing statute to decide the question of the liability or the validity of the tax claimed by the taxing authorities. It is also pointed out as to how absurd the situation would be if an assessment order, which has become final after it has passed though all the stages contemplated under the several sections of the General Sales Tax Act, were to be questioned on the ground of its validity or on the ground of the liability of the person against whom it is claimed and were to be gone into *de novo* before a criminal Court invested barely with first-class magisterial powers. It is also contended that it is only to avoid such situations, that the Legislature enacted that the validity of the tax, or the liability of the person to pay the tax, shall not be questioned in a criminal Court when it had provided all the conceivable remedies that could be open to an assessee to question the decision of the taxing authorities before their order could become final. It is next argued that section 16-A should be read along with sections 11 to 12-C and, if that is done, one would fail to see how the assessee can complain that he has been deprived of his rights to question the validity of the decision of the taxing authority before it is sought to be enforced. From the superficial point of view, the argument sounds well, but on a deeper consideration, it is not possible to say that this argument is free from fallacy. For when the assessee is threatened with a prosecution and a fine on conviction it does not stand to reason to say that the assessee shall not be entitled to question the validity of the order on grounds other than those that fall within the four corners of the sections of the taxing law, which he might or might not have availed of. When the assessee is once made subject to criminal jurisdiction for failure to pay the tax or fee levied, it passes comprehension as to why he should not be entitled to resort to all the remedies open to him under the Criminal Procedure Code or Evidence Act to escape from a conviction and consequent fine.

It is next urged by Mr. Jayarama Ayyar that under section 15 of the General Sales Tax Act failure to pay the tax assessed is made an offence punishable with a fine on conviction by the Magistrate authorized. The term 'offence' has been defined in section 40 of the Indian Penal Code as denoting a thing made punishable under the Penal Code or under any special or local law. The term 'conviction' is also defined in the Law Lexicon as meaning 'condemnation, etc., of a person in a criminal case or matter'—*Vide* Ramanatha Iyer's "Judicial Dictionary," pages 244 and 263. In view of the terminology used in section 15 of the Madras General Sales Tax Act, it is contended that the prosecutions launched against the petitioners in the present cases cannot be said to be merely the enforcement of an order of the taxing authority, or a mere proceeding for the realization of the tax on the analogy of a a civil Court, executing a decree, but that it had been made a criminal offence entailing punishment on conviction in the shape of a fine and such fine is recoverable by attachment of the properties of the person fined. So the prosecution becomes a criminal proceeding both in form and substance. What the petitioners are tried for is therefore a criminal offence and the punishment for the offence is a fine. From one point of view, the effect of section 16-A is that once the existence of an assessment order is proved, the burden shifts on to the accused to prove that he is innocent. That this is so because the prosecutions under taxing laws are merely quasi-criminal proceedings is no answer to a violation of the fundamentals of our jurisprudence

that it is the duty of the prosecution to prove that the accused has committed the offence with which he stands charged. It may be conceded that since the accused are tried for an offence not cognizable, the procedure applicable to summons cases should apply to the proceedings under section 15 of the General Sales Act. It is contended by the learned counsel for the petitioners that the enactment of section 16-A of the same Taxing Act deprives the right given to him to defend himself by disproving the prosecution case by attacking the enforceability of the order or letting in evidence on this point. The section, therefore, nullifies the application of the entire chapter of the Criminal Procedure Code which relates to summons cases. For one thing, it leaves no scope whatever to the accused to say that the charge is not tenable in view of its illegality or want of jurisdiction, or any other valid reason. For another thing, as is contended by the learned counsel, the effect of section 16-A of the Madras General Sales Tax Act is that it raises a presumption that the assessment order is conclusive and cannot be questioned by the accused. This tantamounts to making an addition to the list of conclusive presumptions already provided for in the Evidence Act. This provision, which has the effect of nullifying the application of sections 241 to 245, Criminal Procedure Code and making the assessment order conclusive against the accused charged with the offence of having committed default in the paymet of the tax, it is argued, is repugnant to the Constitution, both from the point of the Criminal Procedure Code and the Evidence Act, and it must be declared void. This argument of the learned counsel is not without force. For, it is no argument to say that the terms 'prosecution', conviction', 'fine', etc., have no doubt been used in section 15 of the General Sales Tax Act, but that these terms do not have the same connotation in the context of the General Sales Tax Act as they have in the context of the Indian Penal Code or any other Criminal Statute. Nor is it enough to concede that these terms are used in section 15 merely because there are no better terms available, and that the mere use of the same terminology as occurs in the Indian Penal Code, or the Criminal Procedure Code, cannot really be said to make the default in the payment of tax to be on a par with a criminal offence involving moral turpitude such as those made punishable under the Indian Penal Code. It may be due that after all it is only the default in the payment of tax that is made punishable and that too by a mere a fine which, in effect, really amounts to a penalty, though it is described in relation to the prosecution and the conviction as a fine. It may also be that the Statute under which a fine is levied for default of payment of the tax due from the assessee is a special Statute for the enforcement of orders in regard to collection of taxes and that the taxes due to the State have to be collected after they have become legitimately due from the assessees by some process which will enable the State not to lose the same and which process has to take the form of a criminal prosecution. But in our view all these would not make it any the less a prosecution and it is no answer to the contention of the learned counsel for the petitioners that this section 16-A denies the right to the accused to challenge the right of the State to prosecute him and to defend himself by proving that the State has not acted within the ambit of the law or the Constitution. We think that this argument is valid though not in its entirety. For, it can be contended that the offence with which the accused in such cases are charged is only the non-payment of the tax due from them and nothing more, and therefore the accused could certainly prove, that as against the charge of non-payment, he has already paid the tax, and that the right to show that the tax has already been paid or that no tax has been assessed against him is still open to the assessee. But still, there must be good reason shown to limit the rights of the accused only to particular defences alone and not to other defences which the law allows them. That this should be so, because the Statute under which the accused are levied the tax has already given the assessee every opportunity in a series of proceedings to show that the tax is not validly levied against them or that they are not liable to pay the same, cannot be any reason or justification for a procedure which curtails the rights of the accused charged with an offence involving a punishment, however small it may be. It is in this context that section 16-A has to be interpreted, and held as repugnant to the ordinary rights of man facing a trial for an offence.

No doubt, section 15 (*b*) in its operative portion gives absolute power to the assessing authority to launch a prosecution, the moment the tax is not paid by the assessee from whom it is due. On this footing it has been urged by the learned counsel for the petitioners that the absolute power given to the taxing authority to launch a prosecution may be exercised even irrespective of the fact that the assessment is still a matter under agitation by the assessee, though a demand notice has been served upon him. Under the scheme of the Act, the tax becomes due only when the process set out in the various sections 11 to 12-C of the General Sales Tax Act has already been availed of, or has not been availed of by the assessee, as the case may be. If, however, the prosecution is launched when the assessment is being questioned the assessee would certainly have a good defence to say that the validity of the tax has yet to be determined before it could be enforced. But section 16-A debars the assessee from resorting to even such a good and tenable defence. If such be the case, it cannot be argued that the section is *intra vires* of the Constitution which guarantees that no person shall be punished unheard and without a right to defend himself in conformity with the existing provisions of law.

It is next argued by the learned counsel for the petitioners that the fine levied by a criminal Court cannot be said to be on a par with the levying of a penalty under the Income-tax Act, or the recovery of that tax as if it were an arrear of land revenue. The imposition of a fine by a criminal Court is on a conviction and it cannot be classified along with penalties under other Acts levied by the taxing authority. A reference to section 16 of the same Act which provides for composition of offences under the Act makes it quite clear that the failure to pay the tax is made an offence in respect of which a fine can be imposed by the criminal Court, notwithstanding the fact that such default is made compoundable, and the section has given the power to the prescribed authority to accept from any person, who has committed the offence, or is even reasonably suspected of having committed the offence against the Act, in addition to the tax so recoverable a sum of money not exceeding Rs. 1,000, or double the amount of tax recoverable, whichever is greater. A definite provision of this kind in the Act throws a flood of light on what exactly is the nature and character of the offence for which the prosecution has been provided for in the Act. It will, therefore, be not incorrect to say that the offence of non-payment of tax is made a criminal offence, so as to attract all the incidence of such criminal offences. No doubt, it may be only of the lesser of the type of offences such as those described in the Indian Penal Code. Such being the case, it does not carry conviction to say that it is after all a quasi-criminal offence and the proceedings in respect thereof are also quasi-criminal and therefore the assessee shall not defend himself and prove his innocence, as contemplated by section 16-A of the Special Taxing Statute. Because the standard of proof may be different in quasi-criminal proceedings, it does not necessarily follow that the accused person shall not avail of all or any defences that may be open to him to prove his innocence.

Mr. Jayarama Ayyar has, however, drawn our attention to the fact that many offences in the Indian Penal Code are made punishable only by a fine and many are also made compoundable but that does not take away the right of the accused to defend themselves when they are prosecuted for those offences. Therefore it would not be reasonable to say that this offence of non-payment of tax also being on a par with those offences, the assessee shall not question the validity of the assessment order. The trials of offences of the kind referred to above have to conform to the same procedure as in the case of other offences and it stands to reason that the same should be the case with the offence under section 15 (*b*) of the General Sales Tax Act as well. The fact also remains that there is a convictoin on a prosecution and a sentence of fine and such being the case, why should not the assessee be entitled to defend himself by raising any defence that may be open to him, so as to prevent his being convicted and fined?

The question is also raised whether, if the offence under section 15 of the General Sales Tax Act is not on a par with any offence under the Penal Code, it is open to the accused who is prosecuted under section 15 to enter the witness-box and give

evidence in his own favour. Certainly, when such a situation is not contemplated, why should the prosecution under section 15 of the General Sales Tax Act be treated differently from the prosecution under the Indian Penal Code or any other law? Mr. Jayarama Ayyar also laid stress upon the fact that section 342, Criminal Procedure Code, which is applicable in the case of ordinary offences under the Penal Code is not made applicable to an offence under section 15 (*b*) of the General Sales Tax Act and that f this be the effect of section 16-A of the General Sales Tax Act then again it will offend against the Criminal Procedure Code and the rights given to the accused thereunder. If the Magistrate is not entitled to put questions to the accused who is charged with the offence of having failed to pay the tax due from him to explain the circumstances appearing against him, whatever they might be, then it would certainly amount, according to the learned counsel, to denying the accused the opportunity to plead his innocence before the Magistrate and explain the incriminating circumstances against him. The criminal Courts in this country administer justice following the procedure laid down in the Criminal Procedure Code and the various provisions of the Criminal Procedure Code also guarantee certain rights to the accused persons when they are tried before Criminal Courts whether such trials are quasi-criminal ones or involve a mere fine by way of punishment. If section 16-A has the effect of saying that the accused person, namely, the assessee shall not be entitled to say anything in defence to disprove the offence with which he has been charged, more especially if it is not open to him to say that the Act or section under which he is charged is *ultra vires* of the Constitution, or does not apply to him, or that the assessment made against him is not made under the Act or that the assessment is not valid or that he is not liable to pay the same as it is not legally due, then such a situation cannot but be deemed to be offending against Articles 14 and 20 of the Constitution. In other words, the contention is that, if every other offender under the Penal Code or other Penal Statutes is given the right to defend himself and he can also be questioned by the Magistrate under section 342, Criminal Procedure Code to explain facts against him, why should the offender under the Sales Tax Act alone be denied these rights which form the essential feature of the trial in criminal cases? Article 14 says that the State shall not deny to any person equality before the law, or the equal protection of the laws within the territory of India and the enactment of section 16-A in the General Sales Tax Act, when it denies that protection tc the assessee under the General Sales Tax Act which is ordinarily available to offenders under the Penal Code or other Penal Statute what else would be the result than that it is a negation of that right? We are of the opinion that Section 16-A of the General Sales Tax Act in so far as it brings about this result must be held to be repugnant to Article 14 of the Constitution. Even taking into consideration the limited scope of the offence for which the assessee is made liable to pay a fine, on conviction, under section 15 (*b*) of the General Sales Tax Act, so long as the section bars the right of the Magistrate to put questions to the accused as to whether he has or has not paid the tax or whether he is liable or not to pay the same and so forth, and in so far as it is not open to the accused even within the limited scope of the taxing law, to disprove the offence of the non-payment of the tax by showing adequate grounds for such non-payment or failure, it cannot be said that the protection afforded to other accused in other criminal cases is available to him. Once again though what section 16-A contemplates is to prevent only the re-opening of the question of the validity of the tax, or the liability of the person to pay the same, before the criminal Court and even though the scope of the Magistrate's jurisdiction is limited to decide upon the simple issue whether the tax due has been paid or not still so long as the enquiry before the magistrate is in the nature of a criminal trial, quasi or otherwise the accused cannot be deprived of the elementary rights which the Criminal Procedure Code and the Evidence Act guarantee him. It may however, be argued that even in this trial, it is open to the accused to show that the notice under section 10 is defective, or that the time within which the payment shall be made had not expired, so that when the scope of the prosecution itself is limited, it cannot be said that, if the scope of the defence is also correspond-

ingly limited, there is any repugnancy between the Articles of the Constitution which give equality before the law to all citizens, and section 16-A of the General Sales Tax Act, which merely aims at preventing the throwing open of the entire question of the validity of the tax or the liability of the person to pay the same before a Court of limited jurisdiction, like the Magistrate of the First Class or the Presidency Magistrate who is to decide only the question of default. We do not think that because of these circumstances, the assessee could be treated differently from the other offenders, so as to give validity to section 16-A as not being repugnant to Article 14 of the Constitution.

Mr. Jayarama Ayyar has further argued that under Article 372 of the Constitution, the Criminal Procedure Code, which was the law in force immediately before the commencement of the Constitution has been declared to continue to be in force until altered, repealed or amended by a competent legislature or other authority and that section 16-A which is enacted in exercise of the powers of the State Government to legislate in respect of Entry No. 54 in List II of the Seventh Schedule, again offends against the sections of the Criminal Procedure Code in so far as it is repugnant to section 5 of that Code. Section 5 of the Criminal Procedure Code is in the following terms :—

"(1) All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment, for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

According to sub-clause (2) of this section the offence, under a taxing law, like the General Sales Tax Act, should also be investigated, inquired into, tried and otherwise dealt with only according to the provisions of the Criminal Procedure Code. This section also states that such investigation, inquiry, trial, etc., should be subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Mr. Jayarama Ayyar's contention is that, in so far as the effect of section 16-A of the General Sales Tax Act is that the accused assessee shall not be entitled to question the validity of the assessment against him or his liability to pay the same, because all that the prosecution has to prove against him is the existence of an assessment order which has been validly served on him specifying a time within which he has to pay, the right given to the accused to claim a trial according to the provisions of the Criminal Procedure Code is taken away. So far as the limitation imposed under section 5 (2) is concerned, it is argued that it has reference only to the manner or place of investigating, inquiring into, or trying and it will not be correct to say that it warrants the depriving of all the other rights available to the accused in a prosecution, namely, to defend himself by disproving the validity of the claim against him or by putting forth a defence that there is no liability which can be enforced against him, for the default of which he could be punished and so forth. In the Full Bench decision of this Court in *Thiruvengadaswami* v. *Municipal Health Officer, Karaikudi*[1] to which one of us was a party, the concluding observations of the discussion on pages 147-149 are as follows :—

"The law of procedure is not different in the trial of cases under the Indian Penal Code and those under other statutes according to section 5 of the Criminal Procedure Code except that in the case of offences under other laws, the procedure laid down by the Criminal Procedure Code is subject to any enactment for the time for regulating the manner or place of investigation, enquiry or trial."

In the light of these observations, it is contended by the learned counsel for the petitioners that, in so far as section 16-A of the Madras General Sales Tax Act purports to take away the rights vested in the accused under section 5 (2) of the Criminal Procedure Code, it should be considered repugnant to the Criminal Procedure Code which has been declared to be the existing law in accordance with Articles 13 and 372 of the Constitution. We see considerable force in this contention. The learned

1. (1949) 1 M.L.J. 488 : I.L.R. (1950) Mad. 118 (F.B.).

Advocate-General has, however, invited our attention to section 1, sub-clause (2) of the Criminal Procedure Code which provides as follows :—

"It extends to the whole of India except the States of Jammu and Kashmir and Manipur ; but, in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force, or shall apply to—

(*a*) the Commissioners of Police in the towns of Calcutta, Madras and Bombay, or the Police in the towns of Calcutta and Bombay ;

(*b*) heads of village in the State of Madras ; or

(*c*) village police-officers in the State of Bombay."

The learned Advocate-General emphasises the phrase occurring in the sub-section, *viz.*, "Or any special form of procedure prescribed by any other law for the time being in force" and contends that, if this sub-section is read along with sub-section (2) of section 5 of the same Code, it cannot be argued that section 16-A of the General Sales Tax Act is in any way repugnant to the Criminal Procedure Code or that it takes away the rights vested in the accused, who is tried for an offence under the special taxing statute, like the General Sales Tax Act. It is further urged by him that the scope of the Full Bench decision in *Thiruvengadaswami* v. *Municipal Health Officer, Karaikudi*[1] is not what the learned advocate for the petitioners contends, but that it only has the effect of declaring that the previous decisions in *Public Prosecutor* v. *Khader Khan*[2] and *Public Prosecutor* v. *Kondappa*[3] were wrongly decided and they turned upon the interpretation of the word 'due' as meaning 'legally due'. We regret that it is not possible for us to agree with the learned Advocate-General that section 16-A of the General Sales Tax Act does not take away the rights that are vested in the accused under section 5 (2) of the Criminal Procedure Code when he is tried under section 15, sub-clause (*b*) of the said Act. Section (1), sub-clause (2) of the Criminal Procedure Code does not, in our opinion, have the effect of enacting anything in derogation of section 5 (2). It only relates to the extent of the application of the Code of Criminal Procedure in the matter of territorial and other jurisdiction, etc., and by no means nullifies the effect of section 5 (2). Even granting that all that section 16-A says is that, when once the special statute has provided all the remedies and reliefs by which an assessee is entitled to question the validity or the legality of the assessment order, or his liability to pay any assessment claimed by the assessing authorities it should not be open to the assessee once again to seek the aid of the Criminal Court, which is charged with the duty of enforcing the assessment order, still it cannot be validly argued that when the assessee prosecuted seeks to defend himself against the imposition of a fine by attempting to knock out the very basis of the prosecution by asking the Court to declare the assessment as illegal or *ultra vires* of the Constitution, the Criminal Court cannot be allowed to shut him out from raising such a defence by the mere enactment of section 16-A of General Sales Tax Act. The validity of section 16-A may be tested also by the following illustration. Suppose the assessment orders sought to be enforced have been passed without jurisdiction, or that the entire procedure resorted to by the assessing authorities in bringing into existence the assessment orders against the assessee had not actually been followed by the assessing authorities or that the assessee himself has been kept completely in the dark as to what had taken place behind his back without any opportunity to be heard or to assail its validity even within the four corners of the Act. In such a situation should it or should it not be open to the assessee, who is prosecuted, for not complying with such an order, to defend himself on the grounds indicated above ? Obviously section 16-A does not leave any scope for the assessee to do this before the Criminal Court. If the effect of section 16-A is that even if the order of the assessing authorities sought to be enforced is one which has been obtained in fraud of the powers vested in the assessing authorities, it is not open to the assessee to question the validity of the order, or his liability to pay the assessment claimed in the order, surely such a provision can hardly be upheld to be in accordance with

1. (1949) 1 M.L.J. 488 : I.L.R. (1950) Mad. 118 (F.B.).
2. (1946) 2 M.L.J. 461.
3. (1947) 1 M.L.J. 317.

either the Constitution or the Criminal Procedure Code which has been declared to be a valid law under the Constitution. Though the learned Advocate-General would still contend that section 16-A is a bar against the assessee questioning the validity of even such orders, as in the illustration above we do not think that we can agree with him. It will be nothing but a travesty of justice if we are to acquiesce in such a position. For, in such a situation, as described above, in our view, it should be open to the assessee to contend before the Criminal Court that the assessment did not take place, that he was not made aware of it or that he was not heard before it was passed that the order itself has come into existence behind his back or that it was the result of the exercise of fraud upon the powers vested in the assessing authorities or that the order had been passed without jurisdiction and as such not enforceable against him. If the assessee is not entitled to do all this, we do not think that section 16-A of the Act, which is only a complete negation of the rights of the assessee given to him under the Criminal Procedure Code can be held to be consistent with the Constitution or the existing law regulating criminal Justice. In *Syed Mohamed & Co.* v. *State of Madras*[1] relied on by the learned Advocate-General, a Bench of this Court has held that section 16-A of the General Sales Tax Act is valid and it cannot be said to be opposed to natural justice or repugnant to the Constitution, in view of the elaborate procedure that has been made available to the assessee to question the validity of the order at a stage prior to the attempt by the State for the realisation of the same. In that decision, that matter arose in a writ and the whole Act was contended to be *ultra vires* and it was held that the plea that the Act was *ultra vires* could not be raised before the Tribunal which owes its very existence to the Act. With respect, we do not think that the reasoning contained in that decision applies to the present cases for the important reason that none of the points now raised before us had been raised, nor considered in that decision. It is not the case in these petitions that the assessee availed of the entire machinery provided for in the Act before the orders in question became final.

It is next argued by the learned counsel for the petitioners that section 16-A of the General Sales Tax Act takes away the right of the revisional jurisdiction of the Sessions Court or the High Court vested in it under sections 435 and 439, Criminal Procedure Code and in so far as this enactment, namely, the General Sales Tax Act has not been reserved under section 107 of the Government of India Act, 1935, for the assent of the Governor-General which now corresponds to Article 254 of the Constitution section 16-A of the Act must be held to be *ultra vires* of the State Legislature. The Criminal Procedure Code has been declared to be the existing law, as already observed, in pursuance of Article 372 of the Constitution, and criminal justice is an item included in the Concurrent List of the Seventh Schedule. The State Legislature, no doubt, has the right to legislate on the subject of criminal justice, but the argument is that, in so far as section 16-A takes away the revisional jurisdiction of the Sessions Court or of the High Court, as the case may be, by enacting that the validity of the assessment order, or the liability of the assessee to pay the same, shall not be questioned in any criminal Court, it is a provision repugnant to the provisions of the Criminal Procedure Code and must be held to be void on account of repugnancy. In order that it should be held valid, it should have been reserved for the consideration of the President and his assent should have been obtained before it became law to prevail in the State. There is nothing before us to show that section 16-A of the General Sales Tax Act has been, at any time, reserved for the assent of the Governor-General under section 107 of the Government of India Act, 1935, then in force or under Article 254 of the Constitution at any subsequent date. It cannot be disputed that actually section 16-A of the General Sales Tax Act affects the jurisdiction of the Sessions Court or the High Court, for, if that section of the Act is to be taken as operative, the accused assessee will not be entitled to prefer any revision against the order of the Magistrate under section 15 (*b*). But as sections 435 and 439 of the Criminal Procedure Code stand, the accused has the right even in quasi-criminal proceedings, to take up the matter before the Sessions Court or the High Court as the case may be and no valid reason

1. (1952) 2 M.L.J. 598.

is shown as to why such a valuable right should be denied to the assessee when he is convicted and fined under section 15 (*b*) of the Act. Therefore, in our view, inasmuch as section 16-A has the effect of depriving the accused of his right under these sections of the Criminal Procedure Code it must be held to be repugnant to the existing law, *viz.*, the Criminal Procedure Code.

If it was the idea of the Legislature that a subordinate tribunal employed by the Act for purposes of enforcing the assessment orders of taxing authorities should not be charged with the onerous duty of deciding constitutional questions or on the validity of enactments in relation to constitutional rights, then it was open to the legislature to have enacted a section in the Act to the effect that when such questions were raised by the assessees they should be referred to the Court of highest jurisdiction in the State for decision. Such a provision exists in the Criminal Procedure Code itself, (*viz.*, section 432) for enabling the Subordinate Courts of Criminal Jurisdiction to make references to the High Court when necessity arises and if there had been no section like section 16-A in the General Sales Tax Act, possibly, the criminal Courts would be entitled to resort to that section of the Criminal Procedure Code, when questions of the kind now in controversy arise. But the existence of section 16-A bars the Courts acting under section 15 (*b*) from resorting to the procedure for reference and to that extent also we have to hold the enactment of section 16-A of the Act should be considered to be repugnant and void, as it hits against the rights of the accused under the Criminal Procedure Code and against the fundamental principles of criminal justice.

For all these reasons set forth in the foregoing paragraphs of this judgment, we are of the opinion that section 16-A of the Madras General Sales Tax Act is *ultra vires* of the Constitution and of the provisions of the Criminal Procedure Code. Such being the case, the convictions of the petitioners will have to be held illegal. The convictions and sentences of the petitioners are accordingly set aside.

R.M. ——— *Convictions and sentences set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE BALAKRISHNA AYYAR AND MR. JUSTICE BASHEER AHMED SAYEED.

N.V. Vaidyanatha Ayyar and another .. *Appellants**

v.

The Indian Bank, Ltd., Tiruchirappalli, by its Secretary (Decree-holder) and others. .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 90 and Proviso—Sale of immoveable property belonging to a limited company in execution of a decree—Application to set aside the sale by a share-holder of the company—If maintainable—Demand for security under Proviso to rule 90—When could be made.

A shareholder of a company is no doubt interested in the property of the company in which he holds shares. But that does not mean that every shareholder of a company who apprehends that the property of the company is being disposed of in execution of a decree, is entitled to apply to the Court under Order 21, rule 90, Civil Procedure Code. The property sold being the property of the company no individual shareholder has a *locus standi* to apply for setting aside the sale. The shareholder's only right will be to seek the remedies provided under the Indian Companies Act.

Once a petition to set aside a sale under Order 21, rule 90, Civil Procedure Code, has been admitted, the Court cannot thereafter call upon the petitioner to furnish security. Whether a petition under the said order has been admitted or not would depend upon the facts. When the Court orders notice to the other side on the petition it normally means that the Court has applied its mind to the petition and decided to hear the petitioner and the opposite side. That would be normally evidence that the petition has been admitted, in the absence of evidence to show any contrary intention.

Appeals against the order of the Court of the Subordinate Judge of Tiruchirappalli, dated the 12th April, 1954 and made in E. A. No. 585 of 1954, and in E.A. No. 574 of 1954 respectively in E.P. No. 642 of 1953 in O.S. No. 132 of 1950.

* A.A.O. Nos. 316 and 387 of 1954. 10th December, 1954.

S. S. Ramachandra Aiyar for Appellants.

S. Ramachandra Aiyar, P. S. Srisailam, C. R. Pattabiraman and *R. Ramasubbu Aiyar* for Respondents.

Judgment of the Court was delivered by

Balakrishna Ayyar, J.—The property which forms the subject-matter of these proceedings is a building on Macdonald's Road, Tiruchirappalli Cantonment. A limited liability company, called the Tiruchinopoly Automobiles, Ltd., owned that building and was doing its business there. The Vasudeva Funds, Ltd., a banking concern in Tiruchirappalli, lent Rs. 50,000 to the Automobiles, Ltd. The date when the loan was made was not mentioned to us, but it must have been some time prior to April, 1948. In that month, the Indian Bank, Ltd., lent a sum of Rs. 1,00,000 to the Automobiles, Ltd., on the mortgage of this and other properties. The Indian Bank sued on the mortgage in its favour, and, on 12th December, 1950, obtained a decree for Rs. 1,05,000 and odd. On 28th September, 1951, the Vasudeva Funds obtained a decree for Rs. 49,000 and odd. Sometime before 2nd December, 1953, here too the date was not mentioned to us, the Indian Bank filed an execution petition for the sale of the hypotheca. While that execution petition was pending, the Vasudeva Funds brought the property to sale and at a Court sale held on 21st December, 1953, it purchased the property for Rs. 11,005. This purchase was, of course, subject to the mortgage in favour of the Indian Bank. The sale of the property in execution of the decree which the Indian Bank had obtained was proclaimed for 24th February, 1954. On that date, the Vasudeva Funds filed E.A. No. 360 of 1954 for adjournment of the sale by three months. But that application was dismissed. The property was then sold and purchased by Chellappa Chettiar for Rs. 55,000. On 24th March, 1954, the Vasudeva Funds filed E.A. No. 574 of 1954 for setting aside the sale on various grounds. At the same time, it filed E.A. No. 575 of 1954 praying that the personal security of the petitioner be accepted and the petition for setting aside the sale proceeded with. Both the applications were opposed. Over the date 26th March, 1954, the following appears in the notes paper of E.A. No. 574 of 1954 :

"The petitioner prays to set aside the sale held on 24th February, 1954 and posted for confirmation to 8th April, 1954. Personal Security offered. Notice 5th April, 1954."

This part of the note appears to be in the handwriting of an officer of this Court and below that the initials of the Subordinate Judge appear. The notes paper shows that on 5th April 1954, the notice ordered on 26th March, 1954, having been given counter was filed, and the petition was ordered to be taken up on 6th April, 1954. On that date the petitioner was ordered to deposit cash or furnish security of immoveable property by 10th April, 1954. That day the Judge was on leave and so the petition was adjourned to 12th April, 1954. On that date, the petition to set aside the sale was dismissed on the ground that security as ordered was not furnished.

Meantime, that is to say, on 26th March, 1954, one Vaidyanatha Iyer, a shareholder in the Tiruchinopoly Automobiles, Ltd., filed E.A. No. 584 of 1954 to set aside the sale. Among others, he urged the ground that the Managing Agent of the Tiruchinopoly Automobiles, Ltd., had been acting in fraud of the company and that Chellappa Chettiar the Court auction-purchaser, was his own nominee. At the same time, a separate application for accepting personal security was filed. On that, notice was ordered to 5th April, 1954. On 5th April, 1954, the petition was ordered to be called on 6th April, 1954. The petition was then adjourned to 10th April, 1954 and re-posted on that date to 12th April, 1954. This petition too was dismissed on the ground that security was not furnished as ordered.

Against the orders dismissing the two petitions the present appeals have been filed. C.M.A. No. 316 of 1954 has been filed by Vaidyanatha Iyer and C.M.A. No. 387 of 1954 by the Vasudeva Funds, Ltd. The former may be first disposed of.

Mr. C. R. Pattabiraman the learned advocate for the Indian Bank took the objection that the petitioner, Vaidyanatha Iyer, is only a shareholder in the Tiruchinopoly Automobiles, Ltd., that the property which was sold was the property of the Automobiles, Ltd., and not of the petitioner and that therefore he has no *locus standi* in the matter at all. On the other side, the reply was this. The first paragraph of Order 21, rule 90, Civil Procedure Code, runs as follows :

"Where any immoveable property has been sold in execution of a decree, the decree-holder or any person entitled to share in a rateable distribution of assets or whose interests are affected by the sale, may apply to the court to set the sale aside. . . . . ."

The petitioner, being a shareholder in the company is a person whose interests are affected by the sale and he is therefore entitled to object. Reference was made to certain well-known cases. The earliest of these is *Hoole* v. *Great Western Railway Company*[1] where it was held,

"an individual member of a corporation may maintain a bill in his own name, without suing on behalf of other persons as well as himself, to restrain the corporation from doing an act which is *ultra vires*.

The next case is *Burland* v. *Earle*[2]. The second paragraph of the head-note to the report runs as follows :

"The company must sue to redress a wrong done to it ; but if a majority of its shares are controlled by those against whom relief is sought, the complaining shareholders may sue in their own names, but must show that the acts complained of are either fraudulent or *ultra vires*."

The third case is *Vadilal* v. *Manecklal*[3]. The plaintiff there was a shareholder of the defendant company. He alleged that the firm of the first defendant, as agents of the company, had been guilty of fraud and that it had taken advantage of its fiduciary position to obtain pecuniary advantages for itself. The plaint was filed on March 7, 1919, and on April 1, 1919, an extraordinary meeting of the defendant company was held at which the plaintiff's suit was repudiated and the company affirmed the course of dealings which the managing agents had taken. At that meeting, the plaintiff was the sole dissentient. The trial Court held that the plaintiff could not maintain the suit, since the majority of the company did not desire the action to be brought. On appeal, the decision was reversed and the suit was remanded for re-trial. Marten, J., observed :

"Where fraud is alleged and where consequently it is alleged that the suit is within one of the recognised exceptions to the principles laid down in *Foss* v. *Harbottle*[4], it will, I think, in general be found that the case is allowed to go to trial to ascertain the facts before it is finally determined whether the action of the majority can in fact bind the minority."

It was stated on behalf of the appellant that the property of the company had been sold to Chellappa Chettiar at an unconscionably low price as a result of collusion between him and the managing director of Tiruchinopoly Automobiles, and that if the petitioner is not permitted to intervene, the company would be put to loss and through the company the petitioner also. On the other side, Mr. Pattabiraman argued that the contention of counsel for the appellant runs counter to all established legal notions about the position of a limited liability company. A shareholder is not in any sense of the word an owner or part owner or co-owner of any of the properties of the company. The legal ownership of the property is vested in the company and only in the company. The company can act only through its accredited representatives—accredited in the manner prescribed by its constitution. If an individual shareholder feels that the managing directors are acting in fraud of the company or otherwise to its and his detriment, teps must be taken in the manner provided in the constitution of the Company and the Companies Act. He referred in this connection to the decision in *Charanjitlal Chowdhuri* v. *The Union of India*[5]. On page 898 it is stated :

"The fundamental rights guaranteed by the Constitution are available not merely to individual citizens but to corporate bodies as well except where the language of the provision or the nature of

1. (1867) L.R. 3 Ch. App. 262.
2. L.R. (1902) A. C. 83.
3. (1924) I.L.R. 49 Bom. 291.
4. (1843) 2 Hare 461.
5. (1951) S.C.J. 29 ; 1950 S.C.R. 869 (S.C.).

the right compels the inference that they are applicable only to natural persons. An incorporated company, therefore, can come up to this Court for enforcement of its fundamental rights and so may the individual shareholders to enforce their own ; but it would not be open to an individual shareholder to complain of an act which affects the fundamental rights of the company except to the extent that it constitutes an infraction of his own rights as well. This follows logically from the rule of law that a corporation has a distinct legal personality of its own with rights and capacities, duties and obligations separate from those of its individual members. As the rights are different and inhere in different legal entities, it is not competent to one person to seek to enforce the rights of another except where the law permits him to do so."

Again on page 899 :

"It is settled law that in order to redress a wrong done to the company, the action should *prima facie* be brought by the company itself".

Again on page 930 :

"In my opinion, although a shareholder may, in a sense, be interested to see that the company of which he is a shareholder is not deprived of its property, he cannot, as held in *Darnell* v. *Indiana*[1], be heard to complain, in his own name and on his own behalf, of the infringement of the fundamental right to property of the company for, in law, his own right to property has not been infringed as he is not the owner of the company's properties. An interest in the company owning an undertaking is not an interest in the undertaking itself. The interest in the company which owns an undertaking is the "Property" of the shareholder under Article 31 (2), but the undertaking is the property of the company and not that of the shareholder and the latter cannot be said to have a direct interest in the property of the company. This is the inevitable result of attributing a legal personality to a corporation."

It seems to us that the preliminary objection must prevail.

A shareholder is no doubt interested in the property of the company in which he holds shares : if the property is not properly looked after and administered, the shareholder would naturally suffer in his pocket. But this does not mean that every shareholder, who apprehends that the property of the company is being mismanaged or is even fraudulently disposed of, is entitled to come in the manner the petitioner has done. It is easy to see that if such a course were permitted, the business of the company can be brought to a complete standstill when differences of opinion exist among the members of the company. One legal effect of incorporation is to vest the ownership of the property in the company, which acquires a separate legal existence. The property has to be managed by the directors, subject to the control of the shareholders and the provisions of the constitution of the company. If the directors misbehave, they can be removed. If they are able to get the backing of the majority and threaten to use the majority to oppress the minority, that will be an occasion when the Court will interfere. The petitioner alleges that the managing director has perpetrated a fraud on the company in collusion with Chellappa Chettiar. In respect of such a conduct, the petitioner has a specific remedy provided under section 153-C of the Indian Companies Act. The first sub-section of it runs as follows :

"Without prejudice to any other action that may be taken, whether in pursuance of this Act or any other law for the time being in force, any member of a company who complains that the affairs of the company are being conducted—

(*a*) in a manner prejudicial to the interests of the company, or

(*b*) in a manner oppressive to some part of the members (including himself),

may make an application to the Court for an order under this section."

And then elaborate provisions follow as to what the Court might do on such an application being made. If the allegation of the petitioner that there has been fraudulent alliance between the managing director and Chellappa Chettiar is true, he can get sufficient and adequate remedy by bringing an application asking that the property which Chellappa Chettiar has acquired be brought back and returned to the company.

In the result C.M.A. No. 316 of 1954 is dismissed with costs.

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1. (1912) 226 U.S. 388.

C.M.A. No. 387 *of* 1954.

We have already stated that the application filed by the Vasudeva Funds for setting aside the sale was dismissed on the ground that security as ordered was not furnished and that this is an appeal by the Vasudeva Funds, Ltd., against that order. The arguments for the appellant may be thus summarised. The first proviso to Order 21, rule 90, Civil Procedure Code, as it applies to Madras runs :

> " Provided that the Court may, after giving notice to the applicant, call upon him before admitting the application either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or that realised by the sale, whichever is less, or to deposit such amount in Court."

By reason of this proviso the Court has authority to call for security only before admitting the petition to set aside the sale ; but once the petition is admitted, it has no jurisdiction whatsoever to demand security. In the present case, E.A. No. 574 of 1954 which was filed to set aside the sale, was admitted by the Court on 26th March, 1954, and after that it had no jurisdiction to insist on security in any form. Reference was made to *Narasimha Pattamahdevi* v. *Annan Naidu*[1], and *Chidambaram Pandaram* v. *Lakshminarayana Chettiar*[2].

In the former case, Mockett, J., referred to a Full Bench decision in *Brij Behari Lal* v. *Firm Srinivas*[3], where it was stated,

> " Admission of the application presumably means the state when the Court decides to issue notice upon such application to the opposite parties concerned,"

and added his respectful agreement with that view. He went on :

> " 'Admission' to my mind conveys that point of time when 'an application or suit, as the case may be' is received into Court and accepted for decision, and that stage is when notice is given to the opposite side."

The facts in the latter case were these : Two petitions were filed in Court, one to set aside a sale and the other to dispense with security. The advocate on the other side was actually heard before orders were passed on both the petitions. Thereafter, the Court called for security and since that was not furnished, the petition to set aside the sale was dismissed. On appeal, Pandrang Rao and King, JJ., allowed the appeal on the ground that the Court had no jurisdiction to make the order it did. They observed :

> " It is quite possible of course that the lower Court did not intend really to admit the petitions; but if in law the procedure adopted by it has necessarily the effect of having brought about the admission of the petitions, it is not possible for us now to regard them as not having passed the admission stage when the order to give security was made."

On the other side, the decision in *Venkatalingama Nayanim* v. *Venkata Narasimha Nayanim*[4], was cited. The facts there were as follows: On the 27th October, 1939, the appellant applied under Order 21, rule 90, Civil Procedure Code to have a sale set aside. The Subordinate Judge ordered that he should furnish security and granted him one week for the purpose. On 31st October, the appellant filed another application asking for more time for furnishing security. Time was extended to the 11th November. On that date, a draft security bond was filed. On the 15th November, without passing any orders in regard to the adequacy of the security tendered or to the necessity for furnishing any registered security bond, the Court issued notice to the opposite side. When the respondent appeared, he took the objection that the property offered as security was not sufficient. The security was then tested and found to be wholly inadequate. The Court then dismissed the application to set aside the sale without considering it on its merits, on the ground that the appellant failed to furnish security. The petitioner then appealed to this Court. Before King and Happell, JJ., the decision in *Venkatalingama Nayanim* v. *Venkata Narasimha Nayanim*[4], was cited and it was argued that the Court had no jurisdiction, after having admitted the petition, to insist on security. The learned Judges held,

1. (1940) 1 M.L.J. 350.
2. (1941) 2 M.L.J. 109.
3. (1939) I.L.R. 18 Pat. 327 (F.B.).
4. (1942) 1 M.L.J. 403.

that the mere fact that notice was issed was not conclusive on the question whether the petition had been admitted. They observed :

" After all, in spite of the incidental remark made in the Judgment in *Chidambaram Pandaram* v. *Lakshminarayana Chettiar*[1], the essential element in the admission of an application is the act of the Court admitting it. As was there held, if some act has been done which in law can amount to nothing else than the admission of an application, then the application must be deemed to be admitted, even if the Court did the act without really applying its mind to its consequences. But whereas in this case, we are able upon the facts to ascribe to the Court a quite different intention when it issued the notice, then it would be absurd to hold that there is any principle of law by which the court should be deemed to have done what it consciously did not intend to do. It is clear therefore to us that in issuing notice, the Court did not intend to deprive itself of the power of deciding whether the security to be eventually furnished by the petitioner was adequate or not, and when it was found that the security was not adequate, the Court was entitled under rule 90 as now amended to dismiss the application without any further consideration of its merits."

These decisions need not be regarded as being necessarily in conflict. All of them concur in the view that once a petition to set aside a sale is admitted, the Court cannot thereafter call upon the petitioner to furnish security. Where they appear to differ is this : In the first two cases it was held that when a petition is numbered and notice thereon is ordered, that would be conclusive evidence that the petition has been admitted. In the last case, it was held that this is not so and that where it is otherwise clear that the Court did not intend to admit the petition, the circumstance that notice was ordered will not have the effect of admitting the petition. Whether a petition has been admitted or not would therefore depend upon two circumstances in each case.

Now, the numbering of a petition is really an act of a ministerial officer of the Court. When a petition is presented, it is checked in the office of the Court, and, if it is in order, it is automatically numbered. No judicial process is involved at that stage. But, when notice is ordered to go, it normally means that the Court has applied its mind to the petition and decided to hear the petitioner and the opposite side. Normally, that would be cogent evidence that the petition has been admitted. But, there may be cases where, notwithstanding the fact that notice has been ordered to issue, it is clear that such a result was not intended. What is it that happened in the present case ? On behalf of the respondents it was explained that along with the petition to set aside the sale, another petition was filed praying that personal security be accepted and that notice was ordered to go on both these petitions. Therefore, the reasonable conclusion—so it was said—is that the Court decided to admit the petition to set aside the sale only provisionally and subject to such orders as it might pass on the petition to accept personal security. That, of course, is not an unreasonable way of looking at the matter. But, one difficulty in accepting that view is that no words were used to indicate that the admission of the petition to set aside the sale was provisional. The order was merely "Notice" and no qualifying words were used. We have remarked that the word "Notice" in E.A. No. 574 of 1954 appears to be in the handwriting of a ministerial officer of the Court and it is, therefore, possible to say that when ordering notice the Court did not apply its mind to the question before it, *viz.*, whether security should be insisted on before admitting the petition, or whether the petition should be admitted provisionally and subject to the result of the enquiry on the petition to accept personal security. But, whether the Court applied its mind or not, the fact remains that an order of the Court did go calling upon the parties to appear and answer to the petition. The effect of that order cannot be whittled down by the circumstance that the order was suggested by the office. We must proceed on the basis that the learned Subordinate Judge accepted the suggestion of the office and made it an order of the Court. Normally, the effect of an order issuing notice is to admit the petition, and we are unable to find anything in the circumstances of this case sufficient to rebut the inference that normally follows from such an order.

It was pointed out on behalf of the respondents that when the petitions came on for hearing, no objection was taken on behalf of the petitioner in E.A. No. 574 of

1. (1941) 2 M.L.J. 109.

1954 that his petition had been admitted and that, therefore, the Court had no jurisdiction to insist on security. Now, it will be realised that the petitioner could not have, consistently with what he had done previously, taken that objection. If any such objection had been taken, the opposite side would have fastened on it as clear evidence of want of *bona fides* in the petitioner. We are inclined to think that what actually happened was that the learned Subordinate Judge, at the time he ordered that notice should be issued on both the petitions, did not bear in mind the requirement of Order 21, rule 90, Civil Procedure Code, that the petitioner could not be required to furnish security after the petition had been admitted.

Mr. Ramachandra Iyer the learned advocate for Chellapa Chettiar raised another point, and in support of it he referred to the decisions in *Gholam Murteja Chowdhry* v. *Goluck Chunder Roy*[1] and *Makudam Mohammad* v. *Mohammad Sheik Abdul Kadir*[2]. The facts in the first of these two cases appear to have been as follows: The plaintiffs obtained a decree in the trial Court. On appeal, the Court ordered a remand. This order of remand was made with the consent of the plaintiffs. After remand, the Court of first instance dismissed the suit. An appeal taken by the plaintiffs failed. The plaintiffs then went up to the High Court, and the point was taken that the order of remand was illegal. The Court repelled the contention and observed:

> "We think that it is now too late for the special appellant to take this objection. He should have done so before consenting to go down on remand. When a party submits, without making all the resistance in his power, to the taking of any material step in the proceedings, he cannot afterwards be heard to complain of the legality of the step as an integral part of the proceedings."

The facts in the second case were these: The question in the suit was whether the plaintiff was exclusively entitled to a house or whether the second defendant was jointly entitled to it. After all the evidence was taken, both the parties endorsed on the plaint that if the key produced by the second defendant would open the door of the house and the second defendant's articles were found in the house then the suit should be dismissed. But that otherwise the suit should be decreed. The Commissioner sent by the Court found that the key produced by the second defendant would not open the door and that all the articles in the house belonged to the plaintiff. After the Commissioner submitted his report, the defendant wanted to go back upon his endorsement. This he was not allowed to do. It was observed:

> "when a party invites the Court to adopt a procedure which is not contemplated by the Code of Civil Procedure and is in fact a procedure *extra cursum curia*, he cannot turn round and say that the Court is to blame for adopting the very procedure which he invited the Court to follow. There is such a thing as estoppel apart from the question of adjustment and that the doctrine of estoppel, would apply to a party who attempts to blow hot and cold in this fashion".

On the basis of these decisions Mr. Ramachandra Iyer strongly argued that the appellant is estopped from questioning the order of dismissal for failure to furnish security as ordered.

We consider that both these decisions are distinguishable. If, after having offered personal security, the petitioner had gone back upon that offer and declined to put into Court an appropriate document on the basis of which his personal security could be enforced, then both these decisions would, apply, and it can be properly said that after having invited the Court to proceed on a certain basis he could not with impunity repudiate it. But this is not what happened here. The Court declined to accept the personal security and required the petitioner to furnish either cash security or the security of immoveable property. That of course is a very different thing. A person may be willing and able to furnish personal security, but he may not be able to deposit cash or to furnish security of immoveable property. The variation which the Court ordered in the nature of the security to be furnished was a very material one and because of that it would not be right to say that there is any estoppel against the petitioner. As we have already stated before, we must consider that E.A. 574 was actually admitted. Thereafter the Court had no jurisdiction to insist on security in the form it did.

1. (1865) III Suth. W.R. (Civil Rulings) 121. 2. (1936) 71 M.L.J. 281.

In the result, the appeal succeeds and the order of the Court below dismissing the application to set aside the sale is set aside. The execution petition will go back to be disposed of according to law and on its merits. We do not think that in the circumstances of this case there should be any order as to costs.

R.M. ——— *C.M.A. No.* 387 *of* 1954 *allowed and C.M.A. No.* 316 *of* 1954 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Shanker and Company by its proprietors and another .. *Petitioners**

v.

The State of Madras represented by its Chief Secretary .. *Respondent.*

Press (Objectionable Matter) Act (LVI of 1951), *sections* 3 (vi) *and* 11—*Order of forfeiture under—Notification should specify the nature of objectionable matter—Notice to party before publication of the notification—If necessary—Party if entitled to copy of the certificate of Advocate-General.*

Constitution of India (1950), *Article* 19 (1) (a) *and* (g)—*If offended—' Obscene '—Meaning of—Facts about sex—If* per se *obscene.*

The Press (Objectionable Matter) Act, 1951, is an Act intended to provide against the printing and publication of incitement to crime and other objectionable matter. Having regard to the fact that section 3 (vi) of the Act mentions more than one ground on which a book could be deemed to contain objectionable matter and also having regard to the language of section 11 of the Act, *viz.*, that it makes it incumbent on the Government to state the grounds for the order of forfeiture the notification stating merely that a book contains objectionable matter within the meaning of clause (vi) of section 3 of the Act is defective as it does not specify the nature of the objectionable matter contained in the book.

In view of the ample safeguard provided by section 24 of the Act to canvass the correctness and propriety of the action of the Government by applying to the High Court, which is given power to examine the case on the merits no notice is necessary to the party concerned before the publication of a notification by the Government under section 11 of the Act nor is it necessary to furnish the party with a certificate of the Advocate-General as that is only required as a condition precedent to the taking of action by the Government. If in any particular case it is alleged that no certificate of the Advocate-General has been obtained by the Government then it is for the Government to prove that such a certificate was given.

Shantilal Vadilal v. *Bombay State*, (1954) 56 Bom. L.R. 709, referred.

The provisions of section 11 of the Act amount only to a reasonable restrictions in the interests of the general public and as such they are not opposed to Article 19 (1) (*a*) and (*g*) of the Constitution. The section is saved by sub-clauses (2) and (6) of Article 19.

Krishna Sharma v. *State of Saurashtra*, A.I.R. 1954 Saurashtra 28 and *Gopal Das* v. *State of Assam*, A.I.R. 1954 Assam 193, referred.

The term obscene is not defined in the Act. In one sense there is a certain amount of overlapping in the qualities described as indecent and obscene. But it is possible to give instances of words or representations which are indecent being obscene.

The classic definition of obscenity as enunciated in *Queen* v. *Hicklin*, (1868) L.R. 3 Q.B. 360 can be accepted even to-day, though it is necessary to decide whether a particular book in question satisfied the test to-day and not whether it would have satisfied that test in 1868 when *Queen* v. *Hicklin* was decided.

The Queen v. *Martin Blake, Warburg*, (1954) 2 All E.R. 683, referred and approved.

Facts about sex are not by themselves indecent or obscene. But a book on coital technique which has the effect of suggesting thoughts of a libidinous character to the mind of the reader will fall within the definition of obscenity. In this there is no distinction between young and old or persons who are married or unmarried.

In prosecutions for the sale of indecent literature, the character of the books which are the subject-matter of the prosecution is to be ascertained by the examination of the books themselves and evidence designed to show that other books, not materially different in character from those alleged to be indecent or obscence, are in circulation should not be considered.

Petition under section 24 of the Press (Objectionable Matter) Act, 1951 (Central Act LVI of 1951) praying that in the circumstances stated in the affidavit

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*C.M.P. No. 4655 of 1954. 28th January, 1955.

filed therewith, the High Court will be pleased to set aside the order of the Government of Madras in G.O. No. Ms. 329, Public (General-B) dated 6th March, 1954 and published in Fort St. George Gazette, dated 10th March, 1954, Part II, page 243 declaring the book "Kalavikkalai" in Tamil by R.P.M. Ghani, printed at Rajan Electric Press and published by Shanker and Company) forfeit to the Government under section 11 of the Central Act LVI of 1951 on the ground that it contains objectionable matter within the meaning of section 3 (vi) of the said Act.

R. Mathrubutham for Petitioners.

The Advocate-General (*V. K. Tiruvenkatachari*) and the Public Prosecutor (*V. T. Rangaswami Ayyangar*) for Respondent.

The Order of the Court was delivered by

Rajamannar, C.J.—This is a petition under section 24 of the Press (Objectionable Matter) Act, 1951, which will hereinafter be referred to as the Act, to set aside an order of the Government of Madras, G.O.Ms. 329, Public (General-B) dated 6th March, 1954, published in Fort St. George Gazette, dated 10th March, 1954, declaring the Book "Kalavikkalai" in Tamil, printed at Rajan Electric Press and published by the petitioner Company, forfeit to the Government under section 11 of the Act. The notification in question runs thus :—

> "Whereas the Tamil Book entitled "Kalavikkalai" purporting to be a translation of an Arabic work written by Sheikum Nafsawi, translated by Sri R.P.M. Ghani, printed at Rajan Electric Press, Madras and published by Shanker & Co., Madras, contains objectionable matter within the meaning of clause (vi) of section 3 of the Press (Objectionable Matter) Act, 1951 (Central Act LVI of 1951).
>
> And whereas the Advocate-General, Madras, has granted a certificate under section 11 of the said Act that the said book contains objectionable matter within the meaning of section 3 of the said Act ;
>
> Now, therefore, in exercise of the powers conferred by section 11 of the said Act, the Governor of Madras hereby declares that all copies wherever found, of the aforesaid book and all other documents containing copies, reprints translations of, or extracts from the same issue, shall be forfeited to the Government on the ground specified in the first paragraph of this notification."

The petitioner is a firm carrying on the business of publishing and printing books under the name of Shanker & Company. According to the affidavit of D. K. Swami, one of its proprietors, the main business of the firm consists in the publication and sale of books on the scientific aspects of sex. The above book was published by them in April, 1953 and purports to be a translation and adaptation of an original work in Arabic by one R.P.M. Ghani. 3,250 copies were printed in the first edition. The book is avilable in two different editions, one with illustrations at Rs. 6 a copy, and the other without illustrations at Rs. 4 a copy. In the affidavit, it is stated that the book is sold only to *bona fide* customers who are adults and who are in need of the book genuinely for their personal use only, and it is not exhibited in bookstalls nor sold openly. The petitioner complains that on 10th March, 1954, the police came and seized all the copies of the book remaining undisposed of in pursuance of the order above mentioned.

Certain general objections were taken to the validity of the order of the Government in question, namely, that the grounds on which the State Government considered the book to contain objectionable matter were not specified, that the petitioner was not given any opportunity to show cause against the order, that the certificate purported to have been issued by the Advocate-General was not disclosed, that the said order is contrary to and in excess of the statute, and that the action of the State Government is opposed to Article 19(1) (*a*) and (*g*) of the Constitution. In addition to these objections, the affidavit also deals with the merits and asserts that the book does not contain any objectionable matter, that it is a scientific work on a special branch of knowledge, *i.e.*, sex, and that its circulation is strictly limited. It is further alleged that the matter contained in the book is contained in several publications which have already been published and which are in circulation

without any action being taken by the Government, and therefore the Government were not justified in treating this book alone as objectionable. On behalf of the State, a counter-affidavit was filed by the Deputy Secretary to Government, Public (General), controverting the main allegations of fact and law contained in the affidavit filed on behalf of the petitioner. It was stated that the notification cannot be challenged on the ground of vagueness or indefiniteness, as it specifically refers to section 3 (vi) of the Act, that the order of the Government is not illegal or in excess of the statute, that it is not opposed to Article 19(1) (*a*) and (*g*) of the Constitution, and that after the certificate had been granted by the learned Advocate-General the petitioner was not entitled to contend that the book does not contain any objectionable matter. It was further denied that the book was a scientific work. It was also pleaded that the fact that there might be other books which are obscene and vulgar against which action has not been taken is not relevant, so far as the present application was concerned.

The Press (Objectionable Matter) Act, 1951, is an Act intended to provide against the printing and publication of incitement to crime and other objectionable matter. Section 3 defines the expression "objectionable matter" for the purposes of the Act, as meaning *inter alia* any words, signs or visible representations which are "grossly indecent or are scurrilous or obscene or intended for blackmail" (*clause* vi).

Explanation II to the section says :—

"In judging whether any matter is objectionable matter under this Act, the effect of the words, signs or visible representations, and not the intention of the keeper of the press or the publisher of the newspaper or news-sheet, as the case may be, shall be taken into account."

Section 11, under which the notification in question has been published runs thus :—

"11. *Power of Government to declare certain publications forfeited*—The State Government, may, on the certificate of the Advocate-General or the principal law officer, as the case may be, of the State or of the Attorney-General of India that any issue of a newspaper or news-sheet or any book or other document, wherever made, contains any objectionable matter, by notification in the Official Gazette, stating the grounds for the order, declare that every copy of such issue of the newspaper or news-sheet or of such book or document shall be forfeited to the Government."

Section 24 enables any person aggrieved by an order of forfeiture passed by the State Government under section 11 of the Act to apply to the High Court to set aside such order, within sixty days of the date of such order. It is under this section that the present petition has been filed.

When the petition first came on for hearing, we pointed out to the learned Advocate-General who appeared on behalf of the State, that, having regard to the fact that section 3 (vi) of the Act contained more than one ground on which the book could be deemed to contain objectionable matter and also having regard to the language of section 11, namely, that it makes it incumbent on the State Government to state the grounds for the order of forfeiture, the notification as it stands was defective, in that it simply says that the book contains objectionable matter within the meaning of clause (vi) of section 3 of the Act. The learned Advocate-General very properly agreed but submitted that in the present case no injustice had resulted from this omission, as the petitioner was well aware of the grounds on which the order was passed. He also intimated that in future the Government would take care to specify the grounds in notifications issued under section 11 of the Act. At the next hearing of the petition, a supplemental affidavit was filed on behalf of the State, in which there is a detailed analysis of the contents of the book and an indication of the grounds on which the book could be characterised as grossly indecent and obscene. To this supplemental affidavit, was appended an English translation of certain passages in the book as illustative of the general tenor of the book, which it was stated, was to have a tendency to create lustful and indecent ideas in the minds of persons into whose hands it may fall. Particular mention was also made of the illustrations depicting various coital postures. It was once more denied that the book was a scientific treatise.

We agree with the learned Advocate-General that though the notification may be said to be defective in that it does not specify the nature of the objectionable matter contained in the book, the petitioner has not been taken by surprise, as he was obviously aware on what ground the Government had declared that it contained objectionable matter. We also agree with him that objection that no notice was given to the petitioner before the notification was published is without force, in view of the ample safeguard provided by section 24 of the Act to canvass the correctness and propriety of the action of the Government by applying to this Court, which is given the power to examine the case on the merits. Vide *Shantilal Wadilal* v. *Bombay State*[1]. We are also clearly of opinion that the petitioner was, and is, not entitled to a copy of the certificate given by the Advocate-General, as that is only required as a condition precedent to the taking of action by the Government. Of course, in a particular case, if it is alleged that no certificate of the Advocate-General had been obtained by the Government, then it is for the Government to prove that such a certificate was given.

Learned counsel for the petitioner put forward what we consider as a novel construction of clause (vi) of section 3, namely, that that clause does not cover matter which may ordinarily be held to fall within the categories mentioned therein, namely, indecent, obscene, etc., but that the clause refers only to one particular type of objectionable matter which concerns, and is directed against, persons in public life, especially holding responsible positions in the Government. The only foundation for this argument is the statement of Objects and Reasons for the Bill. It was said that this provision was intended to enable the Government to deal with abuse of persons in authority, which it was intended to put down and that the only action which could be taken against other instances of indecent or obscene publications would be a criminal prosecution under section 292 of the Indian Penal Code. In our opinion, the argument is founded on a patent fallacy. No doubt certain immediate circumstances might furnish the reason for a particular piece of legislation. But on that ground, it is wrong to construe the actual language used in the enactment in a restricted manner so as to confine it to those special circumstances. It is not permissible to construe a statute so as to confine its operation to incidents and circumstances which the Legislature is supposed to have contemplated that the statute would apply to.

An attempt was made by learned counsel for the petitioner to found an argument on the repetition of the word "are" in clause (vi). The argument, so far as we are able to follow it, was that clause (vi) refers to two classes of objectionable matter (1) matter which is grossly indecent, and (2) matter which is scurrilous or obscene or intended for blackmail. This argument practically leads to the result of substituting "and" for "or" in the second part of the clause. The use of the word "are" once again is easily explained. The word "grossly" qualifies only "indecent" and not the later words "scurrilous" or "obscene". We see no substance in this argument of the petitioner.

We can briefly dispose of the contention based on Article 19(1) (*a*) and (*g*) of the Constitution. Article 19 (2) expressly empowers the State to make a law imposing reasonable restrictions on the exercise of the right conferred by clause (*a*) in the interest of decency or morality and in relation to defamation. Likewise, Article 19(6) gives power to the State to make a law imposing in the interest of the general public reasonable restrictions on the exercise of the right conferred by clause (*g*). It cannot be seriously argued that the material provisions of the Act with which we are concerned are not in the interest of decency or morality nor can it be said that they are not reasonable restrictions in the interests of the general public (Vide *Krishna Sharma* v. *State of Saurashtra*[2] and *Gopal Das* v. *State of Assam*[3].

The main and only question of substance in this case is whether the book contains words or visible representations which are grossly indecent or obscene. Having regard to the nature of the book, we think it is sufficient to confine our-

1. (1954) 56 Bom.L.R. 709 at 711.
2. A.I.R. 1954 Sau. 28.
3. A.I.R. 1954 Assam 193.

selves to the expression "obscene". In one sense there is a certain amount of overlaping in the qualities described as indecent and obscene. But it is possible to give instances of words or representations which are indecent without being obscene. The term "obscene" is not defined in the Act. Section 292 of the Penal Code provides for the punishment of sale, distribution, etc. of obscene books and representations, but there is no definition of "obscene" in that Code. The classic definition of obscenity is that given by Cockburn C.J. in *The Queen* v. *Hicklin*[1], who said :

> " . . . . and I think the test of obscenity is this whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

Dealing with the work which was the subject matter of the prosecution, the learned Chief Justice observed :—

> " Now, with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."

There is no reason why that definition which has been accepted to this day in England should not be accepted by us. It is quite true that, as remarked by Stable, J., in *R.* v. *Martin Secker Warburg, Ltd*[2], it is necessary to decide whether the book in question satisfied the test to day and not whether it would have sadisfied that test in 1868, when *R.* v. *Hicklin*[1], was decided. In deciding the question, we are not concerned with the motive of the petitioner in printing and publishing a work. If the book has got the effect of inciting libidinous or lustful thoughts, the test would be satisfied, though the author or publisher of the book might not have intended this effect.

We are clearly of opinion that the book does fall within the definition of "obscene" as given by Cockburn, C.J., even judging from the moral standards of to-day. Learned counsel for the petitioner contended that the book was a scientific treatise on sex. If we were convinced that it was so, we would have without any hesitation held that it is not obscene. But it is impossible to agree with learned counsel for the petitioner that the book only deals with certain aspect of sex in a scientific manner. Facts about sex are not by themselves indecent or obscene. Indeed, a mere account of such facts can be as dull as any narration of facts in biology or geology. A purely scientific description of sexual phenomena is not likely in the least to excite sexual desire. But the book before us is certainly not calculated to give mere dry-as-dust information about sexual matters. There are descriptions which are obviously intended to excite the reader and not merely intended to give information. The passage, for instance, at page 29, a translation of which is given in the appendix to the supplemental affidavit, has nothing scientiffic about it. Nor is the passage at page 67. It is not necessary to say whether there cannot be a treatise on coital techinique which does not have the effect of suggesting thoughts of a libidinous character to the minds of the reader. But we have no doubt whatever that this is not such a work. Throughout the book, there is matter which certainly has a tendency to deprave and corrupt the minds of readers who are likely to yield to sexual excitement. In this, we do not make a distinction between young and old. It appears to us to be equally irrelevant whether the readers are married or un-married. We do not think that marriage by itself ensures morality. An unmarried person may lead a chaste life, whereas a married man may indulge in extreme lust.

Learned counsel for the petitioner cited certain decisions to which we shall briefly refer. *R.* v. *Martin Secker Warburg, Ltd*[2], has no bearing whatever on the question before us. That dealt with a novel depicting a phase of contemporary American life. The learned Judge in his charge to the Jury said :

> " It is at least a book. It is the creation of a human mind and it depicts people created by the author in the environment in which that portion or portions of their lives with which the book deals were spent. You may agree or you may not—I do not know that it is not mere pornographic literature, the filthy, bawdy much that is just filth for filth's sake."

1. (1868) L.R. 3 Q.B. 360 at 371.
2. (1954) 2 A.E.R. 683.

He told them that the fact that the subject-matter of the work was largely the relationship of the two sexes would not render the book obscene. In effect the direction of the learned Judge to the jury was that the book was literature and should be judged as such.

The decision in *Sreeram Saksena* v. *Emperor*[1], dealt with the publication of reproductions which were chosen from books entitled "perfect womanhood", *Sun Bathers*", *etc*. The photographs were of woman in the nude. It was held that the picture of a woman in the nude is not *per se* obscene, and it was not disputed by the prosecution that there was nothing in the pictures which would shock or offend the taste of any ordinary or decent-minded person. We agree with what Akram, J., said :—

> " Unless therefore the pictures are an incentive to sensuality and excite impure thoughts in the minds of ordinary persons of normal temperament who may happen to look at them, they cannot be regarded as obscene within the meaning of section 292, Indian Penal Code."

It is a far cry from the photographs dealt with in that case to the pictures in the book now before us, which clearly would excite libidinous thoughts. The decision of the Lahore High Court in *Emperor* v. *Harnam Das*[2], does not help the petitioner. It related to an Urdu book, in which certain passages were objected to as being obscene. The learned Judges, applying the test of obscenity laid down by Cockburn C.J. in *The Queen* v. *Hicklin*[3], held that the passages were not obscene. In the opinion of the learned Judges, the book was a serious work intended to give advice to married people, and particularly husbands, on how to regulate the sexual side of their lives to the best advantage, that is to say, with a view to promoting their health and mutual happiness. There was no language "calculated to inflame the passions". We take a different view as regards the book now before us.

A book very similar to the present book was the subject of decision in In re *Pandurangan*[4]. It contained pictures of various postures of sexual intercourse with an explanatory note on the opposite page. Somasundaram, J., after referring to the ordinary meaning of the term "obscene" as given in the dictionaries, held that the book fell within the meaning of that word. We are in entire agreement with this decision. We hold therefore, that the book does contain words and representations which are obscene, and therefore the State Government were justified in issuing the notification under section 11 of the Act.

Counsel for the petitioner contended that other publications of a very similar nature are in circulation without any action being taken by the State Government under the Act and that they furnish evidence as to the nature of the present book, namely, that it does not come within the category of section 3 (vi) of the Act. We cannot agree with this contention. It is not a good defence to a charge of theft that other people who have committed thefts have not been prosecuted. We follow, with respect, the decision in *Ragina* v. *Reiter*[5], in which it was held that in prosecutions for the sale of indecent literature, the character of the books which are the subject of the prosecution is to be ascertained by the examination of the books themselves, as they provide the best evidence of their own indecency or obscenity, and that evidence designed to show that other books not materially different in character from those alleged to be indecent or obscene are in circulation should not be considered, since the character of such books is a collateral issue and therefore irrelevant.

On the finding that the book contains objectionable matter as defined in section 3 (vi) of the Act, this application is dismissed.

R.M. ——— *Application dismissed.*

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1. I.L.R. (1940) 1 Cal. 581 : A.I.R. 1940 Cal. 290.
2. A.I.R. 1947 Lah. 383.
3. L.R. (1868) 3 Q.B. 360.
4. (1953) 1 M.L.J. 144.
5. L.R. (1954) 2 Q.B. 16.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P.V. RAJAMANNAR, *Chief Justice* AND MR. *Justice* RAJAGOPALA AYYANGAR.

Navaneetheeswaraswami Devasthanam, Sikkil, represented by its Executive Officer .. *Appellant**

v.

L. K. Ganapathi Tevar .. *Respondent.*

Madras Estates Land Act (I of 1908), *sections* 8 (5) *and* 6 (1)—*Construction of—If conflicting—Possession under—When available.*

The provisions of section 8 (5) of the Madras Estates Land Act provides for its operation notwithstanding any thing contained in the Act which includes the provisions of section 6 (1) of the Act. Section 6 (1) of the Act also provides that the rights conferred by that section is only subject to the provisions of the Act which would include section 8 (5). There cannot therefore be any doubt that section 8 (5) of the Act will have precedence over section 6 (1) in case of any conflict or inconsistency. If a contract admitting a tenant into possession is saved under section 8 (5) it cannot be exhausted or superseded merely by the expiry of the twelve years' period prescribed for entering into contract. Under section 8 (5) of the Act a landlord is given a right for a period of 12 years from the specified date to admit tenants to possession without the latter obtaining statutory occupancy rights. A tenant admitted into possession by a landlord beyond the date specified in section 8 (5), would not be protected by section 8 (5) and would therefore fall within section 6 (1) and confer on the tenant so admitted a staturory right.

Annam Naidu v. *Appa Rao*, (1950) 2 M.L.J. 396, referred.

Appeal against the Decree of the District Court of East Tanjore at Nagapattinam, dated 22nd March, 1949 and passed in Original Suit No 32 of 1947.

T. V. Muthukrishna Aiyar, K. Raja Aiyar and *G. R. Jagadisa Aiyar* for Appellant.

C. A. Vaidialingam, T. Venkatadri, V. S. Rangaswami Aiyangar and *R. G. Rajan* for Respondents.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—The Executive Officer of Sri Navaneetheeswaraswami Devasthanam, Sikkil, East Tanjore, is the appellant in these appeals and the short point that arises for consideration in them is as regards the proper construction of section 8 (5) of the Madras Estates Land Act I of 1908. The village of Sellur belongs to the appellant Devasthanam who is the Ekabokam Mirasdar or the sole proprietor of the village. The question is whether the respondent is entitled to occupancy rights under Madras Act I of 1908. The learned District Judge from whose judgment and decree these appeals are preferred has held that the respondent who is a tenant has such rights and that the civil Courts have no jurisdiction to entertain the suit for eviction.

Certain facts are beyond controversy. The suit inam village was not an "estate" within the meaning of Act I of 1908 as it stood originally but became an " estate " by virtue of the amending Act XVIII of 1936 and the lands in dispute are not " private lands." There had been an earlier litigation in relation to the lands in the village when a suit was filed for the eviction of the then tenants. It was originally numbered as O.S. No. 35 of 1910 on the file of the Sub-Court, Nagapattinam and was transferred to the Sub-Court, Tanjore and renumbered as O.S. No. 4 of 1913. The village was held not to be an " estate " and so the right of occupancy claimed by the tenants was negatived. The right of the landlord trust to evict them was affirmed by the Sub-Court in its judgment, dated 12th January, 1916, which was finally affirmed by this Court in A.S. Nos. 146, 228 and 230 of 1916 on 29th November, 1917. The trust has been in enjoyment of these properties since then by leasing them out to its tenants. While so the properties now in suit were leased to the respondent-defendant under two lease deeds Exhibit A-7 dated, 11th September, 1945, for a period of three years and under Exhibit A-8, dated 27th July, 1946 for a similar period. Each of these lease deeds contains a provision under which the lessee

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*Appeal No. 241 of 1949 and Second Appeal No. 2063 of 1949. 12th January, 1955.

agreed to surrender possession at the end of the term. On the allegation that there had been default in the payment of rent and other breaches of express covenants in the leases enabling the landlord to effect re-entry the landlord claimed to forfeit the leases and issued notice on 9th September, 1947, determining the leases and demanding the surrender of possession of the leased lands. As this was resisted the plaintiff filed the present suit on 17th October, 1947, for possession of the properties and for arrears of rent, mesne profits, etc. The tenant denied the jurisdiction of the Court to adjudicate upon the subject-matter by reason of the provisions of the Madras Estates Land Act as amended by the Madras Act XVIII of 1936 setting up occupancy rights. He also filed a summary suit in the Revenue Court for the grant of a patta to him under the statute. The Revenue Court dismissed this summary suit for the grant of patta by reason of the fact that under section 8 (5) of the Madras Estates Land Act the tenants were not entitled to claim occupancy rights. The defeated ryot took up the matter on appeal to the District Judge. The suit O.S. No. 32 of 1947 by the landlord for eviction and this appeal were heard together. In O.S. No. 32 of 1947 an issue (issue 1) was raised as regards the jurisdiction of the Court which was dependant upon whether the tenant had occupancy rights in the lands by reason of the Madras Estates Land Act. This was heard as a preliminary point and the learned District Judge held that the tenants had acquired such rights by reason of his construction of section 8 (5) of the Act and he therefore directed the dismissal of the suit without considering the other issues in the case. On the same reasoning the learned District Judge also allowed the appeal against the dismissal of the summary suit for the grant of a patta. Appeal No. 241 of 1949 and S.A. No. 2083 of 1949 are by the landlord trust against the decrees in these two proceedings.

The relevant statutory provisions calling for consideration in deciding the case are mainly two, *viz.*, section 6 (1) and section 8 (5) of the Madras Estates Land Act. Section 6 (1) of the Act as amended runs thus :

" *Section* 6 (1) : Subject to the provisions of this Act, every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land situated in the estate of such landholder shall have a permanent right of occupancy in his holding.

Explanation (1) : For the purposes of this sub-section, the expression ' every ryot now in possession ' shall include every person who, having held land as a ryot, continues in possession of such land at the commencement of this Act.

Explanation (2) : In relation to any inam village which was not an estate before the commencement of the Madras Estates Land (Third Amendment) Act, 1936, but became an estate by virtue of that Act, or in relation to any land in an inam village which ceased to be part of an estate before the commencement of that Act the expression ' now ' and ' commencement of this Act ' in this sub-section and Explanation (1) shall be construed as meaning the thirtieth day of June, 1934, and the expression ' hereafter ' in this sub-section shall be construed as meaning the period after the thirtieth day of June, 1934."

Section 8 (5) runs thus :

"*Section* 8 (5) : If before the first day of November, 1933, the landholder has obtained in respect of any land in an estate within the meaning of sub-section (*d*) of clause (2) of section 3 a final decree or order of a competent Civil Court establishing that the tenant has no occupancy right in such land, and no tenant has acquired any occupancy right in such land before the commencement of the Madras Estates Land (Third Amendment) Act, 1936, the landholder shall if the land is not private land within the meaning of this Act, have the right, notwithstanding anything contained in this Act, for a period of twelve years, from the commencement of the Madras Estates Land (Third Amendment) Act, 1936, of admitting any person to the possession of such land on such terms as may be agreed upon between them."

It would be seen that the present case satisfies the requirements of section 8 (5) of the Act since before the 1st of November, 1933, the landholder had obtained a final decree of a competent Civil Court establishing that the tenant had no occupancy rights in such lands. It is also clear that no tenant has acquired any occupancy rights in such lands before the commencement of the Madras Estates Land (Third Amendment) Act, 1936 which came into force on 31st October, 1936, for it is admitted that the present tenant who is the respondent came into the lands for the first time in 1945 and 1946 under Exhibits A-7 and A-8 respectively. In such a case the section enacts that the landholder shall have the right " *notwithstanding anything*

contained in this Act, for a period of twelve years from the commencement of the Madras Estates Land (Third Amendment) Act, 1936, of admitting any person to the possession of such land on such terms as may be agreed upon between them ", that is, during the period from 31st October, 1936 to 31st October, 1948. As the admission of the respondent to possession is between these two periods, the requirements of the last portion of section 8 (5) are satisfied. Further as the provisions of this section operate notwithstanding anything contained in this Act it would be inclusive of the provisions of section 6 (1). The matter is put beyond doubt because section 6 (1) starts by subjecting the rights conferred by that section to the provisions of this Act which would include section 8 (5). There cannot therefore be any doubt that having regard to the respective provisions of section 8 (5) and section 6 (1), the former will have precedence in the case of any conflict or inconsistency. But if properly read, we do not see any conflict or inconsistency between the two. The construction, however, which found favour with the Court below is to read the last portion of section 8 (5) as withholding from the tenant or the person in possession occupancy rights for an absolute period of 12 years from 31st October, 1936 and to hold that he acquired such rights under section 6 (1) provided he happened to be in possession of the property on or after 1st November, 1948. In other words, the learned District Judge has read the provision as meaning that even though a landholder has admitted a tenant into possession of the property within the period of 12 years, the contractual tenancy ceases to be operative after 31st October, 1948 and that the concession afforded by section 8 (5) becoming exhausted, the tenant thence forward statutorily acquires occupancy rights by force of section 6 (1) of the Act. This interpretation of the section appears to us to be forced and as not giving effect to the actual words of the provision in section 8 (5) which is clearly designed to save from the operation of section 6 (1), the terms of contracts entered into within a particular period, namely, between 31st October, 1936 and 31st October, 1948. If the contract admitting a tenant into possession is saved under section 8 (5) it is difficult to see how that contract itself is exhausted or superseded merely by the twelve years' period prescribed for *entering into contract* expiring. The learned District Judge appreciated this difficulty and that was why he thought that while all the other terms of the lease would be binding upon the tenant, the only term which ceased to be operative after 31st October, 1948, was the covenant to surrender possession. This reasoning itself shows the illegality of the construction adopted by the learned District Judge.

There are a few reported decisions of this Court which have dealt with the construction of section 8 (5) in relation to section 6 (1) of the Act but they do not directly touch the present question which relates to the effectiveness of a contract entered into between a landholder and a tenant admitted into possession during the period 31st October, 1936 and 31st October, 1948, beyond the later date. The earlier decisions are all dealt with in a judgment in *Annam Naidu* v. *Appa Rao*[1] to which one of us was a party. In that case the admission of the tenant to possession was in June, 1933 and was for a period of one year which expired on 15th March, 1934. But the tenant continued in possession thereafter. In the suit filed in 1944 the question raised was whether a tenant who had been admitted to possession before Act XVIII of 1936 came into force, could be held to have acquired an occupancy right in the land " before the commencement of the Madras Estates Land (Third Amendment) Act 1936"—under section 8 (5) or be treated as "a ryot now in possession " within the meaning of section 6 (1) read with *Explanation* 2. The learned Judges held that the tenant did not acquire occupancy rights by such admission. The decision, however, is useful to this extent that it lays down the proper rule of construction of the two provisions of section 6 (1) and section 8 (5) in relation to each other.

Mr. Vaidialingam, learned counsel for the respondent, referred us to an unreported decision of Subba Rao and Panchapakesa Ayyar, JJ., in (S.A. Nos. 269, 295 to 307 and 646 of 1950) *Seshayya* v. *Narasimhacharyulu*[2], as supporting him. The lease in that particular case was for a period of five years granted in 1941. On its

1. (1950) 2 M.L.J. 396. 2. Since reported (1955) 1 M.L.J. 439.

expiry another lease was granted for one year which expired in March, 1947. Thereafter the tenants refused to surrender possession of the lands, with the result that the landholder had to file a suit for eviction. After the filing of the suit a Receiver was appointed and the lessees continued in possession as Receivers from 27th October, 1948. The learned Judges followed the earlier Bench decision in *Annam Naidu* v. *Appa Rao*[1] and held that by reason of being in possession of the property after 1934 the tenants did not acquire any occupancy rights and that the landholders were protected by section 8 (5). The question of the type now raised namely that as the tenants continued in possession of the property after 31st October, 1948, section 8 (5) could not avail the landholder was raised before them but they negatived this contention on the facts which showed that after 27th October, 1948, the possession of the tenants was not *qua* tenants but as Receivers under orders of Court. Mr. Vaidialingam contends that this must be treated as an implied decision in his favour that if the tenants had continued in possession of the property as tenants after 31st October, 1948, they would have acquired occupancy rights by reason of section 6 (1) of the Act. We are unable to agree that this decision involves any such implication. Beyond considering that the argument now put forward need not be rejected out of hand, it does not impliedly decide its correctness merely by reason of the learned Judges investigating the question of fact as to whether there was any basis for the argument. In any event, the assistance afforded by it is very small and the matter has therefore to be considered as if it were *res integra.*

Mr. Vaidialingam also contended that if the construction adopted by the learned District Judge were rejected it would mean that a landholder could in 1947 or 1948 admit a tenant to the possession of the land for such a long term as 50 years or more and would thus enable him to take the land out of the category of ryoti land in which occupancy rights could exist and that this was against the policy of the Legislature. We do not, however, see any reason why the landholder should not do so. There was no obligation upon him to let the land to any tenant and if he kept the land on pannai cultivation, he could do so for ever. Unless he chooses to admit a tenant to possession after 31st October, 1948, there is no means by which a ryot can claim occupancy rights in such lands. In these circumstances, we do not see any anomaly in the construction of section 8 (5) which we are inclined to adopt.

It would also be noticed that the above construction accords with the principle and language of section 6 (1) also. Under this provision there are only two methods by which statutory occupancy rights are obtained. (1) Possession of ryoti land at the commencement of the Act which in the case of inams of the suit category is fixed as 30th June, 1934 (Vide *Explanation* 2). (2) Admission to possession after the coming into force of the Act in the case of inams which became estates by virtue of Madras Act XVIII of 1936 this would be 31st October, 1936. Under section 8 (5) the landlord is given a right for a period of 12 years from 31st October, 1936, that is, till 31st October, 1948, to admit tenants to possession without the latter obtaining statutory occupancy rights. If there is any admission at a later date, it would not be protected by section 8 (5) and would therefore fall within section 6 (1) and confer on the tenants so admitted statutory rights. There would thus be no conflict between the two provisions. But the construction contended for by the respondent would introduce a third method of acquiring statutory rights besides the above two—not possession at the commencement of the Act, nor admission to possession for such admissions between 31st October, 1936 and 31st October, 1948 are admittedly saved by section 8 (5) but mere possession thereafter and this under a contract protected by section 8 (5) and in our opinion this cannot be obviously achieved except by introducting into section 6 (1) words which are not there for which there is no warrant.

The construction which the learned District Judge has adopted is therefore wrong and his decree dismissing the suit is set aside. As the other issues in O.S. No. 32 of 1947 have not been tried, the suit will be remanded to the District Court for that purpose. As regards the second appeal, as the applicant for the patta is not entitled to the relief and as there are no other points to be considered, the second

1. (1950) 2 M.L.J. 396.

appeal is allowed and the summary suit is dismissed with costs throughout. The appellant is entitled to his costs of Appeal No. 249 of 1949. The costs of the suit O.S. No. 32 of 1947 will be provided for by the lower Court by its decree. The appellant is entitled to a refund of the court-fee paid for the appeal.

R.M. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAJAGOPALA IYENGAR.

D. Rajiah .. *Appellant**

v.

The Inspector of Municipal Councils and Local Boards, Madras. .. *Respondent.*

Madras Village Panchayats Act (X of 1950), *section* 47—*Disciplinary action under—Writ of* certiorari *to quash the order—Existence of a remedy by way of appeal or revision to Government—If a bar —Propriety of the Inspector consulting the Government before passing orders.*

It is true that the general rule is that the High Court does not interfere by the issue of a writ of *certiorari* or grant such extraordinary remedies when there is another convenient and adequate legal remedy open to a petitioner. But where there are special facts in any case which shows that the alternative remedy is really illusory, the High Court will not reject the application on the ground of the existence of the alternative remedy.

Where the entire material, on the basis of which an action was taken by the Inspector under section 47 of the Village Panchayats Act against the President of a Panchayat, was before the Government and the Inspector was directed to remove the President, there is no purpose in the President seeking remedy at the hands of the Government under section 47 (4) of the Village Panchayats Act.

Per curiam.—It is not proper that the Government should be consulted or they should even express *prima facie* views upon questions which would ultimately come up before them in a quasi-judicial capacity in appeal or revision after action had been taken.

Under section 47 (3) of the Act before action is taken against the President of a Panchayat, an opportunity should be given to the President for explanation. It presupposes that the officer would be informed of the gravamen of the charge in respect of each matter and given an opportunity to explain the matters appearing in the evidence against him. The section also requires that the order of removal should state the reasons which impel the Inspector to take such action. If such an order is based upon matters which came up after the explanation submitted by the President and such matters have been taken into considration for the purposes of removing the President and if the order is based on certain reports of officers submitted behind the back of the party concerned the order is not only opposed to principles of natural justice but is also contrary to section 47 (3) of the Act. Where a person who holds a statutory office is to be removed the terms of that Statute prescribing the procedure for removal should be scrupulously followed. If there is any substantial departure from the mode of procedure laid down and injury results to the incumbent the order is liable to be set aside as not being in compliance with the Statute.

While a person has a right to be informed of what is appearing in the evidence against him so that he could have an opportunity of correcting or contradicting it, he has no right to insist on being supplied with copies of the reports of the officers who have enquired into the matter.

Appeal under Clause 15 of the Letters Patent preferred against the order of the honourable Mr. Justice Rajagopalan, dated 21st October, 1954 and made in Writ Petition No. 660 of 1954 on the file of the High Court, presented under Article 226 of the Constitution of India for issuing a writ of *certiorari*, calling for the records of the respondent in R.O.C. No. 3320 of 1954-E4, dated 12th October, 1954, on his file relating to the removal of the petitioner herein from the office of the President of Kivalur Panchayat Board and quashing the said order.

R. M. Seshadri for Appellant.

V. Srinivasan for the Special Government Pleader (*V. V. Raghavan*) on behalf of Respondent.

The Judgment of the Court was delivered by

Rajagopala Iyengar, J.—This is an appeal against the judgment of Rajagopalan, J., dismissing W.P. No. 660 of 1954. The appellant was the Presi-

* W.A. No. 139 of 1954. 6th December, 1954.

dent of the Kivalur Panchayat Board, Nagapattinam Taluk and was elected to this office in March, 1952. Under section 21 of the Madras Village Panchayats Act X of 1950, he would hold this office for a term of three years. But this was subject to the contingency of his being removed from office under the provisions of section 47 of the said Act. The relevant portions of section 47 which enable this removal to be effected by the Inspector of Municipal Councils and Local Boards run in these terms :

"47 (1) : The Inspector may, by notification, and with effect from a date to be specified therein, remove any President or Vice-President who, in his opinion, wilfully omits or refuses to carry out or disobeys the provisions of this Act or any rules, by-laws, regulations or lawful orders issued thereunder or abuses the powers vested in him.

(2) The Inspector may, by notification and with effect from a date to be specified therein, remove any member who, in his opinion, is guilty of any misconduct in the discharge of his duties.

(3) The Inspector shall, when he proposes to take action under sub-section (1) or (2), give the President, or Vice-President or member concerned an opportunity for explanation, and the notification issued shall contain a statement of the reasons for the action taken.

(4) The Government shall have power to cancel any notification issued under sub-section (1) or (2) and may, pending a decision on the question of such cancellation, postpone the date specified in such notification."

In or about the middle of June, 1954, the appellant received a communication dated 1st June, 1954, from the Inspector of Municipal Councils and Local Boards setting out seven items of misconduct on the part of the appellant and calling upon him under section 47 (3) of the Act to show cause within a week from the date of the receipt of that notice why he should not be removed under section 47 (1) from the office of the President.

The appellant sent a reply answering seriatim these charges and submitted his explanation on 8th June, 1954, within the time limited through the District Panchayat Officer, Nagapattinam and the Regional Inspector of Local Boards, Southern Range, Tiruchirapalli, as directed in the memo. dated 1st June, 1954. Subsequent to the receipt of this explanation, the District Panchayat Officer wrote to him on 27th June, 1954, that he would visit the Panchayat Office on 1st July, 1954, for verification of the records in his office in connection with the notice already issued to him by the Inspector of Municipal Councils and Local Boards. The inspection took place but the appellant was not kept informed of anything that had been noted against him. Subsequently on 12th October, 1954, he received an order from the Inspector of Municipal Councils and Local Boards stating that he had been removed from the office of President with effect from 20th October, 1954 and a notification was published in the official Gazette setting this out.

The appellant thereupon filed W.P. No. 660 of 1954 to quash the order of the Inspector removing him from his office. The main ground upon which a writ was prayed for was that section 47 (3) was violated and that contrary to the terms of that section and the principles of natural justice he was not given any opportunity to know what exactly was the evidence against him which led to the order of removal. The learned Judge, however, without going into this question dismissed the writ petition on the ground that under section 47 (4) of the Act the Government had power to cancel the present notification and that the existence of this alternative remedy precluded the appellant from seeking the aid of the Court at that stage. It is from this order of dismissal that the petitioner has filed the present appeal.

The first contention urged on behalf of the appellant is that the learned Judge was wrong in dismissing the petition on the ground of the existence of an alternative remedy. There can be no doubt that the general rule is that this Court does not interfere by the issue of a writ of *certiorari* or grant such extraordinary remedies when there is another convenient and adequate legal remedy open to a petitioner. We agree with the learned Judge that normally the position is as held by him. But in the present case, there are special facts which have persuaded us to hold that the alternative remedy is really illusory. In the affidavit filed in this Court by the Inspector of Municipal Councils and Local Boards, it is admitted that action under section 47 was taken against the appellant only after prior consultation with the

Government. In paragraph 5 of the affidavit, dated 10th November, 1954, the order of the Government, dated 5th May, 1954, as a result of which the notice was issued to the appellant to show cause why he should not be removed from the office of the President is set out. It is clear from the contents of that order that the entire material, on the basis of which action was taken against the appellant, was before the Government and it was only after satisfying themselves about the propriety of the removal that the direction to the Inspector was made. In view of this we are satisfied that the petition of the appellant ought not to be rejected on the ground that he should seek his remedy at the hands of Government. Before leaving this part of the case, it is only necessary to add that we consider it not proper that the Government should be consulted or they should even express *prima facie* views, upon questions which would ultimately come up before them in a quasi-judicial capacity in appeal or revision after action had been taken.

Learned counsel for the appellant sought to use the contents of this paragraph and the order of the Government recited there for the purpose of raising a contention that the order passed on 12th October, 1954, should be taken to have been passed not by the Inspector, as it purports to be, but really by the direction of the Government and that therefore it should be treated as a nullity. For this, reliance was placed on the decision of the Supreme Court in *Commissioner of Police, Bombay* v. *Gordhardas Bhanji*[1] for the position that where a statute names an authority and vests it with discretion to pass an order, an order passed by or at the instance of another functionary could not be treated as complying with the requirements of the statute. This argument is not sustainable on the facts of the present case because the order of Government was one which was passed before the appellant was notified of the charges and at a time when discussions were proceeding as to whether a *prima facie* case had been made out for calling upon the appellant to show cause why he should not be removed from office. The participation of the Government at this stage does not make the order passed by the Inspector of Municipal Councils and Local Boards after the explanation of the appellant was received, one passed by the Government or at their direction.

The next contention urged on behalf of the appellant is that there is a substantial want of compliance with the terms of section 47 (3) and also that the principles of natural justice have been violated. To appreciate this point, it is necessary to set out a few facts. Long before any charge was formulated the District Panchayat Officer at the instance of the Inspector of Municipal Councils and Local Boards conducted an enquiry on 11th January, 1954, at the Panchayat Office. The appellant also participated in the enquiry in the sense of being present when it was conducted. The results of this enquiry were embodied in a report by the District Panchayat Officer to the Inspector of Municipal Councils and Local Boards. This report disclosed a *prima facie* case against the appellant of various irregularities. It was at this stage that a reference was made to the Government who directed the Inspector to proceed to take action under section 47 of the Act for the removal of the appellant. After receiving the communication from the Government in May, 1954, the Inspector formulated the charges by the notice, dated 1st June, 1954, already referred to. As stated above, the appellant submitted his explanation on 8th June, 1954. Subsequent to this date, there was no enquiry except an *ex parte* inspection by the District Panchayat Officer ; and the next thing that the appellant heard about this matter was the order for his removal, dated 12th October, 1954. It is in these circumstances that the appellant complains of a violation of section 47 (3) and the principles of natural justice. Under the statute the President has to be given an opportunity for explanation. It pre-supposes that the officer would be informed of the gravamen of the charge in respect of each matter and an opportunity to explain the matters appearing in the evidence against him. The section also requires that the order of removal should state the reasons which impel the Inspector to take such action. In the preamble to the order of removal, dated 12th October, 1954, the report from the District Panchayat Officer, dated 6th July, 1954,

1. (1952) S.C.R. 135: (1951) S.C.J. 803.

and the report from the Regional Inspector of Municipal Councils and Local Boards, Southern Range, dated 23rd August, 1954, are recited as having been read before it was issued. It will be seen that both these are after the explanation offered by the appellant and if these two officers conducted any enquiry the result of which they reported, that was certainly held behind the back of the appellant. There are indications in the order of removal itself that the Inspector has acted upon matters elicited at some enquiry or investigation of which the appellant had no notices Thus in respect of charge No. VI it is stated :

"Corrections and substitutions of figures regarding cost of labour, earth-work, etc., resulting in increase in the amount have been reported by the District Panchayat Officer. The corrections have not been attested by the President and the members have denied knowledge of the corrections. The charge regarding the corrections is proved."

The charge in this respect was that there were too many corrections in the amount in resolution No. 45 of the Panchayat. It will be seen therefore that there must have been some enquiry after the notice to the appellant to show cause but behind his back. Similarly in respect of charge No. VII, which was that the President sold his own bandy to the Panchayat for conservancy purposes in the name of one Sri Ratnam Pillai, the order recites that the District Panchayat Officer, Nagapattinam, who enquired into the matter has reported that Ratnam Pillai sold the bandy to the President for Rs. 100 and that the President subsequently sold it to the Panchayat for Rs. 150 and the President got a receipt from Ratnam Pillai to cover the transaction with the Panchayat. This paragraph lends itself to a similar comment as in regard to the preceeding charge. More than all these, in respect of charge No. V the order states :

"It is reported that on 1st July, 1954, the President paid in person to the owner of the site, rent for the period from October, 1953, to June, 1954, but did not get the lease deed executed even then."

It clearly shows that matters which came up long after the appellant was called on to explain have been taken into consideration for the purpose of removing the appellant. We therefore hold that there has been a substantial failure to comply with the terms of section 47 (3).

Furthermore the appellant held a statutory office and under the terms of section 21 was entitled to hold it for a term of three years. If he is to be removed from such office, the terms of that statute prescribing the procedure for removal should be scrupulously followed. If there is any substantial departure from the mode of procedure laid down and injury results to the incumbent, the order is liable to be set aside as being not in compliance with the statute. Besides there can be no doubt whatsoever that the Inspector of Municipal Councils and Local Boards when passing an order for removal under section 47 is functioning as a quasi-judicial authority. In regard to such bodies it has been laid down by the House of Lords in *Local Government Board* v. *Arlidge*[1] that the decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. In *Errington* v. *Minister of Health*[2] a local authority had made a clearance order and had submitted it to the Minister of Health for confirmation. There was a public enquiry conducted by the Inspector appointed by the Minister of Health at which the objectors took part. But after this public enquiry was completed and the report submitted, the Minister had a private enquiry made without giving the owners of the property an opportunity of arguing *contra* and acting on this evidence the Minister confirmed the clearance order. An application was taken out for the issue of writs of *certiorari* and prohibition and Swift, J., dismissed them on the ground that the Minister in confirming the order was acting merely in an administrative capacity. The petitioner took the matter on appeal to the Court of Appeal and the Court unanimously set aside the judgment of Swift, J. Maugham, L.J., stated the law thus :

"The Solicitor-General does not seek to object to the view that that public enquiry is of the nature of a quasi-judicial inquiry in which, although the rules of procedure of a Court of Justice may not be followed, the ordinary principles of fair play have to be observed. As I think, the question

1. L.R. (1915) A.C. 120. 2. L.R. (1935) 1 K.B. 249.

whether the Minister, after such an inquiry has been held and after a report has been made, can then proceed, I am not dealing with the facts for the moment—to hear *ex parte* statements from one side or the other in the absence of those whose obvious desire it would be to controvert them is precisely similar to the question whether, after holding a public local inquiry or after having caused a public local enquiry to be held of a quasi-judicial character, the Minister can then hold a private inquiry of his own to which one party only is admitted."

The learned Lord Justice held that the statute did not authorise such a precedure and quashed the order for confirmation. Roche, L.J., put the matter thus :

". . . . that the inquiry which was required to be in public, and which, according to the admission of the Solicitor-General it is conceded should be such as to give effect to the elementary principle of hearing both sides, was continued and resumed in private, and when so resumed and continued was held with audience to one side alone. That, in my judgment is manifestly a breach of the requirements of paragraph 4 of the First Schedule to the Housing Act, 1930 ".

To a similar effect are the observations of Charles, J., in *Strafford* v. *Minister of Health*[1] where the question related to the validity of the confirmation by a Minister of Health of a compulsory purchase order. The learned Judge held that the confirmation order was invalid and should be quashed for the reason as stated in the head-note that

" a mere notice and grounds of objection did not constitute a presentation of the landowner's case, and, as the local authority had had an opportunity of presenting their case in detail, the Minister had acted without hearing both sides."

The case arose in an appeal under the Housing Act the appellant objecting to a compulsory purchase order. He had formulated his grounds of objection and they were answered by the Rural District Council which had applied for the order in great detail and sent to the Minister. But the answers of the Council were never communicated to the appellant. The next thing that he heard in this matter was a notice that the order to which he had objected had been confirmed. The learned Judge considered the case to fall within the observations of Lord Loreburn, L.C., in *Board of Education* v. *Rice*[2], and quoted this passage :

" They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their views."

On the view that the appellant had not had any opportunity of controverting the case made out against him, his appeal was allowed.

We are clearly of the opinion that the appellant here has not had a reasonable opportunity of presenting his case and in fact there was no enquiry after the charges were formulated.

Learned counsel for the appellant urged that the appellant had a right to copies of the reports of the officers which were being considered as part of the material by the Inspector of Municipal Councils and Local Boards acting under section 47 (1) and (3), and that the order was vitiated by the non-furnishing of such copies. We consider this as an over-statement of the appellant's rights. While agreeing with the contention that the appellant has a right to be informed of what is appearing in the evidence against him so that he could have an opportunity of correcting or contradicting it, it is quite another thing to say that he should be supplied with a copy of the views of the officers who have enquired into the matter. In this connection, it is sufficient to refer to the decision of Swift, J., in *Denby (William) and Sons, Limited* v. *Minister of Health*[3], where after referring to the fact that the officer appointed by the Minister to conduct a public enquiry before a clearance order was made, was discharging quasi-judicial functions and that in the exercise of such functions must be bound by the dictates of natural justice, the learned Judge went on to say :

" His enquiry must be an inquiry which is fair to all parties interested. He must hear everything which any of them desire to say and should not hear anything without giving an opportunity to the other parties interested to answer that which is said : he should not receive anything from one behind the back of the other, and although he is not bound in any sense by the rules of evidence or procedure which apply to an ordinary court of law, he must, before making his report, comply with

1. L.R. (1946) 1 K.B. 621.
2. L.R. (1911) A.C. 179 at 182.
3. L.R. (1936) 1 K.B. 337.

the ordinary dictates of natural justice as to the obtaining and consideration of the matters which go to form the opinions or conclusions which he presses in his report."

This report was submitted to the Minister and the learned Judge held that there was no obligation upon the Minister to disclose the contents of this report which apart from the evidence gathered at the inquiry in which the contending parties had taken part, merely contained the views of the officers who submitted such reports, following observations of Lord Moulton in *Local Government Board* v. *Arlidge*[1]. We consider that these observations also apply to the present case and that there was no obligation on the part of the Inspector of Municipal Councils and Local Boards to have disclosed the report to the appellant though he was bound to have afforded the appellant an opportunity of meeting the points made in the report against him.

As stated before, we hold that there has been a violation of section 47 (3) of the Panchayat Act, 1950 and on the facts of the present case, the appellant's application for the writ should not be refused on the ground that he had a right of applying to the Government for relief.

The appeal succeeds and a writ will issue quashing the order dated 12th October, 1954, removing the appellant from the office of the President of Kivalur Panchayat Board. The appellant is entitled to his costs here. Advocate's fee Rs. 100.

R.M. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MACK AND MR. JUSTICE BASHEER AHMED SAYEED.

V.P. Madhavan Nambiar .. *Appellant**

v.

The Chaldean Syrian Bank, Ltd. and another .. *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 51—*Scope and applicability—Proviso—Scope of—Onus of proof of ability of judgment-debtor to pay—Power of executing Court to order instalments in suitable cases.*

The liberal provisions of section 51 of the Code of Civil Procedure in favour of judgment-debtors were enacted in Act (XXI of 1936). The Code was amended so as to protect honest debtors of all classes from detention in prison and to confine such provisions to debtors proved to be recalcitrant or fraudulent. It applies to all judgment-debtors and the prosecution is not restricted only to small debtors. It is open to a Court to apply a judicial corrective to the extreme lengths to which the onus which the Code casts on decree-holders is sought to be taken by adopting the view that it is perfectly open to an executing Court on the materials placed before it, to come to an inference as regards the statutory findings required by proviso (*a*) (2) and (*b*) of section 51 of the Code of Civil Procedure.

It is no doubt true that the onus rests on the creditors to prove the debtor's ability to pay, and mere disbelief of the latter's statement that he had no means to pay is not sufficient. Where, however, there is sufficient material shown to warrant an inference that the judgment-debtor has actually been in possession of substantial assets a few months prior to suit, an inference is perfectly justifiable that he has since the institution of the suit dishonestly concealed them, and further more, that he has since the date of the decree means to pay a substantial portion of it from assets he is concealing from the Court.

The recognised practice in England in appropriate cases is not to make an order of committal to prison on the first application but to order payment by instalments. Under section 51 of the Code read with Order 21, rules 39 and 40, although they do not specifically direct an order for instalments, the Courts in India can adopt the practice in England.

The fixation of instalments after an enquiry into the means and the ability of the judgment-debtor to pay is, in many cases much fairer to the judgment-debtor. Such a procedure is also equitable to the decree-holder who may not be able strictly to discharge the onus resting on him under the proviso to section 51 of the Code. A failure to pay the instalment so fixed may immediately justify arrest and commitment to prison.

Appeal against the Order of the Court of the Subordinate Judge of South Malabar at Kozhikode, dated 7th July, 1952 and made in E.P. No. 234 of 1951 in O.S. No. 7 of 1949 on his file.

M. K. Nambiyar and *P. S. Menon* for Appellant.

C. S. Swaminathan for Respondent.

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* Appeal Against Order No. 424 of 1952. 2nd September, 1954.

1. L.R. (1915) A.C. 120.

Judgment of the Court was delivered by

Mack, J.—This is an appeal by V.P. Madhavan Nambiar, second Judgment-debtor in E.P. 234 of 1951, against an order by the Principal Subordinate Judge of Kozhikode directing his arrest and commitment to prison, on findings that he dishonestly transferred, concealed or removed assets after the institution of the suit and furthermore, that he had means to pay at any rate a substantial portion of the decretal amount since the date of the decree.

The antecedent history is briefly this. The decree-holder is the Chaldean Syrian Bank, Ltd., who gave financial accommodation to a concern called United Merchants which commenced in 1948 and did business in timber, banking and so on. It fell into difficulties and the managing partner committed suicide in March, 1949. The appellant who was one of the partners filed an application, Exhibit A-1 for over-draft accommodation to the Chaldean Syrian Bank to the extent of Rs. 50,000 on the strength of which the Bank Manager of the local branch gave the firm financial accommodation. According to the evidence of the Secretary of the Bank, P.W. 1, the head office took exception to this and dismissed the Branch Manager from service. The decree under execution by the bank in E.P. 234 of 1951 was in O.S. 7 of 1949 for the recovery of Rs. 9,000 which with interest had increased to Rs. 12,600. The bank filed another suit, shortly afterwards, O.S. 14 of 1949, for the recovery of Rs. 36,000 and obtained a decree against the partners. In E.P. 420 of 1950, in O.S. 14 of 1949, they first sought to arrest three of the partners including the appellant. That petition was dismissed by the same learned Subordinate Judge on 31st June, 1951, as he was satisfied on the material placed before him, that none of the respondents had means to pay off the decree debt or even a substantial portion of it. Despite the dismissal of that execution petition, the bank pressed for the arrest of the appellant in execution of the smaller decree in O.S. 7 of 1949 and placed more material before the Court. The learned Subordinate Judge quite rightly held that the previous order in E.P. 420 of 1951 did not operate as *res judicata.*

The appellant in an application to the bank, Exhibit A-1 dated 21st February, 1948, said he belonged to a tarwad owning property worth 2½ lakhs to 3 lakhs. The value of this tarwad property was not disputed, but it was contended that he cannot get a separate share or enforce any partition during his mother's lifetime. But under the Madras Marumakkathayam Act he was entitled to separate maintenance from the tarwad. The amount, if any, of such separate maintenance, he did not disclose. He was admittedly living at Kozhikode, away from his tarwad, working as an insurance agent and said that he was earning about Rs. 110 a month by way of commission. Then in his own application Exhibit A-1, he gave particulars of assets valued at Rs. 50,000. They included fixed deposit in the Town Bank of Rs. 15,000, Rs. 14,500 in the Town Bank Kuri or chit fund and so on. His explanation for the disappearance of the assets in Exhibit A-1 is merely to the effect that they were withdrawn by him and invested in the business of United Merchants. He was not able, however, to prove by the production of any voucher, receipt or account the fact that he invested these moneys in this business. The learned Subordinate Judge appears to have quite rightly rejected this unsatisfactory explanation.

The appellant then further admitted that he had his own banking business till the end of 1948 and that the annual outturn was about Rs. 25,000 but he said that he had never maintained accounts either for this or for a timber business he had previously. Finally the appellant admitted that he discharged an overdraft account with the Nedungadi Bank upto Rs. 75,000 before March, 1948. The learned Judge made a note in the examination of the appellant that his demeanour was highly questionable and substantially disbelieved his evidence. In Exhibit A-1 he described himself as Managing Partner of the firm of United Merchants and said that this was correct, belying his previous assertion that he was only a figurehead and that the management was with one Madhavan who, it is said, committed suicide. These were the main circumstances from which the learned Sub-

ordinate Judge arrived at his two findings on which he directed the arrest and detention of the appellant in prison.

Mr. Nambiar has strenuously urged that the decree-holder bank has not discharged the onus placed upon them under section 51, proviso (*a*) (2), that after the institution of the suit the judgment-debtor has dishonestly transferred, concealed or removed any part of his property and under proviso (*b*) that he has or has had since the date of the decree the means to pay the amount of decree or some substantial part thereof and refuses or neglects to do so. It is true that in this case the decree-holder has not been able to point precisely to any particular dishonest transfer or concealment, or to specific money in possession of the judgment debtor out of which he could have paid the decretal amount since the date of the decree. If Courts were to insist on specific evidence of this description, which amounts to positive proof, it would mean that judgment-debtors by skilful concealment of their assets and resourceful evasion will defeat decrees against them.

The liberal provisions of section 51 in favour of the judgment-debtor were enacted in Act IX of 1935. As stated in the Objects and Reasons, that Bill was the outcome of the recommendations of the Royal Commission of Labour in India to the effect that in the case of industrial workers in receipt of less than Rs. 100 a month, arrest and imprisonment for debt should be abolished, except where the the debtor has been proved to be both able and unwilling to pay. The Bill sought to amend the Civil Procedure Code of 1908 so as to protect honest debtors of all classes, and not of the industrial worker class only, from detention in civil prison and to confine such provision to debtors proved to be recalcitrant or fraudulent. The Act therefore applied to all judgment-debtors ; nor was the protection restricted only to small debtors. If the extreme view urged by Mr. Nambiar is to be accepted that before a judgment-debtor can be committed to prison a decree-holder is bound to establish by strict evidence and proof that there has been a dishonest transfer by a registered document, or a concealment of assets in some other manner, or that the judgment-debtor had in his actual possession in his own house a sum of money out of which he could have paid or discharged a substantial portion of the decree, a premium would be put on evasion by judgment-debtors, rendering decrees obtained at great cost and expense nullified, and the pendulum will so swing in a direction in favour of judgment-debtors that legislation for the protection of decree-holders may have to be introduced.

In my view it is perfectly open to a Court to apply a judicial corrective to the extreme lengths to which the onus which Act IX of 1935 casts on decree-holders is sought to be taken by adopting the view that it is perfectly open to an executing Court on all the material placed before it to come to an inference as regards the statutory findings required by proviso (*a*) (2) and (*b*) of section 51, Civil Procedure Code. It is no doubt true that the onus rests on the creditor to prove the debtor's ability to pay, and mere disbelief of the latter's statement that he had no means to pay is not sufficient. Where, however, there is sufficient material shown to warrant an inference, as in the present case, that the judgment-debtor has actually been in the possession of substantial assets a few months prior to suit, an inference is perfectly justifiable that he has since the institution of the suit dishonestly concealed them, and furthermore, that he has since the date of the decree means to pay a substantial portion of it from assets he is concealing from the Court. This is a case in which the appellant appears to be the only partner in this business venture which failed, who appears to be in a position to pay something towards this decree. We can find no real grounds for setting aside the findings of the learned Subordinate Judge on the material placed before him.

The recognised practice in England in appropriate cases, as laid down in *Barefoot* v. *Clark*[1], and In re, *a Judgment-debtor*[2] is not to make an orde committal to prison on the first application but to order payment by instalm

1. L.R. (1949) 2 K.B. 97. 2. (1935) T.L.R. 524.

I can see no impediment in this practice being adopted in suitable cases under section 51 of the Civil Procedure Code read with Order 21, rules 39 and 40, although they do not specifically direct an order for instalments first. The fixation of instalments after an enquiry into the means and the ability of the judgment-debtor to pay in many cases is much fairer to the judgment-debtor who, whilst not being in a position to discharge the decree in full, can certainly pay something towards its discharge. The fixation of instalments helps to bridge the wide gulf between the dismissal of an execution petition for arrest on a decree-holder failing strictly to discharge the onus resting on him under the proviso to section 51, and the commitment to prison of a judgment-debtor who while in a position to pay something simply, cannot discharge the decree in full as he has no immediate means to do it. After the instalments have been fixed by the Court, then a failure to comply with the Court order would immediatly justify arrest and commitment to prison. In our view this procedure would be perfectly admissible under porviso (*b*) to section 51. It is equitable both to decree-holder and judgment-debtor and only sends to prison a judgment-debtor who refuses or neglects to pay towards the decree something which the Court has found after hearing him to be within his means to pay.

We do not however think this a suitable case in which this equitable procedure can or should be adopted and confirming the findings of the learned Sub-Judge dismiss the appeal with costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Pavoorayil Mamu alias Muhammad .. *Petitioner**

v.

Kunhimon *alias* Muhammad and others .. *Respondents.*

Practice—Advocate reporting no instructions—If terminates vakalat—Suit dismissed on counsel reporting no instructions—Subsequent application to restore the suit to file—Fresh vakalat—Necessity—Defect if could be cured by filing the fresh vakalat subsequently.

Civil Procedure Code (*V of* 1908), *Order* 3, *rule* 4*—Scope.*

A vakalat filed by an Advocate for the plaintiff in a suit terminates in law when he reports no instructions. Strictly and technically a fresh vakalat should be filed when a restoration application is filed. But if a fresh vakalat is later filed before final orders are passed on the petition, the defect in the presentation of the petition is curable, and the original presentation of the petition is not improper or illgeal, and the jurisdiction of the Court to deal with the petition is not ousted.

Order 3, rule 4, Civil Procedure Code, is primarily intended to protect clients from anybody other than Advocates authorised by them appearing, acting and making representations on their behalf and it is not intended to penalise clients who had in fact instructed an Advocate at one stage of the litigation, and immediately ratified his authority after he reported no instructions when his failure to file a fresh vakalat was brought to notice.

Ananga Bhima Deo v. *Mohana Deo*, (1936) 71 M.L.J. 604 : I.L.R. (1937) Mad. 320, referred.

Machireddi Narappa v. *Subbarayudu*, (1950) 2 M.L.J. 256, followed.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Ottapalam, dated 28th August, 1952 and passed in C.M.A. No. 18 of 1951 (I.A. 399 of 1951, in O.S. No. 677 of 1949, District Munsiff's Court, Ponnani).

N. Sundara Aiyar and *V. R. Venkatakrishnan* for Petitioner.

K. P. Ramakrishna Aiyar for Respondents.

The Court delivered the following

JUDGMENT :—The petitioner is the fifth defendant in an ancient suit, O.S. No. 677 of 1949 which was dismissed for default on 2nd February, 1951. The advocate for the two plaintiffs who had filed a vakalat on their behalf moved for an adjourn-

* C.R.P. No. 2060 of 1952. 1st March, 1955.

ment of the suit that day and on it being refused reported no instructions. The advocate then filed on 7th February, 1951, I.A. No. 399 of 1951 to restore the suit to file, supported by an affidavit from an alleged agent of the plaintiffs who, the advocates agreed, were in Malaya. Objection was taken in the counter to this application that it was invalidly presented, as the advocate did not file a fresh vakalat, as he was indeed legally and technically bound to do his engagement having been terminated by his reporting no instructions. The advocate filed a fresh vakalat on 10th March, 1951. The District Munsif dismissed I.A. No. 399 of of 1951 on 11th July, 1951, holding that it was not validly presented within the 30 days prescribed without a fresh vakalat by the advocate. In appeal, C.M.A. No. 18 of 1951, the Subordinate Judge set this order aside and remanded I.A. No. 399 of 1951 for disposal on its merits.

Mr. Sundara Aiyar would support the order of the District Munsif by a Bench decision *Ananga Bhima Deo* v. *Mohana Deo*[1], which held that an execution petition presented by a pleader without any vakalat at all being filed either at the time of presentation or at any later stage and on which nothing had really been done was not a validly presented execution petition which would serve as a step in aid of execution. In *Machireddi Narappa* v. *Subbarayudu*[2], Krishnaswami Nayudu, J., took the view that although an advocate files an execution petition without filing a vakalat as a result of a *bona fide* mistake and the vakalat is later filed before final orders are passed on the execution petition, the presentation of the execution petition was not incurable, improper or illegal and that the jurisdiction of the Court to deal with the execution petition was not ousted. With respect I am in complete agreement with this view. In the present case the advocate did file a vakalat from the plaintiffs in the suit but it was terminated in law when he reported no instructions. Strictly and technically he should have filed a fresh vakalat along with his restoration application. Order 3, rule 4, Civil Procedure Code, is primarily intended to protect clients from anybody other than advocates authorised by them appearing, acting and making representations on their behalf and it certainly was not intended to penalize clients who had in fact instructed an advocate at one stage of the litigation, and immediately ratified his authority after he reported to instructions when his failure to file a fresh vakalat was brought to notice. The advocate is really more to blame than the client for filing his restoration application without writing to his clients and obtaining from them a fresh vakalat. I see no reason for any interference in revision with the order passed by the learned Subordinate Judge, which is sought to be set aside on what appears to me a very technical ground.

It is regrettable that this suit, O.S. No. 677 of 1949, has been stayed for nearly three years pending the disposal of this revision petition. I.A. No. 399 of 1951 will now be given as expeditious a disposal as possible by the District Munsif.

The petition is dismissed with costs.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BASHEER AHMED SAYEED.

The Home Insurance Company, Ltd., New York, a company carrying on business in India and sued by its Agent, Messrs. Volkart Brothers, Madras and another .. *Appellants**

v.

Ramnath & Company, a firm duly registered under the Indian Partnership Act carrying on business at No. 199, Armenian Street, Madras and suing by one of its partners P. R. Viswanatham .. *Respondents.*

Carriers—Carriage by sea—Clause in the Bill of Lading 'carried on deck at shipper's risk'—If and when would relieve the carrier from liability in case of total loss or non-delivery of entire goods.

A clause in a Bill of Lading 'carried on deck at shipper's risk' does not imply that in cases of total loss or non-delivery of the entire goods, there is a total exemption from liability of the carriers.

1. (1936) 71 M.L.J. 604 : I.L.R. (1937) Mad. 320. 2. (1950) 2 M.L.J. 256.

* C.C.C. Appeal No. 88 of 1952. 10th December, 1954.

It only means such loss and such damage that might arise consequent upon the goods being put on the deck, which will have to be proved by the shipping company. The loss must be related to the goods being carried on deck. The clause will not be of any avail to the carrier in cases where the goods are totally lost and never delivered.

B. I. S. N. Co. v. *Sokkalal Ram Sait*, (1952) 2 M.L.J. 270, distinguished.

Appeals against the Decree of the City Civil Court at Madras dated 3rd January, 1952 and passed in O.S. No. 656 of 1950.

Ramakrishna Sastry for *Messrs. King & Partridge* for Appellant.

A. R. Krishnaswami for Respondent.

The Court delivered the following

JUDGMENT :—These are two appeals preferred by the first and second defendants against the judgment and decree of the learned Second Additional City Civil Judge in O.S. No. 656 of 1950. The Home Insurance Co., Ltd., represented by its agents Messrs. Volkart Brothers happen to be the appellant in C.C.C.A. No. 88 of 1952 and the Indian Steamship Co., Ltd., Calcutta, happen to be the appellant in C.C.C.A. No. 89 of 1952.

The plaintiff company, who is the respondent brought a suit against the two appellants for directing them or either of them to pay a sum of Rs. 2,000 being the value of the goods with interest at 6 per cent. per annum and for costs. The plaintiff is a registered firm, carrying on business at Madras. The first defendant in the suit is the Steamship Company and the second defendant is the Insurance Company, having their agents at Madras. In May 1949 the plaintiff had purchased from Messrs. N. Jivanlal & Co., Ltd., Bombay, four drums of English sodium sulphide weighing 20 cwts. at Rs. 31 per cwt. and five drums of sodium hydrosulphite weighing 1175 lbs. at Re. 1 per lb. Under instructions from the plaintiff, the said Jivanlal & Co., Ltd., shipped the goods to Madras through the first defendant company per its ship "*S.S. Indian Shipper*". Under similar instructions from the plaintiff, the said Jivanlal & Co., had also insured the goods with the second defendant company. The plaintiff honoured the draft sent by the vendors through the Indo Commercial Bank, Madras, for a sum of Rs. 1,945-15-9, and obtained delivery of the document of title from the said bank.

The ship "*Indian Shipper*" arrived at the Madras Port on 28th May, 1949. But when Sri Rama Vilas Service, Ltd., went to clear the goods under instructions from the plaintiff, the goods had not been landed at the port. The first defendant was informed of this fact. Though the first defendant by his letter dated 8th July, 1949, informed the plaintiff that a special search would be made at Colombo and at Calcutta to ascertain whether the goods were overlanded at any one of those ports, nothing tangible resulted therefrom. As the goods covered by the bill of lading were not delivered, the plaintiff preferred a claim with the first defendant for a sum of Rs. 2,000. After considerable correspondence, the first defendant company on 26th October, 1949, repudiated its liability under the bill of lading, on the ground that the bill of lading contained a condition that the goods were "shipped on deck at shipper's risk." The first defendant would appear to have also suggested to the plaintiff to prefer the claim against the Insurance Company the second defendant. The second defendant company also repudiated its liability on 12th December, 1949, on the ground that the policy was issued on F.P.A. terms and that the second defendant was not liable to make good the value of the goods lost or any portion thereof. The plaintiff averred that neither the first defendant nor the second defendant could avoid liability to make good the loss of the goods covered by the said bill of lading or by the policy of insurance on any of the grounds stated by them in the course of their correspondence. Therefore, the plaintiff brought the suit for the reliefs contained in paragraph 20 of the plaint.

In its written statement, the first defendant company contended that the goods were carried with the consent of the plaintiff and at his risk on the "*S.S. Indian Shipper*" with an endorsement on the bill of lading that the goods were shipped on deck at shipper's risk and that since notice of the loss of goods not having been

as per clause 10 of the bill of lading, they were not liable for the non-delivery of the goods or any loss arising therefrom. The second defendant company in a long statement pleaded that the carriers, *viz.*, the first defendant company was under no liability to the plaintiff and therefore, the second defendant also had no liability to discharge in respect of the loss or non-delivery of the goods. The second defendant company denied that it was bound to indemnify the plaintiff to any extent. It also contended that the plaintiff's interpretation of Clause 8 of the Insurance policy was not correct and that that clause did not cover the loss suffered by the plaintiff.

The learned City Civil Judge framed only two issues, the first of which was whether the first defendant was not liable for the suit claim, for all or any of the reasons set forth in paragraphs 6 and 8 of the written statement, and secondly whether the second defendant was not liable to indemnify the plaintiff to any extent whatsoever. On both these issues the learned City Civil Judge found that the first defendant was liable to the extent of the bill paid by the plaintiff, *viz.*, Rs. 1,945-15-9 with interest at 6 per cent. per annum on the same from the date of the suit and on the second issue, he found that the second defendant was liable to indemnify the plaintiff only to that extent as per the terms of the insurance policy. In the result, a decree was passed in favour of the plaintiff against both the defendants, disallowing a small amount in excess of the actual sum paid by the plaintiff company to its vendors in Bombay. Both the defendants have preferred these appeals, aggrieved by the judgment of the learned City Civil Judge.

Mr. Ramakrishna Sastri appearing on behalf of Messrs. King & Partridge, for the appellants in both the appeals, has very vigorously contended that since the goods were carried on deck with the consent of the plaintiff and subject to the condition that they were so shipped on deck at the shipper's risk, neither of the appellants could be made liable for the loss or non-delivery of the goods, or for any damage suffered by the plaintiff. Before the point in issue could be discussed, it is necessary to state at this stage that there is no dispute with regard to the nine drums having been put on board the *S. S. Indian Shipper*. The bill of lading is sufficient evidence to establish the fact that the goods were actually put on board and were received by the Master of the ship. It is also beyond dispute that the goods never landed at the Madras Port. Neither the shipping company nor the insurance company have been able to trace the goods, nor are they in a position to explain as to how the total loss of the goods had occurred. It is indeed strange that this should be so. Under section 151 of the Indian Contract Act, in all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. It is not shown by any evidence in this case that the first defendant company took all the care and caution that was reasonably expected of a man of ordinary prudence in respect of similar goods. The goods were 9 drums, and if they were put on the deck, certainly the shipping company as bailee should be in a position to state what steps it took in order to prevent the disappearance of the goods in any manner whatsoever. But far from doing so, it is curious that the shipping company is not even in a position to say how exactly the goods were lost, what happened to them and at what stage. In such circumstances, it cannot be said that the shipping company has discharged its duty under section 151 of the Indian Contract Act, and if the goods have disappeared when they were in the custody of the shipping company, without the shipping company being able to account for the loss in any satisfactory manner which would absolve them from liability, it stands to reason that the shipping company must be made responsible for the loss of the goods to the consignor, the plaintiff company.

The learned counsel for the appellant shipping company, however, contends that his client the Indian Steamship Co., Ltd., is completely absolved from liability by reason of the saving clause, *viz.*, that the goods were shipped on deck at the risk of the shipper. His point is that the carrier can contract himself out

of liability with the consignor and that when there is such a contract, the carrier will be protected against all loss by operation of a clause like 'shipped on deck at the shipper's risk'. There could certainly be no doubt that any carrier can contract himself out of his liability by entering into specific terms and conditions with the shipper of the goods. But in such a case, it will depend upon what exactly is the significance and the scope of the contract which has been entered into between the shipping company and the shipper of the goods. The learned counsel contends that a clause of the kind in question will absolve the shipping company even against total loss of the goods. He relies upon a decision in *Lewis* v. *The Great Western Railway Company*[1]. In that case, the plaintiff, under a contract in writing signed by his agent, delivered to the defendants certain cheeses to be carried from London to Shrewsbury at owner's risk through the Great Western Railway. As the plaintiff knew, the defendants had two rates of carriage, a higher rate, when they took the ordinary liability of the carriers, and a lower, when they were relieved of all liability, except that arising from the wilful misconduct of their servants. In using the words "owner's risk" the plaintiff intended that the cheeses should be carried at the lower rate, and subject to the conditions restricting the defendant's liability. The defendants' servants packed the cheeses in such a manner that during their transit upon the defendant's railway they were damaged, but the defendants' servants did not know that damage would result from the mode in which the cheeses were packed. The Court of Appeal held that the defendants carried at alternative rates, the condition excepting them from liability when carrying at the lower rate was just and reasonable and that the injury to the cheeses had not arisen from the wilful misconduct of their servants. But in the present case, there is no evidence that the plaintiff had knowledge of any lower and higher rate, nor is there any evidence to show that there existed such lower and higher rates for carrying the goods from Bombay to Madras. In the absence of such evidence, it cannot be inferred by any means that the plaintiff when shipping the goods had the option in the matter of the choice of the place where the goods were to be lodged in the ship or in the matter of restricting the liability of the defendant shipping company in case of any loss or damage to the goods. Nor is there any evidence to show that he chose the lower rates as against the higher rates which would naturally involve greater or lesser risk to the goods, dependent upon the variation of the rates. Therefore, the facts of this case being quite different from those that obtained in the decision under reference, it is difficult to say how that decision would apply to the present case. Further, in that case the goods were damaged and it was not a case of total loss of the goods which remained unexplained. I am, therefore, of the view that the decision relied upon by the learned counsel is not of any assistance to him.

Learned counsel next invited my attention to a decision of a Bench of this Court in *B.I.S.N. Co.* v. *Sokkalal Ram Sait*[2]. In that case there was a comprehensive clause which had excepted the carrier from liability under any circumstances whatsoever. The Court interpreting the scope and operation of such a comprehensive clause, came to the conclusion that the English Common Law applied and sections 151 and 152 of the Indian Contract Act could not affect the liability of the common carrier, in the view that the liability of a common carrier for the loss, injury or delay, in respect of the goods carried, might be varied by a contract and that the contract before them was not opposed to public policy and that section 23 of the Indian Contract Act did not apply. The Bench was of the opinion that the Bill of lading relieved the shipowner from any liability with regard to showing how the loss had occurred. The case law on the subject has been elaborately discussed in that decision and it is unnecessary for me to traverse the entire field. So far as the facts in the present case before me are concerned, it cannot be said that the special contract between the shipping company and the plaintiff is of such a comprehensive nature as to absolve the shipping company from all liability and so as to exclude sections 151 and 152 of the Indian Contract Act from coming into operation. Further, it has to be noted that in that case there was only short delivery of 44 bags

1. L.R. (1878) 3 Q.B.D. 195. 2. (1952) 2 M.L.J. 270.

out of 1532 bags shipped at Vizag to reach Madras harbour. It was not a case of total loss of the goods shipped. Once again, I have to observe that the facts in the present case not being on all fours with the facts in the decision relied upon by the learned counsel for the appellant, I am unable to see how that decision will be of any assistance to the appellant.

The learned counsel for the respondent has, however, invited my attention to a decision in *Mitchell and others* v. *The Lanchashire and Yorkshire Railway Company*[1]. I have read through the decision and I do not think that that decision is of any assistance in deciding these appeals. The point that arose in that case was only with reference to the notice given by the carrier, after he had carried the goods to destination and warehoused them, asking the owners to take delivery of the goods, and the goods became damaged in the meanwhile. The facts of that case do not come anywhere near the facts in the present case. In the present case the clause 'shipped on deck at owner's risk' does not contain any affirmative words to show that the shipping company was exempted from liability in any case and even in the case of total loss of the goods. The question is whether it was the right of the carrier merely to receive the freight for carrying the goods and there was no obligation on the carrier to answer to the owner of the goods as to what exactly happened to the goods, which he was bound to deliver. The clause in the bill of lading limiting the liability of the carrier does not, in my opinion, appear to exclude the plaintiff's claim, if there occurred a total loss of the goods. A reasonable interpretation has to be given to the saving clause as also the limits of liability clause found in the bill of lading, in the absence of any provision that the shipping company should not be liable, if the goods shipped on deck are lost in their entirety. The meaning of the saving clause could only be that the shipping company could not be made liable for any loss or damage caused to the goods by reason of the fact of the goods being on the deck instead of any other place. If the shipping company were able to prove that the loss or damage to the goods arose by reason of the fact that they were put on the deck, then certainly to that extent the shipping company will not be liable. But in this case, there is no such proof that the total loss of the goods occurred by reason of their being put on deck or that such loss occurred after every care and caution having been taken by the carriers as men of prudence. Such being the case, it is difficult to say that the shipping company was entitled merely to receive the freight and not to account for the goods or account for the manner in which the loss occurred. If such were the law, then in every case where goods are shipped on deck, the company could easily plead that a total loss had occurred and by reason of a saving clause that the goods are shipped on deck at the risk of the owner, could seek to absolve itself from any liability whatsoever. If such a position were sound, then it will give rise to any amount of abuse of the contractual relationship between the parties, and there will be no end to the fraud that might be committed by carriers of goods and bailees, if the clause of the kind in question were to be interpreted as giving absolute immunity to carriers from any liability even in the case of total loss of the goods. In my view, the clause in question does not imply that in cases of total loss or non-delivery of the entire goods, there is a total exemption from liability of the carriers. The term 'shipper's risk' should only mean such loss and such damage that might arise consequent upon the goods being put on the deck which of course will have to be proved by the shipping company. The loss must be related to the goods being shipped on the deck. Therefore, in my view, the first defendant must be held liable to the plaintiff for the value of the goods as decreed by the lower Court. The clause that the goods are shipped on deck at the owner's risk will not be of any avail to the first defendant, in a case where the goods are totally lost and never delivered.

In the case of the insurance company, the second defendant, the learned counsel for the appellants contended that the plaintiff cannot succeed, unless and until the loss of the goods was proved to have been due to a peril of the sea and the burden of proving that the loss was due to such a peril was entirely on the plaintiff. He

1. 44 L.J.R. (1875) C.Q.B. 107.

further contended that so long as the burden is not discharged, the insurance company cannot be made liable. The learned counsel also referred to the extent of liability of the insurance company under the clause "warranted free from particular average". He has invited my attention to certain passages in "The Law of Insurance in British India" by N. Barwell, 1940 edition, at pages 103, 118 and 167. I do not think that the points commented upon in these passages do arise in this case because what is claimed by the plaintiff is merely the price of the goods and nothing more. Particular average meaning partial loss does not seem to have any relevance in the present case. Learned counsel for the appellant also invited my attention to Halsbury's Laws of England 'Volume XVIII at pages 186 and 322. He attempted to put a very restricted scope on the terms of the policy that all other perils, losses and misfortunes would not imply any loss on board the ship, unless it be of the particular type referred to in the clause in the insurance policy Exhibit A. 23. The fact remained that in this case the goods were put on board the ship and they were carried through the sea, but they did not arrive at the port of destination. The term 'misfortunes' after having mentioned all the other perils of the sea, is found in the relevant clause in the insurance policy. It is difficult to say how the loss of the total goods on board the ship, when once it is proved that they were put on board, could be excluded from the scope and meaning of the word 'misfortunes'. The learned counsel for the appellant stated that according to the *ejusdem generis* rule, the misfortunes should be of the same class, category and character as those falling within the category 'perils of the sea'. But I do not think that such a rule will apply in the present case, when almost all the kinds of perils of the sea have been exhaustively given in the list and when in addition to that, the word 'misfortune' is also included. The insurance company, in my opinion, seeks merely to take shelter under the shipping company to avoid its liability for the loss of the goods insured with them. On a proper and reasonable interpretation of the clause contained in the insurance policy, the insurance company cannot escape liability for a total loss of the kind that has arisen in the present case, which loss must be put down to lie within the scope of the terms 'losses and misfortunes'. Merchants insure the goods with the company to cover any risk in their being safely landed at the port of destination and if the goods are not so landed, when once they were put on board, and if the loss of the goods has arisen, then certainly it is a loss and misfortune which is covered by the terms of the insurance policy. In my opinion, the insurance company cannot, therefore, be exonerated from its liability to honour its obligation to the insured. I am, therefore, of the opinion that on the facts of this case and in view of the terminology used, the insurance company as well as the shipping company will both be liable to the plaintiff.

In the result, the decree and judgment of the learned City Civil Judge is quite justified and proper and the same is hereby confirmed. Both the appeals are dismissed with costs.

R.M. — *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P.V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAJAGOPALA IYENGAR.

S. Gopala Reddi .. *Appellant**.

v.

Regional Transport Authority, North Arcot, by its Secretary, the Regional Transport Officer, Vellore and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), *section* 64 (*a*)—*Renewal of permit to one and dismissal of application for permit of another applicant—Appealability of order.*

Where there are more than one applicant for a permit for a particular route, the grant of a permit to one would automatically mean the refusal of a permit to the other. An appeal against a composite order granting renewal of permit to one and dismissing the application for permit to the appellant is perfectly competent as an appeal against the order refusing to grant a permit. The fact that

* Writ Appeal No. 9 of 1954. 11th February, 1955.

such an appeal involved an attack on the order granting a renewal of a permit to another would not prevent the appeal being what it was, namely, an appeal against the refusal to grant a permit to the appellant.

Appeal under Clause 15 of the Letters Patent against the Judgment and Order of the Honourable Mr. Justice Govinda Menon, dated 14th December, 1953 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. No. 981 of 1953 presented to the High Court for the issue of a writ of *certiorari* or any other appropriate writ or order or direction in the nature of a writ calling for the records of the 1st Respondent in R.C. No. 16170/B3/52, dated 2nd March, 1953, of the 2nd respondent in R. No. 19638/A2/53, dated 24th June, 1953 and of the 3rd Respondent in G.O.R. No. 3706-Home, dated 20th October, 1953 and to quash the said orders.

N. G. Krishna Aiyangar for Appellant.

The Special Government Pleader (*V. V. Raghavan*) and *T. Chengalvarayan* for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This appeal against the order of Govinda Menon, J., dismissing an application by the appellant for the issue of a writ of *certiorari* to quash the order of the Government, dated 20th October, 1953, arises out of the following facts. The 4th respondent herein who had already a stage carriage permit on the route, Tiruvannamalai to Dharmapuri, applied for the renewal of his permit. When his application was published, the present appellant applied for the grant of a permit to him on the same route. Both the applications, *i.e.*, the application of the 4th respondent for renewal and the appellants' application for the issue of a permit, were heard together, and quite rightly, by the Regional Transport Authority, because these two were rival applicants for a permit on the same route. The Regional Transport Authority passed the following order on both the applications :

"Renewed after hearing the objection and representation. Individual cases of infringement will be dealt as and when they arise."

The latter part of the order refers to the objection of the appellant to renewal to the 4th respondent of the permit on the ground that he (4th respondent) was guilty of infringement of the conditions of the permit. Against this order, which in effect was a combined order disposing of both the applications of the appellant and the 4th respondent, the appellant filed an appeal to the Central Road Traffic Board. The 4th respondent raised an objection as to the maintainability of the appeal on the ground that there was no right of appeal against an order granting renewal of a permit. The appellant, on the other hand, maintained that the appeal was competent because his appeal must be deemed to be an appeal against the order of the Regional Transport Authority refusing his application for a permit, and he had a right of appeal against such an order under Section 64-A of the Motor Vechicles Act. The Central Road Traffic Board, however, by a process of involved reasoning, came to the conclusion that the appeal was not maintainable, and dismissed it. The appellant thereupon approached the Government for interference under section 64-A but the Government declined to interfere. The appellant then filed an application to this Court under Article 226 of the Constitution for issue of a writ of *certiorari* to quash the said order of the Government. Govinda Menon, J., dismissed the application, observing that the transport authorities cannot be said to have acted in excess of jurisdiction or failed to exercise a jurisdiction vested in them by law. This appeal is against that order of Govinda Menon, J.

With respect to the learned Judge, we must hold that there has been a clear failure on the part of the Central Road Traffic Board to exercise a jurisdiction vested in them, *viz.*, of entertaining and disposing of the appeal preferred by the appellant to them. The Government, in so far as they confirmed the order of the Central Road Traffic Board holding that the appellants appeal was not competent, must also be deemed to have committed an error which related to jurisdiction. The appeal by the appellant was against what we have referred to above as a combined order which disposed of simultaneously the application by the 4th res-

pondent for a renewal of the permit in his favour and the application by the appellant for the grant of a permit. The applications were in effect applications for the grant of a permit, and on that route, only one permit could be granted. The grant of a permit to one, would automatically mean the refusal of a permit to the other. The appeal was, in our opinion, perfectly competent as an appeal against the order of the Regional Transport Authority, refusing to grant a permit. The fact that such an appeal involved an attack on the order granting a renewal of a permit to the 4th respondent would not prevent the appeal being what it was, *viz.*, an appeal against the refusal to grant a permit to the appellant. The Central Road Traffic Board erred in presuming that it was not open to them in the appeal to consider the merits of the order granting renewal of the 4th respondent's permit. Indeed, the first question which had to be determined in the appeal filed by the appellant would be the propriety of the action of the Regional Transport Authority in granting renewal to the 4th respondent. The filing of the appeal by the appellant set at large the order of the Regional Transport Authority granting the renewal.

We, therefore, hold that the Central Road Traffic Board wrongly rejected the appeal as incompetent. They thus refused to exercise a jurisdiction which they undoubtedly had. We, therefore, quash the order of the Central Road Traffic Board and the order of the Government and direct the Central Road Traffic Board to restore the appeal to file and dispose of it in accordance with law. The appellant will be entitled to his costs of this appeal from the 4th respondent. Advocate's fee Rs. 100.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Minor Pechi and another .. *Appellants**

v.

Perumal Thevar and others .. *Respondents.*

Usufructuary mortgage—Duty of mortgagor to pay the Government revenue—When arises—Purchase by the mortgagee in a revenue sale of the mortgaged property—When valid.

Generally when a revenue sale of properties is effected as a result of the mortgagees' default in paying the revenue even though there is no default on the part of the mortgagor, still the mortgagor's title in the property ceases to exist and the purchaser obtains rights of such a purchase. But if the sale has been brought about as a result of any default on the part of the mortgagee and he himself buys the property in the revenue sale then the maxim that a man cannot take advantage of his own wrong will apply.

In the case of an usufructuary mortgage where between the parties, mortgagor and the mortgagee, there is an agreement that the mortgagee need pay the Government revenue only on the mortgaged properties, merely because as between the mortgagor and the Government all the lands included in a patta are liable for the entire sum due thereunder and the lands (including the usufructuarily mortgaged lands) are brought to sale for failure by the mortgagor to pay the revenue due on other properties, not mortgaged but comprised in the same patta, the mortgagee is not under any obligation to pay the Government revenue, and a purchase by him of the mortgaged property in such a revenue sale is valid and the mortgagor's title is extinguished.

Gunnam Dorayya v. *Vadappalli Ayyama Charyulu*, (1914) 27 M.L.J. 295, *Secretary of State for India in Council* v. *Pisipati Sankarayya*, (1910) 20 M.L.J. 794: I.L.R. 34 Mad. 493, *Panchanatha Iyer* v. *Swaminatha Iyer*, 1930 M.W.N. 993 and *Kalappa* v. *Shivayya*, (1895) I.L.R. 20 Bom. 492, referred.

Appeal against the Decree of the Court of the Subordinate Judge of Mathurai in Appeal Suit No. 35 of 1949, preferred against the Decree of the Court of the District Munsif of Thirumangalam in Original Suit No. 263 of 1947.

T. S. Vaidyanatha Aiyar for Appellants.

K. Desikachari for Respondents.

The Court delivered the following

JUDGMENT :—The plaintiffs are the legal representatives of one Mayandi Thevan, who executed a usufructuary mortgage, Exhibit A-1, dated 4th May, 1917,

*Second Appeal No. 239 of 1951. 4th February, 1955.

in favour of one Viruma Thevan for Rs. 166. The mortgage document recited that the mortgagee should cultivate the land, and pay the interest on the mortgage money out of the usufruct as well as the Government revenue charged on the property in question. It has to be mentioned that this Mayandi Thevan is a pattadar in the village in which he held other lands separately assessed to Government revenue. But there was a consolidated patta, which mentioned the revenue charged on each item of land with a total aggregate amount mentioned therein. In this patta there is a clear and specific mention of the revenue due on each of the items. On account of a default of Mayandi Thevan in payment of Government revenue due on other lands included in the same patta—Viruma Thevan having duly paid the Government revenue on the property in question—the suit property alone was sold for Government revenue due on other properties in revenue auction and Viruma Thevan happened to be the purchaser at that auction.

The plaintiffs as the legal representatives of Mayandi Thevan seek to redeem the mortgage under Exhibit A-1 and are met by the plea of the defendants, who are the daughter and the grand-daughters of Viruma Thevan by the plea that Mayandi Thevan's rights in the property have become extinguished as a result of revenue sale and therefore the suit for redemption has to be dismissed. The answer to this plea was that since there was a consolidated amount due under the patta, there was an obligation on the part of Viruma Thevan to pay not only the revenue due on the land mortgaged to him, but also the revenue due on the other lands included in the same patta and, as this has not been done and the suit property has been sold, Viruma Thevan cannot take advantage of the sale, which has been brought about by his non-payment of the revenue on the other lands as well. The lower Courts have accepted this contention and held that Viruma Thevan must be deemed to have purchased property as trustee for Mayandi Thevan and as such the mortgage has become extinguished and directed recovery of possession of the property. The second appeal is by defendants 2 and 3, who are two of the grand-daughters of Viruma Thevan.

Mr. T. S. Vaidyanatha Ayyar for the appellants contends that it was not obligatory upon Viruma Thevan to pay the revenue due on the other pieces of land separately charged, though they are included in the same patta. Viruma Thevan having paid the revenue on his lands, there is no obligation on him to discharge the arrears of revenue due on other lands. Such being the case, the purchase by the purchaser Viruma Thevan cannot be said to be as a trustee for Mayandi Thevan.

In the lower Court as well as here, reliance was placed by the respondents on certain observations of a Bench of this Court in *Gunnam Dorayya* v. *Vadapalli Ayyama Charyulu*[1]. The facts of that case were that a mortgagee in addition to paying the revenue and other cesses due upon the land mortgaged to him also paid a sum of Rs. 60 which represented the irrigation cesses and other cesses due upon other lands of the mortgagor contained in the same patta as the mortgaged land and claimed that such amount should be added on to the mortgage money at the time of redemption. The High Court held that since the Government revenue due upon other lands contained in the same patta issued in the mortgagor's name is revenue due upon the mortgaged land as well, there was a liability upon the mortgagee under section 76 (*c*) of the Transfer of Property Act to pay the same and, he having done so, is entitled to tack that amount to the mortgage money. The authority for the statement that though separate amounts are entered as the revenue due upon separate numbers held under a single patta, the demand of the Sircar and the liability of the landholder is a consolidated demand and the liability for the entire sum mentioned in the patta charged upon each item of land contained in the patta is an observation of a Bench of this Court in *The Secretary of State for India in Council* v. *Pisipati Sankarayya*[2]. Relying upon these two judgments, the learned counsel for the respondents contends that there

1. (1914) 27 M.L.J. 295. 2. (1910) 20 M.L.J. 794 : I.L.R. 34 Mad. 493.

was a duty cast upon Viruma Thevan to pay the Government revenue on other lands included in the same patta and, therefore, the fact that the lands were sold in revenue auction was as a result of a default on the part of Viruma Thevan, in which case he could not take advantage of his own default and thereby claim a right in the properties purchased. I do not think that the decision in *Gunnam Dorayya* v. *Vadapalli Ayyama Charyulu*[1], goes to this extent. It has been held in *Panchanatha Iyer* v. *Swaminatha Iyer*[2], following an earlier decision of this Court, that when a revenue sale of properties is effected as a result of the mortgagee's default in paying the revenue and on account of no default of the mortgagor, still the mortgagor's title in the property ceased to exist and the purchaser has obtained rights by such a purchase. Therefore, if instead of Viruma Thevan being the purchaser, a third party had become the purchaser of these properties, then the plaintiffs cannot say that they have got any right to them. Does it make any difference because the mortgagee himself has become the purchaser ? In my opinion, if the sale has been brought about as a result of any default on the part of the mortgagee, then the maxim that a man cannot take advantage of his own wrong will apply. But here the terms of the mortgage deed, Exhibit A-1, themselves show that the liability of the mortgagee was only to pay the revenue on the property mortgaged to him. When between the parties there is an agreement that the mortgagee need pay only the Government revenue on the properties mortgaged, I do not think that because as between the mortgagor and the Government all the lands included in the patta are liable for the entire sum due thereunder, the mortgagee has got any obligatory duty cast upon him to pay the Government revenue. Therefore it is clear that the revenue sale has not been brought about as a result of any default at the hand of Viruma Thevan.

It is next contended by Mr. Desikachari that at the time the revenue sale took place Viruma Thevan's son-in-law happened to be the deputy karnam and therefore we must infer that the sale was brought about in order to benefit Viruma Thevan and not in any public interests. Except the fact that the deputy karnam was Viruma Thevan's son-in-law, there is nothing on record to show that Viruma Thevan had any hand in bringing about the sale. I am therefore of the opinion that Viruma Thevan's purchase should be deemed to be on the same footing as a purchase by a disinterested third party. Then following *Panchanatha Iyer* v. *Swaminatha Iyer*[2] and *Kalappa* v. *Shivayya*[3], I have to hold that the purchase by Viruma Thevan has extinguished the rights of the mortgagor Mayandi Thevan and that Viruma Thevan is not a trustee for Mayandi Thevan at all. The Plaintiffs, therefore, have no further rights to the suit property.

The Second Appeal is therefore allowed and the suit dismissed with costs in the trial Court and in the lower appellate Court. In this Court each party will bear his own costs.

No leave.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Venkatakrishna Chettiar .. *Petitioner**

v.

The State of Madras represented by the Collector of Salem .. *Respondent.*

Madras Buildings (Lease and Rent Control) (Act XXV of 1949), *section* 3 (2)—*Accommodation Controller's Order to allot a particular building for occupation by Government Officer—Collector allotting it to refugees from outside—No formal order by Accommodation Controller—Whether defect sufficient to release Government of its obligation as a statutory tenant—Estoppel whether can be a bar.*

Where a building was allotted to Government officials under orders of the Accommodation Controller under section 3 (2) of the Act XXV of 1949 and the Collector in his turn allotted it to two

1. (1914) 27 M.L.J. 295.
2. 1930 M.W.N. 993.
3. (1895) I.L.R. 20 Bom. 492.

* C.R.P. No. 651 of 1952. 1st November, 1954.

refugees from Pakistan, and those refugees having defaulted in payment of rents were sued in Court but before the decree against them could be executed they had vacated the premises; on the questions whether the Government in a case like this was the statutory tenant and whether there was an estoppel against suing the Government as a tenant because of the earlier eviction proceedings against the refugees:

Held (1) that because the Accommodation Controller failed to pass a formal order confirming the order of the Collector allotting the said suit house to the refugees the technical error could not be availed of to defeat the statutory tenants' legal obligation to pay arrears of rent for the period of tenancy.

Mrs. B. Gervase, In re (1950) 1 M.L.J. 201, distinguished.

(2) that no estoppel arose which would stand in the way of barring the landlord's right to recover the rents from the Government as a statutory tenant.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of Principal Small Cause Judge, Salem, dated 29th November, 1951 and made in S.C.S. No. 231 of 1951.

N. S. Raghavan for Petitioner.

The Government Pleader (*C. A. Vaidialingam*) for Respondent.

The Court delivered the following

JUDGMENT:—This is a petition by the plaintiff against the decree and judgment of the learned District Munsif, Salem, dismissing his suit for recovery of Rs. 452 being the arrears of rent from defendants 1 and 2, two refugees from Pakistan, as against the State of Madras impleaded as the third defendant. The suit was decreed only against the 1st and 2nd defendant.

The facts are briefly these. The building in question appears to have been requisitioned in 1949 under section 3 (2) of Madras Act XXV of 1949. According to orders of the Accommodation controller, Exhibits A-1 to A-5, they were allotted to Government Officials in turn the last order, dated 9th March, 1951, being allotment to the Inspector of Police, Crime Branch. Then it would appear that under the order of the Collector of Salem, this building was allotted to two families of refugees from Pakistan whom the Tahsildar, Salem, put into possession. This is apparent from the Collector's order, Exhibit A-3, dated 14th November, 1949. As these refugees defaulted in paying rents, the plaintiff instituted proceedings to evict them and obtained a decree against them but by then they had vacated the premises. The plaintiff did not know where they had gone. Afterwards the plaintiff filed the present suit.

There can be no doubt that the Government is the statutory tenant of the landlord under section 3 (2) of the Act, and that in a case of this kind the landlord can look to the Government for payment of rents which is in law the obligation of the tenant. The suit was opposed by the Government on two grounds. The first ground which commended itself to the District Munsif was a technical one, that in this case the allotment was made to the refugees by the Collector and not by the Revenue Divisional Officer who was the Accommodation Controller to whom powers under section 3 (2) of the Act had been delegated. The learned District Munsif held that as allotment to the refugees was not made by the Revenue Divisional Officer but by the District Collector, the allotment was not one envisaged under Madras Act XXV of 1949, and therefore, no statutory tenancy was created which would make the Government liable for the rents. I am unable to accept this technical position relied on by the Government for evasion of their statutory liability. This is a case in which the Accommodation Controller at the worst failed to pass a formal order of allotment in compliance with the order of the Collector directing the refugees to be given this building. I am unable to see how the Government can rely on an error or omission by one of its own officer to defeat legal obligations as a statutory tenant to pay the landlord the arrears of rents during the period of tenancy. The same point was sought to be raised in another way in *Mrs. B. Gervase*, In re[1]. That was a case in which the Collector himself requisitioned a house and allotted it for location of a police station. The untenable position

1. (1950) 1 M.L.J. 201.

taken on behalf of the landlord, who was charged under section 188, Indian Penal Code, was that the requisition was, invalid as it was made by the Collector and not by the Accommodation Controller. In the case before me I have no hesitation in holding that the Government cannot evade its liability as a statutory tenant on this technical point.

The second point raised before the learned District Munsif was that the plaintiff landlord was estopped from filing this suit against the Government as a tenant because he instituted eviction proceedings against the refugees as tenants. The learned District Munsif rightly held that there was no question of estoppel arising in this case. It is true that the landlord could not file a suit to evict the Government as a statutory tenant under section 7 of the Act. It would have been a more appropriate remedy if the landlord had claimed the rents due from the Government and asked the Government to evict the refugees who had defaulted in the payment of rents. I am unable to see how resort to an inappropriate remedy by the landlord can relieve the Government of its liability to pay the rents as a statutory tenant under the Act. Mr. Raghavan in fact urges that the suit filed by the landlord, the plaintiff, for eviction really helped the Government in that it prevented the arrears of rent from accumulating. No estoppel arises which can stand in the way barring the landlord's right to recover the rents from the Government as a statutory tenant.

This Petition is allowed with costs throughout.

K.C. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

G. C. Kesavalu Naidu and another .. *Petitioners**.

Madras Prohibition Act (X of 1937), section 13—Confiscation of vehicles used for transporting prohibited liquor—Proper procedure.

Though the vehicles used for transporting prohibited liquor can be confiscated in terms of section 13 of the Madras Prohibition Act it is not inperative for the Court to do so but it is merely discretionary. In cases where the vehicles belonging to one is hired by the accused for committing the illegal Act, though strictly speaking the remedy of the owner of the vehicle is to proceed against the hirer, who has put it to the illegal purpose, for the recovery of the value thereof, equity, justice and good conscience requires that this provision should be used in a humane and just manner. The proper course for the Magistrate who intends to confiscate the vehicle is first of all to ascertain from the accused whether the vehicle belongs to him or to another and then if the Magistrate believes that the vehicle belongs to the accused he can straightaway order its confiscation. If on the other hand there are reasons to believe that the owner of the vehicle is a different person the confiscation of the same might be postponed for a reasonable time on the analogy of section 517, Criminal Procedure Code and notice might be issued to that alleged owner to come and show cause that he had exercised due care in preventing the commission of an offence, that is, that he did not know and that he had no reason to believe that the conveyance was likely to be used for transporting liquor illicitly.

Desirability of amplifying section 13 of the Madras Prohibition Act on the lines of section 9 of the Bombay Prohibition Act pointed out.

Case-law reviewed.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to direct the return of the bicycle bearing frame No. 334 and directed by the Sixth Presidency Magistrate of the Court of the Presidency Magistrates, Saidapet, Madras, to be confiscated by order, dated 4th November, 1954, in C.C. No. 4170 and 4177 of 1954 on his file to the petitioner herein.

M. Srinivasa Gopalan for Petitioners.

State Prosecutor (*S. Govind Swaminathan*) on behalf of the State.

The Court made the following

ORDER.—These are two petitions involving the same point for consideration filed against the orders made by the learned Sixth Presidency Magistrate, Saidapet, in C.C. Nos. 4177 and 4170 of 1954 respectively confiscating a bicycle in each case which was used for committing an offence under the Madras Prohibition Act X of 1937.

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*Cr. M.P. Nos. 51 and 53 of 1955. 8th March, 1955.

The facts leading to Cr.M.P. No. 51 of 1955 are as follow: The accused Narayanaswami, aged 23 years, and son of Manicka Naicker residing at No. 33, Raman Street, near Pandy Bazaar, Mambalam, was found in possession of two water bottles and three bottles containing 42 drams of arrack in all in a bag tied to the carrier of a bicycle at Old Mambalam Road on 4th November, 1954, at about 12-30 P.M. On his being put before Court he pleaded "guilty" to a charge under section 4 (1) (*a*) of the Madras Prohibition Act. The learned Magistrate convicted him as charged and sentenced him to pay a fine of Rs. 30 and directed the confiscation of the bottles and the destruction of the bag in which the bottles were kept as well as the arrack inside the bottles and also the confiscation of the cycle "since it was used for the commission of the offence." Thereafter the petitioner before us Kesavalu Naidu has come forward with this petition stating that he is the owner of Sai Baba Cycle Works at No. 98, Seven Wells Street, of which the license is in the name of his wife Mrs. Radhabai, that he is hiring out eight cycles that on 4th August, 1954, one Balaraman took one of the cycles which is the subject-matter of confiscation, that that Balaraman appears to have passed it to one Tiruvengadam from whom the accused Narayanaswami appears to have taken it and that inasmuch as the petitioner hired out the cycle to Balaraman, it should not be confiscated and that it should be returned to the petitioner Kesavalu Naidu.

The other Petition Cr.M.P. No. 53 of 1955 is filed by one Subbiah and arises out of C.C. No. 4170 of 1954 in which one Varadan was convicted and sentenced to pay a fine of Rs. 20. That Varadan was found in possession of 12 drams of arrack which was being transported on a bicycle. On his being produced in Court he had admitted the offence. The learned Magistrate in addition to the order of destruction of the bottles and the liquor, directed the bicyle to be confiscated "since it was used for the commission of the offence." Thereupon the petitioner K. Subbiah has come forward with this petition that he is running a cycle shop in the name of his wife Kiliambal under the name and style of Modern Cycle Works at No. 2/4, Eldams Road, Teynampet, that he is hiring out five cycles and one such was hired out on 3rd November, 1954 to Varadan, a vegetable vendor in Teynampet market, for an hour as he wanted to go for a condolence that subsequently the petitioner learnt of the conviction of that Varadan and confiscation of the cycle and that inasmuch as the cycle was hired out in the usual course of business it may be ordered to be returned to him.

I may mention here that this type of claim has almost become an almost type-design one and one such case diposed of by me in Cr.M.P. No. 979 of 1954 is reported as *Sheik Ismail*, In re[1].

The short order which I made therein and which is relevant for the disposal of the present petitions is as follows:

> "The bicycle in this case was undoubtedly used for committing the offence under the Madras Prohibition Act (X of 1937) and therefore in terms of section 13 of that Act it was properly confiscated by the Magistrate. The circumstances under which that cycle came to be lent to the accused by the petitioner before us are neither here nor there. It is certainly open to the petitioner to take appropriate proceedings against the accused for reimbursement of the cycle which, according to him, was lent for one purpose and has been found to be used for another purpose, *viz.*, for committing the offence under the Madras Prohibition Act of 1937. In fact it is only on account of the availability of the facilities by hiring out these vehicles that illicit liquor is practically sold like milk in various parts of Madras. Therefore, the Magistrates must vigorously put down, the prohibition offences by confiscating the vehicles used for the purpose. The order passed is thoroughly proper, and I confirm it and dismiss this petition."

There is no difficulty in regard to the law on the subject because whenever in terms of section 13 of the Madras Prohibition Act in any case in which an offence has been committed against the said Act, animals, vessels, carts or other vehicles used to hold or carry the liquor, drug, materials, etc., are liable to be confiscated. The term "liable to confiscation" imports not that confiscation is automatic but that the Court may impose it as an additional punishment in suitable cases.

1. (1955) 1 M.L.J. 186.

exercising a sound discretion. *Sadashiv*, In re[1], *Pandharinath Pundlik*, In re[2], In re *Abdul Azeez*[3], *Bhimji* v. *Emperor*[4].

The difficulty arises therefore only in the imposition of this punishment. In regard to the mode of exercising this punishment there is no decided case explaining the principles of its exercise under the Madras Prohibition Act. But fortunately for us, aid can be derived from the case-law in regard to analogous provisions in other Acts, *viz*., section 11 of the Opium Act, section 65 of the Abkari Act I of 1886, section 43 of the Madras Forest Act V of 1882 and section 99 of the Bombay Prohibition Act XXV of 1949. It is unnecessary to consider similar provisions in other minor Acts like the Ancient Monuments Preservation Act (1904), section 17 (3) —confiscation ; Arms Act (1878), section 24—confiscation; Explosives Act (1884), sections 10 and 11—forfeiture and distress of vessel ; Merchandise Marks Act, (1889), section 9—forfeiture; Metal Tokens Act (1889), section 4 (2)—forfeiture; Penal Code, sections 126, 127 and 263-A (2)—forfeiture; section 169—confiscation; Petroleum Act (1934), section 24—confiscation; Poisons Act (1919), section 6 (2)—confiscation ; Public Gambling Act (1867), section 13 ; Central Excises and Salt Act (1944), sections 10 and 28—confiscation.

Section 11 of the Opium Act states that in any case in which an offence under section 9 has been committed, the vessels, packages and coverings in which any opium liable to confiscation under this section is found, and the other contents (if any) of the vessel or package in which such opium may be concealed, and the animals and conveyances used in carrying it, shall likewise be liable to confiscation.

The case-law under this section may be summarised as follows :—The animals and conveyance used in carrying contraband opium would not be liable to confiscation if hired for the purpose and if the owner of such animals or conveyance has no knowledge or intention or interest in such transaction or was not in any way implicated in the offence. An order was made under section 11 of the Opium Act confiscating a boat in which some opium had been found. Held that the order should not have been made without giving the owner of the boat an opportunity of being heard. Section 11 of the Opium Act does not contemplate that every receptacle, such as a ship or a house or a carriage in which a small quantity of opium may happen to be found is liable to confiscation ; the liability arises from the owner of such conveyance, using the conveyance for the purpose of transporting opium. A person cannot be made liable because his servant makes use of his private carriage as a depository for his private stock of opium. *Shaik Abdul Rahman* v. *Emperor*[5]. Where no improper conduct was imputed to the owners of the boat an order confiscating the boat under section 11 of the Opium Act was set aside ; *Chedi Mala* v. *The King Emperor*[6]. A boat in which excisable articles are carried in contravention of the Excise Law should not be confiscated unless it is found that the owner of the boat was in some way implicated in the offence under the Excise Law. *Golap Saha* v. *Emperor*[7]. Under section 11 of the Opium Act, a conveyance used for the purpose of carrying opium is liable to confiscation, which means that the section leaves it to the discretion of the tribunal which is trying the case to decide whether having regard to the facts of the particular case, the conveyance used in carrying the opium may be confiscated ; *Mohamed Keshab* v. *Emperor*[8]. An order of confiscation in respect of a motor car used in smuggling opium unless an opportunity is given to the owner of the car to prove that he had no knowledge or reason to believe that it was used for smuggling is bad ; *Manghan Das* v. *Rahim Bux*[9]. Cash found on a person convicted of illegally importing opium into British India under section 9 (*c*) of the Opium Act cannot be confiscated under any provisions of the Act. Under section 517, Criminal Procedure Code, only such property can be attached as is proved to have been used in the commission

1. 9 Cr.L.J. 162.
2. (1915) I.L.R. 40 Bom. 186.
3. (1943) 2 M.L.J. 447.
4. I.L.R. (1945) Nag. 413.
5. (1910) 12 Cr.L.J. 103.
6. (1904) 8 C.W.N. 349.
7. (1907) 12 C.W.N. 139.
8. A.I.R. 1925 Cal. 1021.
9. A.I.R. 1921 Pat. 232.

of an offence. Where a person who has illegally imported opium is convicted of an offence under section 9 (*e*) of the Opium Act and monies are found on him which he had received from a person to whom he proposes to sell the imported opium, the money cannot be attached under the provisions of section 517, Criminal Procedure Code, as it cannot be said to have been used in importing the opium : *Gobinda Ram* v. *Emperor*[1].

In In re *G.N. Chakrapany Chettiar*[2], Horwill, J., held as follows :

"The petitioner entered into a hire-purchase agreement with the accused, who used a car for transporting large quantities of contraband opium and ganja. The Magistrate confiscated not only the drugs found in the car but the car itself. The petitioner objected ; but his objections were over-ruled with the remark that it was open to Messrs. Chakrapani Chetty & Sons (petitioner) to seek his remedy under the hire purchase agreement in a Civil Court. I doubt very much whether Messrs. Chakrapani Chetty & Sons would have any remedy against the Government in a Civil Court under their hire-purchase agreement. The Magistrate has a discretion under section 11, Opium Act, to confiscate any conveyance used in carrying contraband opium ; and I do not think that the exercise of that discretion could be called in question in a Civil Court. That could be done only by the Courts which have appellate or revisionary jurisdiction over the Magistrate. If the petitioner's case is true that he had received only one instalment towards the purchase of the car and had no reason at all to suspect that his car was being used for transporting opium it would be, I think, very hard on the petitioner to have his car confiscated. In similar cases, it has been held that a conveyance ought not to be confiscated unless the owner knew or had reason to believe that his vehicle was likely to be used for such a purpose. That seems to be a very fair test for the Magistrate to apply when he has to consider whether or not he should order the confiscation of the vehicle. As the Magistrate has not considered this, I think his order should be set aside.

The petition is, therefore, allowed, the order of confiscation of the petitioner's car set aside, and the Magistrate ordered to consider afresh the question whether the car should be confiscated. He should permit evidence to be let in by the prosecution and by the petitioner."

Section 65 of the Abkari Act I of 1886 states, that in any case in which an offence has been committed under the said Act, the animals, carts, vessels or other conveyances used in carrying any liquor or intoxicating drug, shall likewise be liable to confiscation. The case-law under this section may be summarized as follows : The Madras Abkari Act I of 1886 was preceded by Mardas Act III of 1864 and under section 26-B thereunder a Police Officer had power to seize liquor with vessels, packages, and coverings and the animals and conveyances used in carrying it. He was then to take them before the Magistrate. Section 26-B authorized the award of one-half of the fine levied to the officer or officers who apprehended the offender or seized the articles, and also one-half of the proceeds of the sale of liquor, vessels, packages, conveyances, stills and other articles confiscated under the said Act. Under section 17 animals were liable to confiscation by the Collector, and in all cases in which there had been a conviction before a Magistrate and in which also by the order of the Collector any property had been confiscated, such property became property confiscated under the Act within the meaning of section 26-B. In the *Queen* v. *Sakiya*[3], a Bench of this Court held that the confiscation of animals did not appear to be within the authority of the Magistrate, having regard to the language of section 26-B and that in all magisterial cases falling for disposal under that section, the proceeds of whatever had been confiscated by the Collector including animals, would be available for distribution in the manner herein before described. In the *Queen* v. *Thathayya*[4], a Bench of this Court held that neither under the provisions of the Madras Abkari Act III of 1864 nor under the provisions of the Abkari Amendment Act V of 1879, an order by a Magistrate confiscating a boat used for carrying liquor without a valid permit is legal because under section 17 the Collector alone can confiscate and not the Magistrate. This defect was remedied in Act I of 1886 which has been reproduced above and under that Act the Magistrate could order the confiscation, as an additional punishment, of all animals, carts, vessels or other conveyances used in carrying the liquor or intoxicating drug. In In re *Ponnuswami Pillai*[5], a

1. (1923) 81 I.C. 103.
2. (1942) 2 M.L.J. 550.
3. (1882) I.L.R. 5 Mad. 137.
4. (1881) I.L.R. 4 Mad. 240.
5. (1909) 19 M.L.J. 254.

Bench of this Court held that a Magistrate who adjudges confiscation has power to direct the sale or destruction of the confiscated article.

Under section 43 of the Madras Forest Act V of 1882 when any person is convicted of a forest offence, all timber or forest-produce in respect of which such offence has been committed, and all tools, ropes, chains, boats, vehicle and cattle used in committing such offence shall be liable by the order of the convicting Magistrate, to confiscation. Such confiscation may be in addition to any other punishment prescribed for such offence. The case of importance under this section is In re *Ardhanari Iyer*[1], where it was held that the words " shall be liable to confiscation " in section 43 of the Madras Forest Act cannot be construed as being identical to " shall be confiscated " and that the section does not make confiscation imperative on the Court and to hold that the Court has no option but to confiscate is opposed to the language of section 43.

Section 99 of the Bombay Prohibition Act XXV of 1949 runs as follows :

" When during the trial of a case for an offence under this Act, the Court decides that anything is liable to confiscation under the foregoing section the Court may, after hearing the person, if any, claiming any right thereto and the evidence, if any, which he produces in support of his claim, order confiscation or in the case of any article other than an intoxicant, hemp, mhowra flowers or molasses, give the owner an option to pay fine as the Court deems fit, in lieu of confiscation :

Provided that no animal, cart, vessel or other conveyance shall be confiscated if the owner thereof satisfies the Court that he had exercised due care in preventing the commission of an offence."

I may complete this analysis by pointing out that in *Abdul Azeez*, In re[2], the cart used for conveying hides was ordered to be confiscated in a prosecution under section 65 of the City Police Act when there was no satisfactory explanation for the hides carried. The High Court ordered delivery of the cart, to the accused from whom it was seized or to any other person claiming to be entitled to it. In *Phula Singh* v. *Emperor*[3], a car seized in a prosecution under section 338, Indian Penal Code, was ordered to be released. In Criminal Revision No. 1103 of 1950 Somasundaram, J., directed in the circumstance of that case seizure of the car used for the commission of an offence was not warranted. In *Venkataraya Chetti*, In re[4], confiscation of transported jaggery was held not justifiable unless the lorry driver transported with knowledge or connivance or criminal negligence of the driver of the lorry. In *Suleman Issa* v. *State of Bombay*[5], the Supreme Court held in a case arising under section 61-E, Bombay Police Act, corresponding to section 65, Madras City Police Act, that confiscation is not necessary to be ordered in every case. The trend of these decided cases is that if the accused be only a servant or bailee an opportunity should be given to the orderer or bailer to establish after notice to him that the offence or contravention took place in spite of all reasonable precautions taken by him to prevent the contravention and that the offence took place in spite of such precaution in which case it could be returned to him.

The net result of this analysis is that though the vehicle used for transporting prohibited liquor can be confiscated in terms of section 13 of the Madras Prohibition Act, it is not imperative for the Court to do so but merely discretionary; secondly though strictly speaking the remedy of the owner of the vehicle is to proceed against his hirer who has put it to illegal purpose, for the recovery of the value thereof, equity, justice and good conscience requires that this provision should be used in a humane and just manner. The proper course for the Magistrate who intends to confiscate the vehicle is first of all to ascertain from the accused whether the vehicle belongs to him or to another and then if the Magistrate believes that the vehicle belongs to the accused he can straightaway order its confiscation. If on the other hand there are reasons to believe that the owner is a different person the confiscation of the property might be postponed for a reasonable time on the analogy of section 517, Criminal Procedure Code and as explained in *Naini Mal* v.

1. A.I.R. 1941 Mad. 835.
2. (1943) 2 M.L.J. 447.
3. A.I.R. 1931 Lah. 565.
4. (1950) 1 M.L.J. 183.
5. (1954) S.C.J. 387 : 1954 S.C.R. 976.

Crown[1], *Kishanchand* v. *Nanak Chand*[2], *Kanshi Ram* v. *Emperor*[3], *Deopujan* v. *Kukur Ahir*[4] and notice might be issued to that alleged owner to come and show cause in the language of section 99 of the Bombay Prohibition Act that he had exercised due care in preventing the commission of an offence, *i.e.*, that he did not know and had no reason to believe that the conveyance was likely to be used for transporting liquor illicitly a course incidentally directed in *C. N. Hassan Khan* v. *Government of Mysore*[5], arising under section 14 of the Mysore Prohibition Act XXXVII of 1948. In this connection the learned State Prosecutor feels and I am also of the opinion that section 13 of the Madras Act X of 1937 may be suitably amplified on the lines of section 99 of the Bombay Prohibition Act.

In the result, the orders of the lower Court ordering the confiscation of the bicycles are set aside and the learned Sixth Presidency Magistrate, Saidapet, is directed to dispose of the question of confiscation in the light of the observations made above.

R.M. —— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAJAGOPALAN.

The Transport Company, Limited, Kallidaikurichi .. *Appellant**

v.

The Tirunelveli Motor Bus Company, Limited .. *Respondent.*

Contracts—Specific performance of—Executory contract to allot shares in a company—Enforceability—Conditions.

A Court has jurisdiction to decree specific performance of a contract either to take shares or to allot shares subject to the same principles, which govern suits for specific performance as laid down in the Specific Relief Act. The legal possibility of a valid executory contract for allotment of shares is recognised provided there is an offer to take up shares which is communicated to and was accepted by or on behalf of the company. An executory contract to take up shares may be brought into existence in the same manner and subject to the same principles as under the Contract Act. The communication of the acceptance need not be in writing. It may be verbal or may be inferred by conduct.

Appeal against the decree of the Subordinate Judge of Tirunelveli in Original Suit No. 80 of 1946.

K. Rajah Ayyar, *K. S. Desikan* and *T. R. Sundaram* for Appellant.

S. Ramachandra Ayyar for Respondent.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—This is an appeal by the plaintiff against the decree and judgment of the Subordinate Judge of Tirunelveli in Original Suit No. 80 of 1946 under which the suit for several reliefs was decreed only to a comparatively small extent. In the plaint, as amended, the plaintiff claimed restoration and re-transfer of buses with the routes and permits described in Schedule B, an account by the defendant of the profits made from 7th August, 1942, till the date of restoration of the buses by employing the buses mentioned in Schedules A or B on the routes allotted to them and a decree in plaintiff's favour for an amount, which may be ascertained after taking accounts, or, in the alternative for the above reliefs, a decree directing the defendant-company to specifically perform the contract by allotting 410 shares to the plaintiff or directing the defendant to pay the value of 410 shares as on 15th July, 1946.

The plaintiff and the defendant are both private limited companies, incorporated under the Indian Companies Act in November and June, 1938, respectively, for

1. (1923) 24 Cr.L.J. 804 : A.I.R. 1924 All. 189.
2. (1925) 26 Cr.L.J. 1453 : A.I.R. 1926 Lah. 9.
3. (1922) 24 Cr.L.J. 713 : A.I.R. 1924 Lah. 75.
4. (1939) I.L.R. 19 Pat. 337 : A.I.R. 1940 Patna 198.
5. 1952 Cr.L.J. 701.

* Appeal Suit No. 306 of 1949. 1st September, 1953.

doing business as common carriers of passengers and goods for hire in motor vehicles. The registered office of the plaintiff-company is at Kallidaikurichi, Tirunelveli District, and that of the defendant is at Tirunelveli Junction. Before the incorporation of the plaintiff-company, one, Natesa Ayyar (P.W. 1), was carrying on the business of transport, but that business was later transferred to the plaintiff-company after its incorporation. Among the objects of the defendant-company as set out in the memorandum of association, Exhibit B-16, besides the business of carriers of passengers and goods on the Tinnevelly-Nagercoil route and its branches, the defendant-company was also to acquire and take over all the buses that were running in the Tinnevelly-Nagercoil route and its branches. There were also other objects set out in the memorandum of association but it is not necessary to refer to them.

The buses were acquired by allotting shares in the company instead of paying the value of the buses in cash. The object of the company seemed to be to acquire all the buses and bus routes with a view to put down unhealthy competition and consequent loss. The share capital of the company was Rs. 1,00,000 divided into 1,000 ordinary shares of Rs. 100 each. The whole of this was treated as issued capital and its paid up capital before 1942 was Rs. 35,900 in respect of 359 shares. The authorized capital, therefore, of this company, the whole of it, was also the issued capital.

Natesa Ayyar (P.W. 1) acquired in 1938, thirty-six shares in the defendant-company in lieu of three buses, which he transferred to the defendant-company. *Vide* Exhibits B-8 and B-20. In 1942, the plaintiff-company was plying buses along three routes, *viz.*, Kallidaikurichi-Kariyar route, Tinnevelly-Palamcottah route and Tinnevelly-Pattai route. But, for some reason or other, the business of the plaintiff-company was ending in loss and, therefore, at a meeting of the general body of the company held on 6th August, 1942, it was resolved to transfer fourteen buses along with three routes to the defendant-company and to take shares for Rs. 41,000 as a member. This resolution must have been preceded by negotiations with the managing director of the defendant-company, one Velayudham Pillai, as is made clear by the fact that in the resolution of that meeting, it was also stated that the managing director of the defendant-company also promised to advance monies on the security of the shares to discharge the debts of the plaintiff-company to be recouped from the dividend in three years. The resolution authorized the managing director of the plaintiff-company (P.W. 1) to send an application immediately to the Tinnevelly Motor Bus Service Co., and further empowered him to do all acts necessary to carry out the resolution. The agenda for the meeting of the general body is Exhibit A-2 and item 4 in it relates to this subject. Exhibit A-4 is a copy of the resolution which is No. 4. The routes and the numbers of the buses including the reserve bus, which was agreed to be transferred to the defendant, were all specified in the resolution. In pursuance of the authority conferred upon the managing director P.W. 1 sent an application to the defendant-company, Exhibit A-3, with which he enclosed a copy of the resolution of the general body of the plaintiff-company, Exhibit A-4. On 7th August, 1942, *i.e.*, the same day on which the application was made, on the reverse side of Exhibit A-3, the following note was made in the hand-writing of one, Chellam Pillai, who was one of the directors and was signed by five of the seven directors of the defendant-company. The note Exhibit A-3 (*a*), reads thus :

> " The Kallidaikurichi Transport Company may be included as a member for 410 shares and the amount requested by the managing director for discharging their debts may be paid from our company and receipt obtained."

Of the other two directors, Velayudham Pillai, the managing director was one and probably it was thought unnecessary that he should also sign it. There is no explanation why the signature of the other director was not obtained and there is no evidence that he had ever objected. It may be mentioned here that there were only nine or ten members constituting the general body of the defendant-company of whom seven were directors. On the same day, *i.e.*, 7th August, 1942, Velayudham Pillai, paid to P.W. 1 a sum of Rs. 16,001 on account as per the receipt,

Exhibit A-10. Subsequently, on 27th September, 1942 and 3rd February, 1943, P. W. 1 received from the defendant-company Rs. 5,000 and Rs. 20,000 respectively, *vide* Exhibits A-10 (*a*) and A-10 (*b*). In all, therefore, P.W. 1 recieved as loan from the defendant-company the sum of Rs. 41,001. The fourteen buses were handed over to the defendant-company on the night of 7th August, 1942, after P.W. 1 received the amount of Rs. 16,001 as loan.

It is the plaintiff's case, which is spoken to by P.W. 1, that the acceptance by the directors, as evidenced by Exhibit A-3 (*a*), was communicated to P.W. 1 by Velayudham Pillai immediately before the sum of Rs. 16,001 was paid on the night of 7th August, 1942 and the buses were transferred. This evidence remains uncontradicted as the defendant did not venture to put Velayudham Pillai into the witness box to deny it. A share certificate, Exhibit A-5, bearing date 7th August, 1942 and a duplicate, also bearing the same date, seem to have been issued by the managing director to the plaintiff. A return of allotment of shares was made to the Assistant Registrar of Joint Stock Companies in August, 1942, as is evident from Exhibit A-12, dated 12th August, 1942, Exhibit A-12 (*a*), dated 5th September, 1942, Exhibit A-12 (*b*), dated 16th September, 1942 and also Exhibit A-8, dated 25th March, 1943. On 7th March, 1943, a joint application was made by Natesa Ayyar representing the plaintiff-company and Velayudham Pillai representing the defendant-company, to the Road Traffic Board for transfer of the permits in respect of the fourteen buses to the defendant-company and this was sanctioned on 27th March, 1943, as per the proceedings of the Road Traffic Board, Exhibit A-6 (*a*) and was confirmed on appeal by the Central Road Traffic Board at the instance of an objector : *vide* Exhibit A-6 (*b*), dated 9th June, 1943.

One of the buses was attached by the decree-holder in Original Suit No. 31 of 1940 on the file of the Subordinate Judge's Court, Tirunelveli and a claim petition was filed on behalf of the defendant-company by Velayudham Pillai in which it was definitely stated that, in consideration of 410 shares of the defendant-company allotted to the plaintiff, the fourteen buses were acquired by the defendant-company, and that the Transport Company, Limited, Kallidaikurichi, *i.e.*, the plaintiff had no right to the bus and, therefore, it could not be attached : *vide* Exhibit A-15, dated 16th April, 1943. The attachment, however, of the bus was raised as the decree amount was deposited as appears from the endorsement on the petition, dated 18th September, 1943.

Under section 32 of the Indian Companies Act, a summary of the shares of the defendant-company was sent to the Registrar of Joint Stock Companies in which it was stated that the 410 shares were issued as fully paid up, otherwise than in cash : *Vide* Exhibit A-9. At the general body meeting of 23rd March, 1944, the balance-sheet and the profit and loss account for the year ending June, 1943, together with the audit report, came up for consideration and they were approved unanimously by the general body. In the balance-sheet then under consideration, the amount advanced, *i.e.*, the sum of Rs. 41,001 was shown as amount due by Natesa Ayyar to the defendant-company and a sum of Rs. 10,250 was shown in the profit and loss account relating to the Town Bus and Kariyar Bus Service account as depreciation on fourteen buses of the value of Rs. 14,000 which implies that the fourteen buses of the value of Rs. 41,000 were treated as buses owned and possessed by the defendant-company in respect of which they were entitled to claim a depreciation as a deduction to set off against the profits of the year and, what is more, the amount of Rs. 41,001 advanced to the plaintiff was shown as a loan due from Natesa Ayyar. It is no doubt true that, in this balance sheet, the value of the buses was not shown on the assets side : *Vide* Exhibit A-14, and the auditor's report, which was before the general body meeting, Exhibit A-34, dated 6th March, 1944, states that shares were issued to the value of Rs. 41,000 for the purchase of buses and the sum of Rs. 41,001 is treated as loan to Natesa Ayyar. Regarding the purchase of buses from the Transport Company, it is stated therein that there is no valuation definitely mentioned anywhere in the account books but the auditor was made to understand that this amount of Rs. 41,001 represented the value of fourteen buses taken over and the depreciation was justified. The loss in respect of the Town

Bus Service and Kariyar Bus Service of Rs. 14,096-3-6 was sought to be explained on the basis of the aforesaid transaction.

In the general body meeting, besides the five directors, who signed in Exhibit A-3 (*a*), there was Velayudham Pillai, the managing director, who was aware of the transaction from the beginning and two or three others, who were outside the directorate. In June, 1944, Velayudham Pillai ceased to be the managing director and the present managing director, Sayyed Khasim Sahib, was elected in his place. For the year ending 30th June, 1942, the company declared a dividend of six per cent. and, for the year ending 30th June, 1943, a dividend of seven per cent. was declared. Natesa Ayyar received dividend warrants for the thrity-six shares which were held in his name in the defendant-company, for the year ending 30th June, 1943, but he did not receive dividend warrants in respect of 410 shares of the plaintiff-company. On 27th December, 1944, he got issued a lawyer's notice to the defendant, Exhibit A-18, calling upon the managing director of the defendant-company to issue dividend warrants in respect of the 410 shares immediately. On 10th January, 1945, the managing director, Sayyed Khasim Sahib, sent a reply, Exhibit A-18 (*a*) to the effect that the matter would be placed for consideration before the general body meeting of the defendant-company and that after the decision of the general body, a reply would be sent. He however added that, as he could see from the available records in the office of the defendant-company, there was no allotment of 410 shares to the plaintiff nor was there any application by the plaintiff to the directors of the defendant-company. After this reply, a general body meeting was convened. Exhibit A-34 (*b*) is the notice calling for a general body meeting on 31st January, 1945. The resolution, as it was passed at that general body meeting stated :

"The Kallidaikurichi Transport Company, Limited, having applied for 410 shares according to rules to the Board of Directors, Tirunelveli Motor Bus Services Co., Limited, the Directors of this company convened a meeting of the Board in pursuance of the same and brought the said application for approval. As the Board of Directors of the Company did not make the allotment, it was resolved by all the directors except Sri R. Velayudham Pillai that the 410 shares said to have been obtained by the said Transport Company cannot be binding on Tirunelveli Motor Bus Service Company."

The objection in this resolution was that, though there was an application in the records of the company's office for the allotment of 410 shares, no allotment was made by the directors and that, therefore, the right to the shares did not legally vest in the plaintiff. On 14th April, 1945, a letter was addressed on behalf of the defendant-company by its lawyer to the Advocate of Mr. Natesa Ayyar, the managing director of the plaintiff-company, intimating him that the alleged allotment of the said 410 shares was not legal and that it was not supported by consideration. In this letter, it was also alleged that there was no application for allotment of shares, contrary to what was contained in the resolution of the general body meeting. After some more correspondence, the plaintiff instituted on 20th April, 1945, Original Suit No. 35 of 1945 on the file of the Sub-Court, Tirunelveli, against the defendant for a declaration of the plaintiff's title to 410 fully paid-up shares in the defendant-company and for a decree against the defendant for a sum of Rs. 3,054-8-0 being the dividend together with interest at six per cent. per annum. Exhibit B-2 is the plaint in that suit.

The main defence of the defendant in that suit was that the buses were sold for a sum of Rs. 41,000 and the amount received by Natesa Ayyar (as loan) was not really a loan but represented the sale price of the vehicles with the routes, that the certificates in respect of the additional 410 shares was a forgery and was fabricated by the managing director of the plaintiff company, Natesa Ayyar, and the managing director of the defendant-company without the knowledge and consent of the other directors of the company. There was no application for the allotment of shares to the board of directors and there was no allotment of shares.

There was only one omnibus issue framed in the suit, apart from the formal issues, which did not bring out however the real question for decision between the parties. The issue was :

" Is the plaintiff entitled to 446 shares or only to 36 shares ?"

Though the learned Judge, who tried the suit, noticed that it was not happily worded, he did not amend it but took it for granted that the matter in dispute between the parties, whatever it may be, was within that issue and under it, he discussed the various questions of law and fact. In conclusion, he found that no title vested in the plaintiff in respect of the 410 shares as there was no allotment of the shares by the directors but that there was allotment only by the managing director, which was insufficient in law to vest title to the shares and to make the allotment legal. He, however, also went into the question whether the case of the defendant that there was a sale of the buses for a sum of Rs. 41,000 or whether there was an agreement to exchange the buses for the shares was true and whether the sum of Rs. 41,000 was really a loan advanced to Natesa Ayyar. On this question, he found that the case of the defendant that there was a sale was not true, but that there was an agreement to accept for the shares the buses and that the sum of Rs. 41,000 advanced to Natesa Ayyar was a loan and not the sale price of the buses. In the result, the suit was dismissed with costs on 15th July, 1946.

There was no appeal against this decision by the plaintiff but on 12th October, 1946, a notice, Exhibit B-9, was issued by a Vakil on behalf of the plaintiff to the defendant-company in these terms :

"Now that Original Suit No. 35 of 1945 on the file of the Sub-Court, Tinnevelly, has been dismissed on the technical ground that there has been a legal defect in the proceedings relating to the allotment of the 410 shares, the subject-matter of the aforesaid suit, the following position arises and is created by the result of the above suit.

The Transport Company, Limited, which entered into the transaction of parting with its fourteen buses to you in lieu of 410 shares in your company has all along been under the idea, belief, and impression that the entire transaction, inclusive of the allotment of the 410 shares was in order, in accordance with law, valid and binding on you. But, however, the Court accepting your plea of invalidity attached to the allotment of shares has dismissed the suit.

Law and equity, therefore, enjoin you to restore to the Transport Company, Limited, the buses delivered over to you or their substitutes and all additions to them together with all the route rights in the Palamcottah-Tinnevelly, Tinnevelly-Pattai, Ambasamudram-Saliyar routes, original and subsequently obtained along with the net profits earned from 7th August, 1942, up to the date of re-delivery.

You are hereby called upon to do so within three days from the date of receipt of this notice. If you fail to do so on any account, you are hereby informed that a suit will be filed against you to obtain the reliefs aforesaid with costs."

There was no compliance with this demand made on behalf of the plaintiff by the defendant and the present suit was, therefore, instituted on 1st November, 1946.

In the plaint, as originally framed, a claim for specific performance was not included. The plaintiff made an application on 19th March, 1947, under Order 6, rule 17, Civil Procedure Code, for amendment of the plaint (Interlocutory Application No. 167 of 1947). Leave to amend was granted notwithstanding the opposition of the defendant by the Court by its order, dated 17th November, 1947 and the plaint was accordingly amended. This order granting leave to amend was affirmed by this Court in revision. The present suit, therefore, is one based upon a contract to allot shares, in exchange for fourteen buses, which still remained executory, as the allotment in pursuance of it was declared to be invalid by the decree in Original Suit No. 35 of 1945. In other words, the plaintiff wishes to fall back upon what he claims to be the original executory contract concluded between the plaintiff and the defendant to exchange buses for 410 shares of the value of Rs. 41,000. Though it is not very precisely stated in the pleadings, it has been so understood both in the Court below and also in the arguments before us. As a result of the existence of this contract, and its breach by the defendant, the plaintiff claims that he is entitled to enforce specific performance, or, in the alternative, to claim damages for its breach. If the contract is treated as having been rescinded, he claims that he is entitled to restitution of the benefits which the defendant derived under the contract, as it is a proved fact that the plaintiff, in pursuance of the arrangement, not only delivered the buses but also concurred in the transfer of the routes and the buses

to the defendant by joining in an application which was made to the Road Traffic Board.

The suit was resisted by the defendant on various grounds, which are covered by as many as fifteen issues in the case, some of which overlap. But the sum and substance of the defence at any rate as it emerged in the arguments before us is,

(i) that there was no concluded contract of exchange between the plaintiff and the defendant ;

(ii) that the managing director, Velayudham Pillai, had no power or authority to enter into a contract of exchange so as to bind the company ;

(iii) that even if Exhibit A-3 (*a*) had the concurrence of the directors, they had no authority to enter into a contract with a stranger to allot shares as it was opposed to the articles of the company ;

(iv) that under section 105-C of the Indian Companies Act, a contract agreeing to give shares in the first instance to the plaintiff, without following the provisions of that section, is void ;

(v) that if the contract is enforced by directing the allotment of 410 shares to the plaintiff, it would in effect and substance reduce the defendant-company to a subsidiary company thereby practically affecting and impairing its right to manage its own affairs without interference ;

(vi) that, in any event, the plaintiff is not entitled either to claim specific performance of the contract or damages for its breach, as under Exhibit B-9, he had definitely and irrevocably elected to treat the contract as having been rescinded and claimed restitution. In other words, under Exhibit B-9 and even in the plaint as originally filed, he never proceeded on the footing that he was standing by the contract and claimed relief on that footing but that the intention has always been, until the stage of amendment of the plaint, to claim restitution on the footing that the contract was rescinded by him ; and

(vii) that the suit was barred by limitation.

There is also the question which was debated before us, *viz.*, on what basis plaintiff should be granted either restitution if he is entitled to it, or damages for the breach of the contract if he is not entitled to specific performance, but is only entitled to damages for breach of the contract.

It is rather difficult to determine from the judgment of the learned Judge whether he intended to find whether there was or was not a concluded contract between the parties. In paragraph 9 he found, to quote his words :

"When the defendant has wholly failed to make out a case of conspiracy, fraud and collusion in the matter, when the evidence of P.W. 1 is uncontradicted and is corroborated by the documents to which I have made reference *supra*, I have no option but to hold that the plaintiff's case of the contract of exchange, *viz.*, transfer of 14 buses in lieu of 410 shares has been proved."

In paragraph 13 of the judgment, he says that the finding in the previous suit was that there was no valid offer to purchase shares and no valid acceptance and therefore there was no valid contract and that finding is binding upon the plaintiff and is *res judicata*. He also states in that paragraph that there was election made by the plaintiff to treat the contract as having been rescinded by the notice, Exhibit B-9, and that, therefore, the plaintiff was not entitled to any relief on the footing that the contract was affirmed by him. He also found that the suit was not barred by limitation, that there was no enforceable contract and if there was any contract, the plaintiff was not entitled to claim the relief of the specific performance of the contract. He came to this view on various grounds, which are referred to in paragraph 15 of the judgment. In paragraph 17, under issues 2, 2 (*b*) and 3, he found that the plaintiff was not entitled to demand an account from the defendant of the profits earned by their buses from 7th August, 1942 and finally he found that the plaintiff was entitled to recover the value of the fourteen buses on the footing of failure of consideration and the value of the buses was fixed by him at Rs. 41,000.

The plaintiff, however, objects to the finding as regards the value in this appeal. As there was a loan due from the plaintiff to the defendant, he allowed the loan to be set off against the amount which the defendant is bound to pay as the price of the fourteen buses and directed the defendant to pay court-fee on a sum of Rs. 41,001 treating it as a set off. In the result, after making the necessary adjustments, he found that the plaintiff was entitled to a decree for the balance, *viz.*, Rs. 3,480-8-4, with interest at six per cent. per annum.

In the appeal by the plaintiff, the correctness of the findings of the learned Subordinate Judge, which were against the plaintiff, were canvassed and the position taken up by the defendant was contested.

The first and foremost question which is the foundation for the suit is the existence of a concluded executory contract, which preceded the allotment. The legal possibility of a valid executory contract for allotment of shares is recognised, provided there was an offer to take up shares which was communicated to and was accepted by or on behalf of the company. An executory contract to take up shares may be brought into existence in the same manner and subject to the same principles as under the Contract Act. The communication of the acceptance need not be in writing. It may be verbal or may be inferred by conduct : see *Bai Mangu* v. *Bharatkhand Cotton Mills, Co.*[1] and In re *Universal Banking Corporation* (*Gunn's case*)[2]. A Court has jurisdiction to decree specific performance of a contract either to take shares or to allot shares subject to the same principles which govern suits for specific performance, as laid down in the Specific Relief Act. It has, therefore, to be seen, whether the evidence in the case establishes an executory contract of exchange of shares for the buses, apart from allotment which was held to be void and ineffective to convey title to the plaintiff to 410 shares.

In pursuance to the resolution of the plaintiff-company, Exhibit-A-4, dated 7th August, 1942, P.W. 1 sent an application Exhibit A-3. In the earlier litigation, these two documents, Exhibits A-3 and A-4, were not available but, in the present case, the plaintiff got them produced by summons issued to one Sesha Ayyangar, the Vakil of Velayudham Pillai, to produce the documents. On the same day, 7th August, 1942, the matter was considered by the directors, as appears from the endorsement, Exhibit A-3 (*a*), though there is no record of any meeting of the board of directors nor is there any evidence that the seventh director accepted or rejected it. The endorsement, Exhibit A-3 (*a*), which was signed by five of the directors and which must have had also the concurrence of the managing director, Velayudham Pillai, constitutes an acceptance of the offer of exchange made under Exhibit A-3 by a majority of the directors of the company and also constitutes an agreement to advance to the plaintiff the amount required to discharge his debts. It is no doubt true, as stated by Fry, L.J., in In re *Portuguese Consolidated Copper Mines, Limited*[3], that the directors cannot think without a meeting, It is also established that a company is entitled to the benefit of the " combined wisdom " of the directors in a meeting, unless the articles provide for transacting the business by resolution in writing circulated to the directors without a meeting. In the case of this private limited company, there is no doubt no such article authorizing the directors to dispose of the business by circulation. Though the minutes book of the defendant-company does not record any meeting of the board of directors on 7th August, 1942, there is no evidence that when all of them signed on the same day, they did not consult each other. They belong to different places near by and the directors could have given evidence in the matter to enlighten the Court where and under what circumstances they signed the endorsement, Exhibit A-3 (*a*), on the same day. No oral evidence was adduced on behalf of the defendant. The theory of "combined wisdom", has not been rigidly applied and Bacon, V.C., in In re *Bonnelli's Telegraph Company* (*Collie's Claim*)[4], considered the import of the expression " combined wisdom " and expressed the view that the directors must be of one mind but

1. (1930) 59 M.L.J. 61 : A.I.R. 1930 P.C. 134.
2. L.R. (1867) 3 Ch. App. 40.
3. L.R. (1889) 42 Ch. D. 160.
4. L.R. (1871) 12 Eq. 246, 258.

that it is not necessary that they should all meet in one place. The learned Vice-Chancellor says :

"I can conceive a great many circumstances which I do not say happened in this case, but which may happen in any case where the actual presence of the three directors cannot be procured, but where their combination can be most effectually secured by correspondence, by transmission of messages, or by other means which may be resorted to. If you are satisfied that the persons whose concurrence is necessary to give validity to the act did so concur, with full knowledge of all that they were doing, in my opinion, the terms of law are fully satisfied, and it is not necessary that whatever is done by directors should be done under some roof, in some place, where they are all three assembled."

Under the articles of association of the defendant-company the quorum for the meeting of directors is three. The endorsement was written by one of the directors and was signed by five of them. In the absence of any clear explanation on behalf of the directors, it is rather difficult to accept the contention that the directors did not consider the propriety of accepting the offer made on behalf of the plaintiff and that they were not of one mind. It is difficult to reject the acceptance by them on the technical ground that there is no record of any meeting in the minutes book of the company on that day. One of the signatories to Exhibit A-3 (*a*), is the present managing director and he, who is contesting the suit, did not venture to go into the witness box and throw light on the question.

It is the evidence of P.W. 1, which was not contradicted on the other side, that Velayudham Pillai, the then managing director, communicated this acceptance to P.W. 1, whereupon on the night of 7th August, 1942, an amount of Rs. 16,001 was paid (*see* Exhibit A-10) and the fourteen buses were delivered to the defendant. It must be remembered that at that time the policy of the company was to acquire as many routes and buses as possible to avoid unhealthy competition, particularly during the war period when they were making enormous profits in the business. Therefore there was an offer by the plaintiff-company and acceptance on behalf of the defendant, which was communicated to the plaintiff and was acted upon. In the balance sheet for the period ending 30th June, 1943, Exhibit A-14, the amount due by Natesa Ayyar, *viz.*, Rs. 41,001 was shown as a loan to him and in respect of fourteen buses depreciation of over Rs. 10,000 was claimed. The auditor's report drew pointed attention to the shares. The balance sheet and the auditor's report were placed before the general body with the concurrence of the directors. The general body consisted of seven directors and two or three others and the amounts earned by these buses and the routes were shown in the balance sheet. We purposely refrain from making any reference to the intermediate steps taken by the managing director of making a return to the Registrar of Joint Stock Companies of the allotment of shares and the joint application for the transfer of routes made by P.W. 1 and Velayudham Pillai, as it may be said that it was only an act of the managing director and not of the directors. But the same explanation cannot be availed of with reference to the balance sheet and the auditor's report which were accepted by the general body including the directors. They should have, if they had any doubt, enquired of the managing director as to how it happened that there were fourteen more buses whose earnings were brought into the balance sheet and the depreciation in respect of which was claimed as a deduction. The loan to Natesa Ayyar, of a large sum of Rs. 41,000 should certainly have attracted the attention of the directors to call for an explanation from the managing director if really they were ignorant of it as is now claimed. Unfortunately, they did not go into the witness box to explain their conduct. The balance sheet and the auditor's report were unanimously accepted by the meeting of the general body. It is therefore reasonable to presume that this contract of exchange was accepted by the directors and the shareholders. We are not now concerned with the legality of the allotment of shares and the irregular procedure adopted in making the allotment, which was the subject-matter of consideration in the earlier suit, which resulted in the declaration that the plaintiff was not entitled to the shares in question. We are only dealing with the existence of an executory contract which was accepted and communicated and acted upon, until the suit, Original Suit No. 35 of 1945, which was preceded by the exchange of notices in which the allotment was repudiated.

To support the case of the plaintiff, there is the evidence of P.W. 1, Natesa Ayyar, and there is no evidence *contra*. We are, therefore, of opinion that apart from the invalid allotment, there was an antecedent executory contract of exchange between the parties which was acted upon.

As the defendant refused to perform the contract and repudiated it, is the plaintiff entitled to specifically enforce the contract or claim damages for its breach or claim restitution on the ground that it became void ? It was open to the plaintiff, after the disposal of the suit, Original Suit No. 35 of 1945, either to affirm the contract and treat it as subsisting and to claim specific performance or to treat the contract as having been broken by the defendant as it was denied in the earlier litigation and to claim damages. Without affirming the contract, it is also open to him to rescind the contract, accepting the repudiation and claim restitution of the benefits received by the defendant under the contract.

The interconnection between the rights and the corresponding obligations arising under sections 39, 64, 65 and 75 of the Contract Act were considered by Sir George Rankin in the decision of the Privy Council in *Muralidhar Chatterji* v. *International Film Company, Ltd.*[1]. In explaining the significance of " void " and " voidable ", Sir George Rankin quoted with approval, the passage from Pollack and Mulla in their Commentaries on the Indian Contract Act (Sixth edition), at page 365 :

" Whenever one party to a contract has the option of annulling it, the contract is voidable ; and when he makes use of that option the agreement becomes void."

After pointing out that under section 64,

" . . . . a liability to make restitution attaches to a party putting an end to a contract under section 39 ",

their Lordships observed :

" the right to damages (*i.e.*, under section 75) presents no insuperable objection to the application of section 64 to cases of decision under section 39 ".

Under section 64, the obligation to restore the benefit is cast on the party rescinding a voidable contract and not on the other party, even though it was the other party's default that led to the recision. That left untouched the rights of the rescinding party under sections 65 and 75. In the present action, the plaintiff-company carried out in full their part of the contract with the defendant-company and no further obligation under that contract rested on the plaintiff. When the defendant-company repudiated the contract itself the plaintiff was entitled to treat the contract as void within the meaning of section 65. It became void when the plaintiff exercised his right to rescind it under section 39. The defendant's liability, then, was to restore to the plaintiff any advantage the defendant had received under that contract or to make compensation for it. That was independent of the statutory right accrued to the plaintiff under section 75. The rights were not necessarily alternative ; they could be cumulative. The advantage which the defendant received under the contract within the meaning of section 65 included in the circumstances of this case not only the value of the fourteen buses with the route rights but also the profits the defendants earned directly by the use of those buses and the route rights.

After the suit was disposed of, on behalf of the plaintiff, a lawyer's notice, Exhibit B-9, was issued to the defendant. All that was claimed in that notice was restitution of the benefit, *viz*., the return of the buses together with the substitutes and additions and the route rights together with the net profits from 7th August, 1942, up to the date of re-delivery. In the notice, it was alleged that the plaintiff was under the impression till the disposal of the suit, that the entire transaction inclusive of the allotment of 410 shares was in order, in accordance with law, valid and binding but that the Court, accepting the plea of the defendant based on the invalidity attaching to the allotment of shares, dismissed the suit. It is, therefore, claimed that, in law and equity, the plaintiff was entitled to restoration of all the benefits which the defendant had obtained under the contract, which became void by the decision of the Court in Original Suit No. 35 of 1945. In our opinion, the

1. (1943) 2 M.L.J. 369 : L.R. 70 I.A. 35 : I.L.R. (1943) 2 Cal. 213 (P.C.).

plaintiff by the notice, Exhibit B-9, far from affirming the contract, and claiming specific performance as if it continued to exist or even claiming damages as if it was broken by the defendant, acted as if the contract was wiped out and claimed that the parties should be restored back to the position in which they would have been, had not the contract been entered into. After this definite election, with full knowledge of the facts and after consulting a lawyer, it is difficult to hold, notwithstanding the finding that there was an executory contract of exchange, that the plaintiff is entitled to either specific performance or to damages. What is more, even in the present suit as originally filed, no claim for specific performance was in the first instance made. It was only the other reliefs that were insisted upon in the suit. Later by an amendment, the plaintiff included in the suit a prayer for specific performance but, in the body of the plaint, no specific allegations were made justifying a decree for specific performance. We think, therefore, that by reason of Exhibit B-9, and the plaint as originally filed, P.W. 1 has put himself out of his power to revive or resuscitate the contract, which by his own act of election, was rescinded. In our opinion, it is too late for him to go behind his own election and get rid of its effect. In this view, the only relief which the plaintiff will be entitled to, is the restoration of the benefits received by the defendant under the contract and no more. This is the relief, which the lower Court thought, in justice, the plaintiff was entitled to, though we are not in entire agreement with the extent of the relief granted by the lower Court.

In the above view, it may not be necessary to consider the other objections raised on behalf of the defendant regarding the validity and the enforceability of the contract except the question of limitation. On this point however, we see no reason to differ from the conclusion of the trial Court that the suit was not barred by limitation. By reason of the decision in the earlier suit, the contract became void and it is from that date that the plaintiff's cause of action arose. Till then he was in the position of a party who accepted performance of the contract by the defendant by alloting the shares but the allotment was declared to be ineffective and invalid by the decree in Original Suit No. 35 of 1945. Even to enforce the contract, the suit is in time, as no definite period was fixed under the contract for specific performance and it was only when there was demand and refusal after the disposal of Original Suit No. 35 of 1945, that the cause of action for enforcing the contract arose. The objection, therefore, that the suit was barred by limitation must be over-ruled.

As the other objections were also argued before us, we may briefly refer to them. In view of the finding that the contract had the approval of the directors and even of the general body, the objections that the managing director had no power to enter into the contract and that there was no power to allot shares to strangers, lose their force. Section 105-C of the Companies Act also does not stand in the way as, in the present case, the whole of the capital is issued capital. Whatever may be the interpretation that may be placed on section 105-C, the restriction in that section does not apply to issued capital. The Supreme Court, in *Nanalal Zaver and another* v. *Bombay Life Assurance Company and others*[1], did not finally decide the proper construction of this section though there was the opinion of Das and Mukherje, JJ., that section 50 of the Indian Companies Act applies to the increase of the share capital above the authorised capital and section 105-C applies to the issue of further shares within the authorised limit, *i.e.*, within the authorised capital. In that case, as appears from the facts, the directors decided to issue further shares within the authorised capital but, as in the present case all the shares were already issued, the allotment of such shares would not contravene the provisions of section 105-C.

It now remains to consider the extent of the relief by way of restoration of the benefit which the plaintiff would be entitled to. The learned Judge in the Court below thought that the plaintiff was entitled only to the value of the shares as on the date of the contract, *viz.*, 7th August, 1942, which was fixed by him at Rs. 41,000,

1. (1950) S.C.J. 337 : 1950 S.C.R. 391 (S.C.).

the nominal value of the shares agreed to be allotted to the plaintiff. He refused to grant to the plaintiff the substituted buses and did not direct the transfer of the routes nor did he direct an account of the profits, which the defendant-company earned by the use of the buses of the plaintiff. The plaintiff contends and, in our opinion, rightly that the nominal value of the shares should not have been taken as the basis for valuing the fourteen buses.

* * * * * *

(The learned Judges then held that the market value of the buses on 7th August, 1942, was Rs. 75,000.)

The other relief regarding the substituted buses cannot be granted as no legal basis has been shown to us to justify the grant of such relief. It must be rejected. But there is no reason to reject the claim of the plaintiff that he was entitled, not only to the value of the buses as on that date but also to an account of the profits, which were earned by the defendant-company by the use of the buses. The buses were purchased for the specific purpose of plying them along the three routes, which were also transferred by the plaintiff to the defendant. It is, therefore, reasonable to direct the defendant to restore to the plaintiff not only the value of the buses but also the profits earned by those buses, which have to be ascertained by the lower Court by taking an account of the profits. The plaintiff at present has no buses. The claim, therefore, of the plaintiff that the defendant should also be directed to retransfer the routes or at any rate, must concur in an application to transfer the routes cannot be considered. If however, the plaintiff purchases buses and an application is made to the Road Traffic Board for giving him back the three routes which, with his concurrence, were transferred to the defendant-company, the Road Traffic Board may consider the circumstances under which the plaintiff parted with his rights and the defendant unjustly retained the benefit and the user of those routes.

The appeal, therefore, will be allowed in part to the extent indicated above. The defendant will be entitled to the set-off which was claimed and was allowed by the Court below on his payment of the court-fee. There will be a decree, therefore, in favour of the plaintiff for the balance after deducting a sum of Rs. 41,000 from the sum of Rs. 75,000. The difference between the two amounts with subsequent interest will be substituted for the sum of Rs. 3,480-8-4 decreed by the lower Court. The plaintiff will also be entitled to the profits earned by the defendant by the use of the buses from 8th August, 1942, which will be determined by the lower Court after taking accounts. The liability to account is on the defendant. The mode of taking account and the items that should be considered will be decided by the lower Court in the first instance. The refusal to direct delivery of the substituted buses may not preclude the plaintiff from showing, if he can, that the profits earned by them should also enter into the computation. The lower Court will pass a final decree for the amount after it is ascertained.

There is no substance in the memorandum of cross-objections. The ground is that interest on Rs. 41,000 should have been allowed but that ground was not taken in the grounds of the memorandum of objections, the defendants's only grievance being that the plaintiff should not have been allowed interest from the date of the plaint which, of course, is an untenable contention. The memorandum of cross-objections is, therefore, dismissed with costs. The appellant and respondent will pay and receive proportionate costs throughout in the appeal and the suit.

Interest on Rs. 75,000 will be allowed at six per cent. per annum from the date of the plaint.

R.M. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK AND MR. JUSTICE KRISHNASWAMI NAYUDU.

A. Bacha Saheb .. *Appellant**

v.

Nariman K. Irani and another .. *Respondents.*

Transfer of Property Act (IV of 1882), section 69—Mortgagees power of private sale—Drastic nature of —Suit for injunction restraining the exercise of the right of private sale under—Grant of temporary injunction—Considerations that should weigh with a Court—Imposition of onerous terms—Propriety.

Section 69 of the Transfer of Property Act is a drastic provision and places *bona fide* mortgagors who have a real defence to any action on the mortgage in a very disadvantageous and helpless position. Where the mortgagee purports to exercise the power of sale under section 69 of the Transfer of Property Act without the intervention of a Court, no defences could be raised as would normally be open in a suit for sale or foreclosure instituted on the mortgage. The title of the purchaser cannot be impeached for any irregularity as is normally available in sales by execution of decrees by Court under Order 21 of Code of Civil Procedure. The only remedy of a person who is damnified by an unauthorised or improper or irregular exercise of the power is to sue the mortgagee for damages.

There is a great scope afforded for mortgagees to circumvent the law and misuse the benefit conferred by the section to the detriment of the mortgagor.

The incorporation into the Indian Statute of the provisions of the English enactment places the mortgagor in a mortgage where a power of sale is conferred without the intervention of Court, at a a great disadvantage.

(Suggestions for amendment of the section to avoid the hardships and probable injustice indicated.)

A Court in granting a temporary injunction has undoubtedly powers to impose terms and conditions to the granting of the injunction, but the imposition of such terms must be reasonable and such as not to make it impossible for the plaintiffs to comply with the terms thereby virtually denying the relief which he would otherwise be ordinarily entitled to. Ordinarily in a suit for an injunction where it is found that there are real and *bona fide* objections to the exercise of the right of private sale by a mortgagee under section 69 of the Transfer of Property Act, the plaintiff would be entitled to an injunction and unless the Court is of opinion that the suit for injunction is filed purely with a view to delay and put off the recovery of the mortgage amount and is not *bona fide*, injunction should be granted and in appropriate cases the income of the properties may be secured to the mortgagee in case there is a large arrears of interest or there is any apprehension that the property may not be sufficient to discharge the mortgage.

Per *Mack, J.*—"The application of the principles of advanced English Legislation to India without regard to Indian conditions and machinery leads to unfortunate results. The power of private sale given to a mortgagee under section 69 of the Transfer of Property Act should be amended to minimise if not avoid abuse of its provisions. A mortgagor when served with a notice under section 69 (2) of the Act might be enabled to apply to the Court having jurisdiction, on a reasonable court-fee, to have the sale held through a Commissioner appointed by the Court, acting under the Court's control and instructions. It is also necessary to amend the Court-fees Act to make it impossible for mortgagors to file injunction suits valued by them at will in any but the Court having jurisdiction to try suits arising out of the mortgage itself."

Appeal against the order of the Second Additional Judge of the City Civil Court at Madras, dated the 11th day of October, 1954 and made in I.A. No. 718 of 1954 in O.S. No. 980 of 1954.

K. Venkateswaran for Appellant.

T. C. A. Anandalwar, P. R. Varadarajan, T. T. Srinivasan and *A. N. Rangaswamy* for Respondents.

The Court delivered the following Judgments

Mack, J.—I have read with great interest the order of my learned brother, with which I am in substantial agreement. In C.R.P. Nos. 1663 and 1666 of 1954, in which we dealt with the court-fee payable on the suits, we expressed the view that they were limited in scope and that the City Civil Court had no jurisdiction to determine the scaled-down amounts, if the mortgagors were found to be 'agriculturists' entitled to relief under section 13-A of the Madras Agriculturists' Relief Act as amended by Act XXIII of 1948. Within this limited scope of granting an injunction restraining exercise of powers of sale under section 69 of the Transfer of

*A.A.O. Nos. 501, 502, 552 and 553 of 1954. 27th January, 1955.

Property Act until the scaled-down amount is determined in a competent Court by appropriate proceedings, the City Civil Court has no jurisdiction, in my view, to lay down any terms under which the powers of sale under section 69 can be exercised ; nor can the mortgagee exercise these powers except for the scaled-down amount. It is regrettable that in the earlier injunction suit filed, the right of the mortgagee to substantial relief under section 13-A was not even mentioned, and it would appear that this aspect of the matter was completely overlooked by the learned advocates for the mortgagor and the mortgagees throughout that previous litigation. In this view of the matter, I agree that C.M.A. Nos. 501 and 502 of 1954 filed by the puisne mortgagee and mortgagor respectively should be allowed with costs. L.P. A. Nos. 221 and 222 of 1954 which arise out of them, we are also separately allowing, but without any order as to costs. C.M.A. Nos. 552 and 553 of 1954 by the mortgagees are dismissed without any order as to costs. In C.R.P. Nos. 1663 and 1666 of 1954, we have directed the parties to bear their own costs.

My learned brother has made some interesting observations on the powers of private sales by mortgagees under sections 69 and 69-A of the Transfer of Property Act as amended by Act XX of 1929 being abused by mortgagees in conditions prevailing in India which are rather different from those in the United Kingdom at the time of the English Conveyancing and the English Property Act of 1925, in the light of which Act XX of 1929 was enacted. This is unfortunately true and not the only instance in which advanced English legislation has been made applicable to India without regard to Indian conditions and the machinery available here, with unfortunate results. The abuse has not however been one-way traffic, and mortgagors also show sometimes reciprocal resourcefulness in suits for injunctions, paying practically no court-fee in the lowest Court of civil jurisdiction to restrain *bona fide* honest mortgagees from exercising their powers of sale on some ground or other. I am in substantial agreement with my learned brother on the desirability for amended legislation to minimise, if not, avoid, abuse by a statutory provision for a right to a mortgagor, when served with notice of sale under section 69 (2), to apply to the Court having jurisdiction to have the sale held through a commissioner appointed by the Court, acting under the Court's control and instructions, on a reasonable fixed court-fee, the resulting sale, of course paying the full stamp duty as in a private sale. It also appears necessary for the Court-fees Act to be radically amended so as to make it impossible for mortgagors to file injunction suits valued by them at will in any but the Court having jurisdiction to try suits arising out of the mortgage itself.

Krishnaswami Nayudu, J.—These appeals arise out of the two applications filed by the plaintiffs before the 2nd Additional City Civil Judge, Madras in O.S. Nos. 980 and 996 of 1954 for an order of temporary injunction restraining the mortgagees, defendants 1 and 2, from bringing certain properties to sale in pursuance of a power of sale under section 69 of the Transfer of Property Act.

The properties sought to be brought to sale consist of two Cinema houses, one in the City and another at Pallavaram, and extensive lands in Adyar and other places, all of which have been subjected to several mortgages. Defendants 1 and 2 claim as assignee-mortgagees in respect of some of the mortgages and as direct mortgagees in the remaining. There are ten such mortgages and the mortgagees claim a total sum of Rs. 52,021-2-4 for the recovery of which amount they have proposed to sell the properties. There is a subsequent mortgage. The plaintiff in O.S. No. 980 of 1954 is the mortgagor and the plaintiff in O.S. No. 996 of 1954 is the puisne mortgagee of the properties.

The contention of the plaintiffs is that they are agriculturists within the meaning of the Agriculturists Relief Act IV of 1938 and also under Act V of 1954. Under Act IV of 1938 being agriculturists they will not be liable to pay a large sum of 8 lakhs and odd as claimed by the mortgagees but to a sum less than Rs. 4,03,000 having become entitled by reason of the Amending Act of 1948 to the benefit conferred by section 13-A of the Agriculturists Relief Act IV of 1938 and that the claims

under many of the mortgage deeds will become wholly wiped out. Further, by reason of the passing of Act V of 1954, which granted temporary relief to agriculturists by staying all proceedings against agriculturists for a period of one year from the date of the passing of the Act, any sale without the intervention of Court would be wrongful, illegal and void and the plaintiffs in both the suits prayed for a declaration that any sale of the properties before 7th February, 1955 without intervention of Court would be wrongful, illegal and void, and for an injunction restraining the mortgagees from exercising the right of sale, without intervention of Court, of the plaintiffs' properties and in any event till 6th February, 1955. The mortgagees denied that the plaintiffs were agriculturists either within the meaning of Act IV of 1938 or Act V of 1954 and stated that they were not entitled to any injunction.

On the applications for temporary injunctions, out of which these appeals arise, the learned City Civil Judge granted a temporary injunction but put the plaintiffs on terms by directing them to deposit a sum of Rs. 1,60,000 within one month from the date of his order. Both the plaintiffs and the mortgagees, defendants 1 and 2 have filed these appeals against the said order of the City Civil Court.

Though the question as to whether the plaintiffs are agriculturists has not been, quite properly, elaborately gone into by the learned Judge, we agree with his conclusion that the plaintiffs have established that they are agriculturists owning agricultural lands and have not been shown to have paid any income-tax, they having produced a certificate from the Income-tax Department to that effect, and it is therefore correct to say, as the learned Judge pointed out, that there is a *prima facie* case requiring investigation as to the question of the applicability of the Agriculturists Relief Act and the right to have the debts scaled down. We are also in agreement with the view taken by the learned Judge that if the proposed sale is to be allowed to be proceeded with, irreparable injury will be caused to the plaintiffs.

We have no hesitation in observing that section 69 of the Transfer of Property Act is a drastic provision and places *bona fide* mortgagors, who have a real defence to any action on the mortgage, in a very disadvantageous and helpless position. Section 69 empowers the mortgagee, in whom the power of sale without the intervention of the Court is expressly conferred by the terms of the mortgage deed and where the properties are situated in certain important towns including the City of Madras, to sell after giving three months' time in writing and calling upon the mortgagors to pay the principal sum ; and when once the sale has been effected in exercise of such a power, section 69 (3) provides that the title of the purchaser shall not be impeached on the ground that no case had arisen to authorise the sale or that due notice was not given, or that the power was otherwise improperly or irregularly exercised, and the only remedy of a person who is damnified by an unauthorised or improper or irregular exercise of the power is to sue the mortgagee for damges. While therefore in a suit for a sale or foreclosure instituted on a mortgage, the defences open to the mortgagor can be raised and considered, no such opportunity is however available to the mortgagor, where the mortgagee purports to exercise the power of sale under section 69 without intervention of Court. Even *bona fide* and substantial defences open to the mortgagor as to any prematurity of the sale and as to the correctness of the amount claimed by the mortgagee in pursuance of which he purports to sell and such other defences as would disentitle the mortgagee from recovering the mortgage amount, cannot prevent the sale being proceeded with, unless by an order of Court in a suit instituted by the mortgagors. The present suits have therefore become necessary in order to prevent the mortgagees from seeking to sell the properties for the recovery of the amount which according to the plaintiffs will not be the amount to which they will be legally liable.

Further if one examines the legal effect of such a sale, by reason of section 69 (3) the title of the purchaser cannot be impeached. The grounds which are ordinarily available to a judgment-debtor in a sale of mortgaged property in execution of a

mortgage decree to have the sale set aside under the provisions of Order 21, Civil Procedure Code will not be available, however much the sale is vitiated by any material irregularity in the conduct of the sale and even if the sale is for an amount which is not actually due. The mortgagor is really helpless and the properties, however valuable they may be, will be lost to him, his right against the mortgagee being only for recovery of damages. While section 69 of the Transfer of Property Act as is seen from its application being restricted to important towns, was enacted for the purpose of facilitating recovery of money advanced on immovable properties situated in towns of commercial importance and to encourage the growth of trade and commerce—the idea being to enable the lender to revover the amount speedily rather than by pursuing the ordinary remedy of instituting a mortgage suit and going through the formalities of a suit and execution proceedings—in actual practice, the benefit conferred by the section on the mortgagee to sell mortgaged properties without intervention of Court has been more often misused to the detriment of the mortgagors, taking advantage of the immunity of the purchaser from his title being questioned provided by the statute. There is great scope afforded by the language of section 69 (3) for mortgagees to circumvent the law and notwithstanding that they may not have a real right to recover the amount and may not succeed in getting a decree for the amount claimed by them in a suit on a mortgage, the properties might be sold causing irreparable injury to the mortgagor, who is disentitled from recovering his properties which sometimes are very valuable. Once the sale is held, ordinarily it is not liable to be set aside except on the ground of fraud or that the sale was a benami transaction, the mortgagee himself being the purchaser. In view of the language of section 69 (3), it is generally a herculean task for one to have a sale held under section 69 set aside and it is seldom that one suceeds in such a suit to set aside a sale.

Section 69 of the Transfer of Property Act of 1882 was modelled on the English Conveyancing Act of 1881 (41 and 42 Vict. C. 41) and the English Property Act of 1925. Prior to the enactment of the Transfer of Property Act of 1882, the powers of a mortgagee to sell the properties mortgaged were dealt with under sections 6 to 9 of the Trustees' and Mortgagees' Powers Act (Act XXVIII of 1866), which was modelled on Lord Granworth's Act (23 and 24 Vict. C. 145). It was found, as pointed out by Fisher on Mortgage, paragraph 975, 6th edition, that the purchaser's title was protected where no case had arisen to authorise the exercise of the power, and where no notice had been given and that Lord Granworth's Act was silent as to an improper exercise of the power after it had arisen, and which was irregular otherwise than by the absence of notice ; nor did it protect the purchaser where he was aware of the absence of notice ; or of other irregularities ; and it gave the person damnified an express remedy in damages only where the exercise of the power was unauthorised, but none where, being authorised it was improperly exercised either for want of notice or otherwise. Section 8 of the Trustees' and Mortgagees' Powers Act XXVIII of 1866 was in similar terms and the only grounds on which the title of the purchaser could not be impeached were that no case had arisen to authorise the exercise of such a power and that no notice had been given. The additional protection given to the purchaser in respect of the non-impeachability of the sale was that even if the power was otherwise irregularly and improperly exercised, the right of the mortgagor, who had suffered by such unauthorised or improper or irregular exercise of the power, was only in damages and not to have the sale set aside. The defect pointed out by Fisher as existing in Lord Granworth's Act was subsequently removed by Conveyancing Act of 1881 reproduced in the English Property Act of 1925.

The anxiety of the Indian draftsmen in incorporating into section 69 (3) the language of the provisions of the Conveyancing Act of 1881 and the English Property Act of 1925 was therefore to bring it in line with the Law in England to protect the purchasers' right in respect of properties sold in pursuance of the power of sale conferred on the mortgagee. By virtue of section 69 (1) the provisions of the Trustees' and Mortgagees' Powers Act of 1866 were no longer applied to mortgages

and it is section 69 of the Transfer of Property Act, as amended by Act XX of 1929, that now governs the mortgage, where a power of sale without the intervention of Court is conferred on the mortgagee. In the Statement of Objects and Reasons of the Amending Act of 1929, with particular reference to section 69, it is stated that it was the intention of the proviso of section 69 to bring it in accordance with the English Statute, *viz.*, the English Conveyancing Act and the English Property Act of 1925, as the procedure of the Indian Act XXVIII of 1866 based on the earlier Lord Granworth's Act, which has been repealed could no longer exist and required to be revised. The incorporation into the Indian Statute of the provisions of the English enactment places the mortgagor in a mortgage, where a power of sale is conferred without the intervention of Court at a great disadvantage. In view of the language of section 69 (3), as it stands, no sale held in pursuance of the power of sale can be successfully challenged in a Court of law, however much the mortgagor may have a just and real grievance as to the circumstances under which and the manner in which the sale is held, apart from the question as to whether any case had arisen for the sale at all. Except that it was thought necessary to bring section 69 (3) of the Transfer of Property Act in line with the English statutory provisions, there was no other ground for such wholesale incorporation of the provisions of the English statute in the Indian enactment. But experience has shown that far from advancing the object with which section 69 was included in the Indian Act, which was mainly on grounds of commercial policy to facilitate lending and borrowing on security of immoveable properties in towns of commercial importance and to make recovery of amounts advanced on security of immoveable properties easier and quicker the protection clause section 69 (3) has been working havoc to the great detriment of the honest mortgagors.

While the power of sale without the intervention of Court may be supported and justified in the conditions prevailing in a commercially advanced country like England, where the machinery employed for selling the properties can be said to be perfect and reliable, its introduction in India, though it is confined to towns of commercial importance, with all the implications of the English Statute, does not seem to be necessary or justified since from the results of its working, it has been found that there is scope for its abuse resulting in great injustice to *bona fide* mortgagors, who are likely to be deprived of their properties by an improper and irregular exercise of the power of sale. Section 69 (3) affords greater sanctity to a private sale than to a sale held by Court in pursuance of the provisions of the Civil Procedure Code where, after notice and settlement of sale proclamation, a sale is ordinarily held and such sale may be set aside for any material irregularity in the conduct of the sale. However much a provision in a mortgage for a power of sale may be supported, it does not appear that such a power of sale requires to be conferred on the mortgagee enabling him to sell the property without the intervention of Court, especially in the conditions prevailing in our country and taking into account the manner in which this power is liable to be misused. A power of sale may no doubt be conferred not without the intervention of Court, but without the necessity of instituting a mortgage suit and selling the property only after the final decree through the elaborate process provided in the Civil Procedure Code for sale of immoveable property. A power of sale may be conferred in the mortgage deed, but such a power of sale may be exercised without the necessity of the mortgagee instituting a suit for sale and obtaining a decree, and he may be directed to apply to the Court to exercise the power of sale asking the Court to appoint a Commissioner to sell the property. Such a provision might greatly help the furtherance of the object with which the provision came to be included in England and incorporated in Indian Statute and at the same time protect the interests of the mortgagor, since the Court, before appointing a Commissioner, will have an opportunity to go into the question as to whether a case had arisen for the sale and since the sale would then be in the hands of the Commissioner an Officer of Government the property may be expeditiously sold without the elaborate procedure of settling a sale proclamation and other formalities required for a sale under the Civil Procedure Code. I consider that no power of sale without the intervention of Court

should be conferred on mortgagee and any sale of mortgaged property in order to ensure the interest of the parties must be through a civil Court. In enacting this provision one of the objects must have been to enable the mortgagees to realise their monies without instituting a suit on the mortgage paying the necessary court-fee. But in actual practice, this object of dispensing with the court-fee is rarely achieved, since a purchaser at a private sale has necessarily to seek the assistance of Court to recover possession of the properties purchased and a suit for possession would be necessary for the purpose with the consequential heavy court-fee to be paid calculated on the market value of the property. Payment of court-fee therefore at some stage or other could not be avoided. Further, the purchaser at such a sale is not likely to pay the full value of the property as he has to make provision for expenses of the litigation for recovery of possession, which invariably is inevitable, as no mortgagor in possession would ordinarily deliver possession to a purchaser at a sale held in pursuance of the power of sale under section 69.

Section 69 (3) which protects the purchaser at a private sale against all possible and reasonable objections as to the sale on grounds, which would otherwise entitle the mortgagor, if he were a judgment-debtor, to question the sale successfully if one is held in pursuance of a mortgage decree for sale, is a provision resulting in considerable injustice, which requires to be suitably amended so as to protect the interests of the owner of the property as well. Section 69 therefore requires in the light of the exprience of its working reconsideration by the Legislature. In any event, suitable and substanital amendments appear to be necessary by bringing the conduct of sale under supervision of Courts, removing the restrictions imposed on the mortgagor from questioning the sale, and making provisions for the sale being questioned in appropriate cases on grounds similar to that provided in the Civil Procedure Code for setting aside a sale held through Court, and such other amendments as may be necessary to avoid the abuse to which the provisions might furnish an easy handle.

I have considered it necessary to deal with this aspect of the case at some length with a view to impress upon the Courts the disastrous effects of allowing such a sale to be proceeded with, and the principles that should therefore guide a Court in considering a relief for injunction, restraining the mortgagees from selling the properties without intervention of Court. The learned City Civil Judge, while appreciating the effect of such a sale and observing that section 69 is very drastic and penal and that irreparable injury would be caused to the plaintiffs in case the sale is held, however, erred in putting the plaintiffs on terms by directing them to pay a large sum of Rs. 1,60,000 within a month.

The Court in granting a temporary injunction has undoubtedly power to impose terms as a condition to the granting of the injunction, but the imposition of such terms must be reasonable and such as not to make it impossible for the plaintiffs to comply with the terms thereby virtually denying the relief which he would otherwise be ordinarily entitled to. There is one important fact which does not appear to have been taken into consideration by the lower Court before directing the plaintiffs to pay that large sum as a condition attaching to the granting of injunction. The income yielding Cinemas which have been mortgaged including the income yielding theatres had already been put in possession of the mortgagees as Receivers and they have been realising the income and it is not as if the mortgagor has retained possession of the properties depriving the mortgagees of the benefit of the income. Ordinarily, therefore, where it is found that there are real and *bona fide* objections to the sale, the plaintiffs would be entitled to an injunction, and unless the Court is of opinion that the suit for injunction is filed purely with a view to delay and to put off the recovery of the mortgage amount and is not *bona fide*, injunction should be granted and in appropriate cases the income of the properties may be secured to the mortgagee, in case there is a large arrears of interest or there is any apprehension that the properties may not, if sold, be sufficient to discharge the mortgage, so that the mortgagee's interest may not be prejudiced.

The learned City Civil Judge, in putting the plaintiffs on terms, was apparently influenced by the proceedings in a previous suit instituted by the mortgagor, O.S.

No. 1490 of 1953, with reference to the sale of these identical properties at an earlier occasion when his application for a temporary injunction for staying the sale was dismissed. An appeal was preferred to the High Court in C.M.A. No. 698 of 1953. When the appeal came up for hearing, it was withdrawn as a result of memo. of consent dated 7th April, 1954 and dismissed in consequence. The plaintiff then agreed to pay a sum of Rs. 1,60,000 to the mortgagees on or before 15th May, 1954, when the mortgagees should release one of the Cinema houses and 1 acre and 41 cents of land in Kalikundram village. It was agreed that on such payment the sale of the remaining properties were to be postponed till 15th August, 1954 within which time the mortgagor agreed to pay the balance of the amount due, and on failure to do so, the mortgagees were at liberty to exercise the power of sale in respect of the remaining properties as well. The mortgagor did not comply with that order passed by consent. The learned City Civil Judge, relying on the said consent order, has found it necessary to direct that sum to be paid. The fact, however, was that in the earlier suit, O.S. No. 1490 of 1953, no question arose as to the liability of the mortgagor for the full amount of 8 lakhs and odd claimed by the mortgagees and his right to have the amounts scaled down under the Agriculturists Relief Act (IV of 1938) and the Moratorium Act (V of 1954). As such it was quite possible that finding that a large sum as 8 laksh was due, the plaintiff agreed to pay the sum of Rs. 1,60,000 by sale of one of the Cinema houses but apparently was not able to do so. But, in the present suit, a subtantial contention is raised as to his right to have the amount alleged to be due, reduced by the application of the provisions of the Madras Agriculturists Act to a sum of Rs. 4 lakhs and odd with the result that the mortgage claims under some of the mortgage deeds will be wholly wiped out. In these changed cirumcstances it was for the lower Court to have considered whether it would be still necessary to insist on the compliance of the order passed by consent in the previous proceedings. It is urged on behalf of the plaintiff that he made *bona fide* attempts to find a sale for one of the properties, but was not able to succeed. We are inclined to agree that the mortgagor made *bona fide* attempts to sell, but was not successful. If a mortgagor satisfied *prima facie* that he is an agriculturist entitled to the benefit of the Agriculturists Relief Act (IV of 1938) the result of it would be that he will not be liable for the entire amount claimed by the mortgagee and for the recovery of which the property is to be sold privately, and in such cases Courts have to interfere by staying the sale until the ascertainment of the amount really due by the mortgagor after being scaled down, unless the mortgagee agrees to bring the properties to sale for any reduced amount. Sales have been stayed under similar circumstances by the learned Judges of this Court in *Govindaswami Naicker* v. *Javanmull Sowcar*[1]. It may be pointed out that in so far as C.M.A. No. 501 of 1954 is concerned, which arises out of O.S. No. 996 of 1954 in which the puisne mortgagee is the plaintiff, the question of any undertaking to pay any sum in the previous proceedings does not arise, as he was not a party to those proceedings. He is coming up for the first time with the suit and he is as such entitled to relief under the Act IV of 1938, if he establishes he is an agriculturist entitled to the benefit of the provisions of the Act. In his case therefore the imposition of any terms to the grant of injunction can in no view be justified.

We are therefore of opinion that the imposition of terms for the granting of injunction by the learned City Civil Judge cannot be supported, and we grant a temporary injunction restraining the mortgagees defendants 1 and 2 from selling the properties without the intervention of Court till the disposal of O.S. Nos. 980 and 996 of 1954. The C.M.As. Nos. 501 and 502 are allowed with costs and C.M.As. Nos. 552 and 553 are dismissed. No order as to costs.

R.M. *C.M.As.* 501 *and* 502 *allowed and C.M.As.* 552 *and* 553 *dismissed.*

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1. (1938) 2 M.L.J. 918 (920).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

A. Krishnaiyya .. *Petitioner**

v.

Dominion of India represented by the General Manager, M. & S. M. Railway, Madras .. *Respondent.*

Railways Act (IX of 1890), section 67 (3)—Refund of difference between fare paid on a ticket for higher class when the passenger is obliged to travel in a lower class—If applicable to season-ticket holders.

Though a ticket has been defined by the Indian Railways Act to include a season-ticket as well still the refund of fare contemplated under sub-section (3) of section 67 of the Act cannot be said to apply to season-ticket holders. No refund of fare is admissible in the case of season-ticket holders in the event of either the class of accommodation for which the season-ticket is issued is not being provided on the train for any reason or there being no room in the particular class of accommodation. The terms and conditions under which the season-ticket has been issued will govern the relations between the parties.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Full Bench of the Court of Small Causes at Madras, dated 13th November, 1950 and made in N.T.A. No. 127 of 1949 (S.C.S. No. 6198 of 1948, Small Causes Court at Madras.)

T. Ramaprasada Rao for *Messrs. John and Row* for Petitioner.

S. S. Ramachandra Aiyar for Respondent.

The Court delivered the following

JUDGMENT :—This Civil Revision Petition has arisen out of an order passed by the Full Bench of the Presidency Court of Small Causes on a new trial application filed by the railway administration against a decree passed by the learned Registrar of the Court of Small Causes, Madras in the sum of Rs. 0-2-6 against the Railway administration and in favour of the petitioner in this Court.

The petitioner is the holder of a season ticket to travel between Ponneri and Madras. At the time he was possessed of this ticket, he was employed as an arbitrator under the Town Planning Act and he had to go to Madras in connection with his official duties. On a particular day, it is stated, that the petitioner was obliged to travel in a class lower than the class for which he held the season-ticket. It may be noted that his season-ticket was for enabling him to travel by the second class but on the day in question he actually travelled by third class because in the the train by which he was obliged to travel there was no second class accommodation. Thereupon he gave notice to the railway administration and not being satisfied with the response from the said administration, he filed the suit and obtained a decree for Rs. 0-2-6 from the Registrar of the Small Causes Court, Madras.

The railway administration not being satisfied with this decree took the matter by way of a new trial application before a Full Bench of the Court of Small Causes. The Full Bench in a well-considered order set aside the decree of the learned Registrar. Consequently the plaintiff has preferred this Civil Revision Petition.

Even at the outset it may be observed that both the petitioner and the respondent administration have shown gross lack of a sense of proportion in pursuing a matter which involved just a trivial sum of Rs. 0-2-6. It is very strange that neither side realised the enormous waste of money and time in pursuing a matter of such tuppenny importance ; but the justification that has been held out by the learned counsel for the petitioner is that this involves a matter of principle and that it is applicable to all season-ticket holders and that therefore it assumed importance in the eye of both the railway administration and also the petitioner himself. I do not think that there is much substance in this. It would have been better if the parties had chosen a better opportunity where a greater stake was involved to fight out the question of a principle like this.

*C.R.P. No. 1123 of 1952. 29th October, 1954.

However that be, since the matter has been argued before me, I have to dispose it of.

The point now urged by the learned counsel for the petitioner is that under section 67 (3) of the Railways Act, he is entitled to a refund of the difference between the fare paid by him and the fare payable for the class of carriage in which he travelled actually while he held a ticket for a class much superior to the one in which he travelled. This sub-section, as has been argued by the learned counsel for the respondent, cannot be made applicable, in my opinion, to the case of season-ticket holders. Though a ticket has been defined by the Act to inculde a season-ticket, as well, still what is contemplated in sub-section (3) of section 67 cannot be said to apply to season-ticket holders. It must be remembered that season-ticket holders are issued these season-tickets on concession rates and subject to certain conditions and terms which both parties have to apply. One of the conditions to which the holder of the season-ticket must be deemed to have agreed is that the railway administration is at liberty to alter and vary the train, without liability of any kind to the holders of season-tickets, and is not accountable for any stoppage, hindrance or delay in the proper-starting or arriving of any train, arising from negligence, accident or any other cause ; nor is any refund admisssible in the event of either the class of accommodation for which the season-ticket is issued not being provided on the train for any reason or there being no room in the particular class of accommodation. The season-ticket holder in this case having agreed to these terms when the season-ticket was issued to him, he cannot now question the right of the railway administration to alter and vary the trains and he cannot make the railway administration liable for any loss or damage that might arise to him by reason of such alteration or variation of the trains. In this case it cannot be disputed that the ticket holder was obliged to travel by the lower class only on account of the exercise of the railway administration of this right under this rule to vary or alter the train. Therefore considered as a contract between the two parties, the terms under which the season-ticket has been issued will govern the relations between the parties and construed from that point of view, the ticket holder cannot enforce any liability against the railway administration if he suffers by reason of any alteration or variation of the trains.

The next point urged by the learned counsel for the petitioner is that this rule which has been framed under the power vested in the railway administration under section 47 clauses (*b*) and (*g*) is *ultra vires* of section 67 (3) and therefore it is not enforceable. I cannot agree with this contention either. The power given to the railway administration under section 47 is wide enough to cover not merely for providing for the accommodation and convenience of passengers and regulating the carriage of their luggage and generally for regulating the travelling upon, and the use, working and mangement of the railway. When the railway administration issues season-tickets at concession rates for the covenience of passengers, it is open to the railway administration to frame the rule in exercise of its powers vested under section 47 to regulate the travelling of ticket holders also. So a rule framed in exercise of that power cannot be said to be *ultra vires* of section 67 (3) of the Act.

Further the language of section 67 (3), as has been pointed out by the learned Full Bench of the Court of Small Causes is not also capable of being applicable to season-ticket holders. That section seems to apply to persons who buy single tickets for travelling and not to persons who tranvel on the basis of season-tickets which are issued on different terms and conditions which are stipulated for and govern the use of the season-tickets issued. In sub-clause (2) of section 67, in order to claim a refund where a ticket holder does not have room available in the class of carriage for which he has purchased a ticket, he has to return the ticket within three hours after the departure of the train. Sub-clause (3) of section 67 contemplates that when a ticket holder is obliged to travel in a class lower than the one for which he has purchased a ticket, he has to deliver his ticket and then only he is entitled to a refund. This only contemplated that he can do so after completing

the journey by the lower class while holding the ticket for higher class, which does not happen in the case of a season ticket holder. There is no question of a season ticket holder delivering up a season ticket at the counter where the collector stands for collecting the tickets from the persons who have travelled in the train. On the other hand what the season ticket holder is expected to do is to show the ticket to the collector and pass out of the gate or the counter as the case may be. If it were intended that season ticket holders should also be brought within the scope of Section 67 (3), the legislature would certainly have used language suitable for the case of season ticket holders, which has not been the case in this sub-section. Therefore it will be incorrect to say that section 67 (3) is also capable of application to season ticket holders who are governed by special terms and conditions in the matter of the issue and use of the season tickets.

Therefore on a consideration of all the aspects placed before me by the learned counsel for the petitioner and also by the respondent, the railway administration, I do not think theat there are any merits in this Civil Revision Petition. It deserves to be dimissed and is hereby dismissed. As to costs, I do not make any order.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Ayikkarakath Puthiya Purayil Amina Umma and others .. *Appellants**

v.

Ayikkarakath Puthiya Purayil Mammad and others .. *Respondents.*

Malabar Law—Will—Construction—Bequest to the seven children (named) by wife who is alive but without including her specifically—If bequest to tavazhi *or the named children as tenants-in-common.*

The material clause in a will ran as follows : "Subsequent to my death, (1) *A*, (2) *B*, (3) *C*, (4) *D*, (5) *E*, (6) *F*, (7) *G*, children born to me in *X*, and the male and female children now born and may be born in future to the females among them should hold the properties mentioned in the schedule in their possession as *tavazhi* property with joint rights and enjoy the same as I am enjoying with right, liberty and authority to effect alienation or transfer but each of them should not individually saddle the properties with debts or alienate the same."

On a construction of the will, *held* : The bequest was to the *tavazhi*. The seven named children of the testator cannot enjoy the property with joint rights as *tavazhi* property, unless it is held that there is by implication a bequest in favour of the mother also with whom the children would constitute a *tavazhi*. To give effect to every one of the recitals in the clause a bequest in favour of the wife also must be implied.

Appeal against the Decree of the Court of the Subordinate Judge of Tellicherry, dated 26th March, 1951 and passed in Appeal Suit No. 201 of 1949 preferred against the final decree of the Court of the District Munsif of Talliparamba, dated 26th February, 1949 and made in R.I.A. No. 1984 of 1947 in Original Suit No. 350 of 1946.

D. A. Krishna Variar for Appellants.

T. R. Sangameswara Aiyar for Respondents.

Judgment of the Court was delivered by

Rajamannar, C.J.—The substantial question in these two appeals relates to the construction of a will, dated 12th December, 1922, executed by one Pottichi Kalantham. On the date of the will, his wife, Ayeessa, and the seven children born of her were alive. The material clause of the will for the purpose of these appeals is clause 3 which runs as follows :

" Subsequent to my death, (1) Abubaker, (2) Ameena, (3) Mammad, (4) Pathumma, (5) Ummar (6) Alikkunhi and (7) Assan, children born to me in Ayikkarakath Puthiya Purayil Ayeessa of Taliparamba nagaram and the male and female children now born and may be born in future to the females among them should hold the properties mentioned in the schedule in their possession as tavazhi property with joint rights and enjoy the same as I am enjoying with right, liberty and authority

* S.A. No. 509 of 1951 and A.A.O. No. 241 of 1951. 19th January, 1955.

to effect alienation or transfer, but, each of them should be not individually saddle the properties with debts or alienate the same."

The appellants contend that under this clause, the bequest is to the tavazhi consisting of Ayeessa and her male and female children and the male and female children that may be born in future to the females among them. The contention of the respondent, on the other hand, is that the bequest is to the seven named children of the testator who took the property bequeathed as tenants-in-common. Several decisions have been cited to us in which documents of gift and wills have been construed. But ultimately the decision of this case depends entirely on the language of Clause 3 of the will cited above.

It is now well established that apart from any presumption laid down by section 48 of the Marumakkathayam Act, which will not apply to this case, a person can make a gift or bequest in favour of persons constituting a tavazhi and that the property bequeathed to them will be taken by them and enjoyed as tavazhi property. The donees or the legatees are not constituted members of a tavazhi because of the gift or the bequest. The gift or bequest is made to members who actually constitute a tavazhi.

In our opinion, reading Clause 3 as a whole and without leaving out of account any part of that clause, the intention of the testator appears to be quite clear that he was making a bequest of the property to the tavazhi, of which the seven named children were members. The difficulty is that they would not constitute a tavazhi except along with their mother who happened to be alive on the date of the will, and the will does not expressly name the mother as the legatee. It is contended on behalf of the appellants that to effectuate the intention of the testator, it should be held that by implication there is a bequest also in favour of the mother, who along with the named children, would constitute the tavazhi. It is admitted by the appellants that if the testator had expressly excluded his wife, the mother of the seven children, then it would be difficult to contend that the bequest is to the tavazhi as such. But their learned counsel says that you cannot read such an exclusion into Clause 3. He also relied on the recitals in that clause which relate to the manner in which the testator intended the property to be enjoyed, namely, " as tavazhi property with joint rights ", " each of them should not individually saddle the properties with debts or alienate the same." Now, it is quite clear that the seven named children of the testator cannot enjoy the property with joint rights as tavazhi property, unless we hold that there is by implication a bequest in favour of the mother also with whom the children would constitute a tavazhi. Counsel for the respondent objects to this construction which he says would amount to making a new will for the testator. But we do not agree with him. The alternatives before us are either to give effect to every one of the recitals in the clause which can be done by implying a bequest in favour of the wife, or to hold that only the seven named persons take as tenants-in-common and reject the other parts of the clause as repugnant. We are clearly of opinion that the first alternative is the better.

As none of the decisions cited to us deals with a case exactly similar to the facts of the present one, it is not necessary to refer to any of them. It suffices to say that there is nothing in any of these decisions which prevents us taking the view we have expressed above. On this view, the appeals must be allowed on this point.

Another point was raised on behalf of the appellants as regards a sum of Rs. 250 found to have been paid by the 3rd defendant to discharge the kozhukanam in respect of the property, item 1, dealt with by the schedule. This was undoubtedly a liability which is binding on the entire tavazhi, and if one of the members of the tavazhi has discharged this liability from his own funds, he is certainly entitled to reimbursement from the other members. We do not agree with appellants' counsel that the 3rd defendant is not entitled to the reservation made in his favour by the Court below.

In the result, the appeals are allowed, except in respect of the item of Rs. 250 paid by the 3rd defendant, and the decree of the District Munsif of Talliparamba is hereby restored, except as regards the reservation in favour of the 3rd defendant in respect of item 1. The appellants will have their costs in S.A. No. 509 of 1951.

K.S. ——— *Appeals allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Reference under section 57 of the Indian Stamp Act.*

In the matter of Validation of a document, dated 14th June, 1947, executed by Kuppuswamy Chettiar, in favour of Arunachala Chettiar.

Stamp Act (II of 1899), sections 41, 2 (5) and 2 (22)—One year period prescribed by section 41—Applicability—Document—Whether 'Bond' or 'promissory note'—Tests.

The time-limit of one year laid down by section 41 of the Stamp Act only applies to a case where a party of his own motion produces a document and wants to escape liability for any penalty. It has no application to a case where a document is produced before the Collector or comes to him in the performance of his functions in which case he is not only empowered but is under a duty to impound a document which appears to him not duly stamped.

Where a document though purporting to be a promissory note, does not contain an unconditional undertaking to pay a certain sum of money and it is not possible to ascertain that a sum of money is payable on any given date, but only states that a specified amount will be paid with interest in six equal instalments, without any indication as to when the instalments fall due, it is only a bond within section 2 (5) (*b*) and not a promissory note under section 2 (22) of the Stamp Act. But if a document otherwise fulfils the definition of a promissory note, it does not cease to be so merely because the words 'or order' is omitted in it.

Reference made by the Joint Secretary, Board of Revenue (Law Revenue), Chepauk, Madras, in his letter No. L. 5779-52-5, dated 6th November, 1952, for the decision of the High Court.

The Government Pleader (*C. A. Vaidialingam*) on behalf of the State.

K. Desikachari for the Executant, namely, *Kuppuswami Chettiar*.

L. S. Veeraraghava Aiyar for the Payee, namely *Arunachala Chettiar*.

The Judgment of the Court was delivered by

Rajamannar, C.J.,—The questions referred to us under section 57 of the Indian Stamp Act by the Board of Revenue in this case are :

1. Whether the document in question is a promissory note or a bond within the meaning of section 2 (5) (*b*) of the Indian Stamp Act?

2. If the document is a bond, it not having been produced within one year from the date of its execution as required by section 41 of the Stamp Act, whether the Collector has jurisdiction to proceed under sections 41 and 42 of the Stamp Act and issue a certificate.

The document in question, dated 14th June, 1947, runs as follows :

"Promissory note executed on 14th June, 1947, in favour of Arunachala Chettiar, son of Kollakara Chettiar, residing at Palappudi village, hamlet of Satyamangalam, Gingi taluk, by Kuppuswami Chettiar, son of Venkatachala Chettiar, residing at the aforesaid village. In respect of the sum received from you at Tiruvannamalai by me in the year 1943 and given for opening a javuli shop by T. Arunachala Aiyar the sum found due to you is Rs. 3000. As this sum of Rupees three thousand had to be paid to you, I shall pay the same together with interest at Rs. 0-4-0 per month per Rs. 100 in six equal instalments, and discharge the same.

"To this effect is the promissory note executed by me with my consent.

V. Kuppuswami Chettiar."

The document is attested by one witness and bears six one-anna revenue stamps.

The first question turns on the application of the definitions of 'promissory note' and 'bond' under section 2 (22) and (5) of the Indian Stamp Act. Section 2 (22) says :

* Case referred No. 42 of 1953. 28th March, 1955.

"Promissory note means a promissory note as defined by the Negotiable Instruments Act, 1881 (XXVI of 1881)."

Section 4 of the Negotiable Instruments Act defines a promissory note thus :

"A promissory note" is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

The learned Government Pleader adverted to the omission in the document of the expression "to the order of". We do not think that mere omission of any such expression would render the document any the less a promissory note, if otherwise it fulfilled the terms of the definition. Actually a promissory note need not contain this expression. It is sufficient if there is an unconditional undertaking to pay a certain sum of money *to* a certain person. On a reading of the document it is clear that there is an undertaking to pay to a certain person.

We, however, are of opinion that the document in question is not a promissory note, because there is no unconditional undertaking to pay a certain sum of money. The document provides that the sum of Rs. 3000 had to be paid together with interest at 4 annas per month per Rs. 100 in six equal instalments. There is no mention or indication of the date on which the instalments fall due. The result is that on any given date it is impossible to say that a *certain* sum of money is payable. The document does not even specify when the first instalment falls due. We therefore hold that the document in question is not a promissory note as defined in section 4 of the Negotiable Instruments Act, and, therefore, not a promissory note within the meaning of section 2 (22) of the Indian Stamp Act. We are further of opinion that the document in question clearly falls within the definition of 'bond' in section 2 (5) (*b*) of the Indian Stamp Act, namely, an instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another. The instrument is attested by a witness. It is not payable to order or bearer and by the instrument a person has obliged himself to pay money to another. The Board of Revenue took the same view, namely, that the instrument was a bond.

For a disposal of the second question it is necessary to state a few facts. Arunachala Chettiar in whose favour the document was executed produced the document before the Sub-Collector, Tindivanam, on 27th October, 1950, along with a petition purporting to be under sections 31 and 32 of the Indian Stamp Act. The Sub-Collector impounded the document holding that the document was a bond withi the meaning of section 2 (5) of the Stamp Act, collected the stamp duty of Rs. 5 and penalty of Rs. 45 and issued a certificate under section 42 of the Indian Stamp Act. It was contended on behalf of the executant of the document that the Collector had no jurisdiction to act under section 42 of the Act. That section runs as follows :

(1) When the duty and penalty (if any) leviable in respect of an instrument have been paid under section 35, section 40, or section 41, the person admitting such instrument in evidence or the Collector, as the case may be, shall certify by endorsement thereon that the proper duty or, as the case may be, the proper duty and penalty (stating the amount of each) have been levied in respect thereof and the name and residence of the person paying them.

(2) Every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated as if it had been duly stamped, and shall be delivered on his application in this behalf to the person from whose possession it came into the hands of the officer impounding it, or as such person may direct.............."

As the Collector acted under section 33 read with section 40 of the Act, the case clearly fell within section 42. The contention, however, on behalf of the executant was two-fold : (1) that the instrument was produced before the Collector after the lapse of one year from the date of its execution and therefore the Collector could not take any action under section 41 of the Act and (2) that the document was produced along with an application under sections 31 and 32 of the Act and when a document is so produced, the Collector has no jurisdiction to impound it and proceed under sections 33 and 40 of the Act. We see no substance in either contention. Section 41 no doubt provides for the production of a document by a party of his own motion within one year of the date of its execution and such person brin-

ging to the notice of the Collector the fact that this instrument is not duly stamped and offering to pay the proper amount of duty. There was no scope for the application of this section in this case. For one thing the production was long after one year from the date of the execution of the instrument and further there was no attempt to satisfy the Collector that the omission to duly stamp it was occasioned by accident, mistake or urgent necessity. The time limit of one year laid down by this section only applies when a party of his own motion produces the document and wants to escape liability for any penalty. It has no application to the present case.

From the facts set out in the reference by the Board of Revenue it no doubt appears that the document was produced along with an application under sections 31 and 32 of the Stamp Act. Obviously the application was not maintainable under those sections, because the instrument was produced after the expiration of one month from the date of its execution [*Vide* section 32 (3)]. Be that as it may, the document was produced before the Collector, who was certainly a person in charge of a public office within the meaning of section 33 (1) of the Act. Once it is produced before him, or comes to him in the performance of his functions, then he is not only empowered, but is under a duty to impound the document, if it appears to him that it has not been duly stamped and that is what the Collector did in this case. Learned Counsel relied upon the decision of the Allahabad High Court in *Chunni Lal* v. *Board of Revenue U. P.*[1], as supporting his second contention. There the learned Judges held that when an instrument is presented to the Collector under sections 31 and 32 for his opinion as to the duty chargeable upon it, he is not authorised to impound the document forthwith, if he comes to the decision that the instrument is not sufficiently stamped. He has to act in accordance with the provisions of section 32. The application made under section 31 of the Act was within the prescribed time and was a valid application under that section. As section 32 clearly lays down what is incumbent on the Collector when an application under section 31 is presented to him, it is obvious that the Collector cannot omit to carry out the duties therein specified and proceed to act under section 33. We do not understand this decision to be an authority for the position that when an obviously belated and unsustainable application under section 31 of the Stamp Act is made to the Collector, he has no jurisdiction to impound the document under section 33 of the Act. If the learned Judges meant to lay down this proposition, with great respect to them we are unable to agree with them.

Our answer to the second question is that section 41 of the Stamp Act has no application to this case, and the Collector had ample jurisdiction to act under section 42 of the Stamp Act read with sections 33 and 40 of the same.

R.M. — *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

The Madras Co-operative Milk Supply Union, Ltd., Ayanavaram .. *Petitioner**

v.

The State of Madras .. *Respondent.*

Madras General Sales-tax Act (IX of 1939) as amended by Act (VI of 1951)—Distribution by Co-operative Milk Supply Union of oil-cakes to its members—Not "sale"—Distribution of oil-cakes cannot be brought as an item of business of milk supply.

The distribution of oil-cakes to its members by a Co-operative Milk Supply union would not constitute a sale under the Madras General Sales-tax Act. Where the Co-operative Society is only a dealer in milk the distribution of oil-cakes could not be brought as an item of business it carried on, even independent of the question, whether the distribution of the oil-cakes constituted a sale or not.

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* Tax Revision Case No. 85 of 1954. 7th March, 1955.

1. A.I.R. 1951 All. 851.

Petition under section 12-B (1) of the Madras General Sales-tax Act, 1939, (as amended by Act VI of 1951), praying that the High Court will be pleased to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 15th March, 1954, in T.A. No. 788 of 1953.

D. Ramaswami Ayyangar and *P. R. Varadarajan* for Petitioner.

The Assistant Government Pleader (*K. Veeraswami*) for Respondent.

The Order of the Court was delivered by

Rajagopalan, J.—The assessee was assessed on an alleged turnover of Rs. 91,491-8-7, which the departmental authorities and the Tribunal held was of sales of oil-cakes to its members. The assessee was a co-operative society. That such transfer of cakes to members would not constitute sales is concluded by the authority, *The State of Madras* v. *Azzaram Brass Manufacturers* (*Association*)[1]. Besides the Co-operative Society was a dealer in milk and the distribution of oil-cakes could not be brought as an item of business it carried on, even independent of the question, whether the disposal of the oil-cakes constituted sales or not.

The petition is allowed with costs and the order of the Appellate Tribunal in relation to turnover of Rs. 91,491-8-7 is set aside. Counsel's fee Rs. 100.

K.S. — *Petition allowed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

The Board of Revenue and another .. *Referring Authority**

v.

V.M. Murugesa Mudaliar of Gudiyatham .. *Respondent.*

Stamp Act (II of 1899), (Madras) Schedule 1-A, articles 19, and 44—Persons carrying on business in partnership owning property as co-owners—One co-owner relinquishing his share in favour of another—Document is not a conveyance but a release deed.

Where property is owned by a number of persons as co-owners each co-owner is in theory entitled to enjoy the entire property in part and in whole. A document by which one co-owner purports to abandon or relinquish his claim to the share to which he would be entitled would be in the nature of a release within the Article 44 of the Stamp Act. In such a case there need be no conveyance as such by the co-owner in favour of the other co-owners. A document under which a Hindu co-parcener purports to give up his rights to the family property in favour of the remaining coparceners would not be a deed of conveyance but a deed of release. There is no difference in principle between such a document as between members of a coparcenary and one between co-owners.

Reference under Stamp Act Section 46, (1894) I.L.R. 18 Mad. 233 (F.B.) followed.

Case stated under section 57 of the Indian Stamp Act by the Board of Revenue of Madras (as per order of the High Court in C.M.P. No. 2545 of 1954 in O.S.A. No. 72 of 1951) in the matter of the deed, dated 23rd May, 1949, executed by V.M. Murugesa Mudaliar and others, for decision on the following question of law, *viz.*

"Whether the document in question is correctly classified as a dissolution of partnership, release, and conveyance chargeable with stamp duty under Articles 39 (*b*) 44 (*b*) and 19 of Schedule 1-A of the Stamp Act, respectively and that the respondent is liable to pay a stamp duty of Rs. 938-15-0 on the document in addition to the penalty."

The Government Pleader (*C. A. Vaidialingam*) for the Referring Authority.

Respondent not represented.

Order of the Court was delivered by

Rajamannar, C.J.,—The question referred to us by the Board of Revenue under section 57 of the Stamp Act is whether the document styled a deed of release executed on 23rd May, 1949, is liable to be charged with stamp duty under Article 39 (*b*), 44 (*b*) and 19 of Schedule 1-A of the Stamp Act respectively.

1. (1954) 2 M.L.J. 590 : (1954) S.T.C. 284.

* Referred Case No. 68 of 1954. 28th March, 1955.

The Referring Authority was of the opinion that the document in question came under all the three articles and therefore liable to be charged with stamp duty under each of these three articles. Article 39 (*b*) of Schedule 1-A of the Act deals with an instrument of dissolution of partnership. Article 44 (*b*) is an article applicable to an instrument of release whereby a person renounces a claim upon another person or against any specified property. Article 19 applies to a conveyance.

The executants of the deed are three persons, who along with two persons in whose favour the deed was executed, were partners of a registered firm known as "Gudiyatham Lungi Company." The executants appear to have ceased to be partners of the firm from and after 12th April, 1949. The preamble recites that the releasors, *i.e.*, the executants were co-owners of the immovable property described in the schedule to the document as house and ground bearing Door No. 47 in Coral Merchant Street, G.T., Madras, entitled to three-fifths share therein, that the book value of the said property was a sum of Rs. 16,431-2-6 and that the releasors after having retired from the firm, desire to renounce all interest in the said property by deed, receiving the proportionate value of their shares in cash. The operative portion of the document in so far as it is material is as follows :

"This deed witnesseth that, in consideration of the sum of Rs. 9,858-9-7 (rupees nine thousand eight hundred and fifty eight, annas nine, and pies seven), the receipt whereof on or before the date of these presents through adjustment of accounts .... the releasors hereby release, extinguish, abandon, cancel, and otherwise relinquish all their respective rights, claim, demands or interest, in any manner in to any extent in respect of the property set out and fully described in the schedule hereunder.".

Now let us examine each one of the articles under which the document is said to be chargeable with stamp duty. Article 39 (*b*) need not detain us for any length of time. The document is obviously not a deed of dissolution of partnership and we did not understand the learned Government Pleader to maintain that it is. The parties charged with the stamp duty agree that it is a release falling under Article 44 (*b*) and so we need not discuss this article either.

It only remains to consider whether the instrument falls within the definition of conveyance under Article 19 of Schedule 1-A of the Stamp Act. We are of opinion that it does not. The document proceeds on the footing that the five persons, namely, the three executants and the two persons in whose favour the instrument was executed, who were carrying on business of that firm owned the property as co-owners, the executants being entitled to a three-fifths share and the other two being entitled to the remaining two-fifths share. It is not the case of any one that there was a division of the property by metes and bounds in accordance with the said shares. In such circumstances the document in and by which one co-owner purports to abandon or relinquish his claim to the share to which he would be entitled would be in the nature of a release within Article 44.

In such a case there need be no conveyance as such by one of the co-owners in favour of the other co-owners. Each co-owner in theory is entitled to enjoy the entire property in part and in whole. It is not therefore necessary for one of the co-owners to convey his interest to the other co-owner. It is sufficient if he releases his interest. The result of such release would be the enlargement of the share of the other co-owner. There can be no release by one person in favour of another, who is not already entitled to the property as a co-owner.

The learned Government Pleader relied upon the ruling of a Full Bench of the Bombay High Court in *Hiralal Navalram*, In the matter of[1], in which a document was held to be a conveyance. The facts of that case are totally different from the facts of the present case. There was a factory, which belonged in partnership to three persons Navalram, Omkar and Shivnarayan of whom Navalram was entitled to 12 annas share and Omkar and Shivnarayan together were entitled to the remaining 4 annas share. The heirs of 4 annas share sold it to one Ramchand. He died and it was his adopted son, who executed the deed in question purporting to relinquish all his claims over the 4 annas share in the partnership for Rs. 17,841 in favour of Navalram, who was entitled to the 4 annas share. It was held by the Special

1. (1908) I.L.R. 32 Bom. 505.

Bench that by the document the executing party purporting to be entitled to a share in a going pressing factory, transferred the whole of that share to the other person interested in the factory for the sum of Rs. 17,841 and therefore, the document was a conveyance on sale of property, namely the quarter share in the pressing factory. Now, it must be noticed at the outset that the document was not treated as a document relating to a particular immoveable property. It was understood as a document relating to rights and interests respecting a 4 annas share in a partnership business. The following from the material portion of the deed shows the true scope of that deed :

"In consideration of all the rights which I have acquired (namely) in the profits in respect of the press described above and the press machines and other machinery and the things and dividend etc., I have this day received from you Rs. 17,841 in the lump. Now nothing remains due to me by you in respect of any of the aforesaid things."

The document was not, therefore, a release simpliciter by one co-owner in favour of another of his interest in particular immovable property. It was, on the other hand, a conveyance by the purchaser from the representatives of a deceased partner of their rights to the assets of the partnership in favour of the other partners. The decision, therefore, has no application to the present case.

The learned Government Pleader was prepared to concede that a document under which one Hindu coparcener purported to give up his rights to the family property in favour of the remaining coparceners would not be a deed of conveyance, but a deed of release. He did this apparently because of a decision of a Full Bench of this Court in *Reference under Stamp Act, S.* 46[1]. In that case the document was one under which a Hindu son executed in favour of his father, as representing the interest of the other members of the family an instrument by which he relinquished his rights over the general property of the family in consideration of certain lands being allotted to him for life, and certain debts incurred by him being paid. It was held that the instrument was a release, which should be stamped, as such. The learned Judges observed that it was a deed by which one co-owner renounced his claim for partition against the family property in consideration of a certain income to be enjoyed by him for his life out of certain lands over which he has no power of alienation. We can see no difference in principle between such a document as between members of a coparcenary and the document in question, which is a document between co-owners. With respect, we follow the principle of this Full Bench decision and apply it to the present case. We hold that the document in question is only a release within the meaning of Article 44 of Schedule 1-A of the Stamp Act and was properly stamped as such. It was not liable to be charged either as a deed of dissolution of partnership or as a conveyance.

R.M. —————— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE SOMASUNDARAM.

Subbiah Odayar .. *Appellant**

v.

The Revenue Court, Tanjore and another .. *Respondents.*

Tanjore Tenants and Pannayals Protection Act (XIV of 1952), *section* 10 (2) (*c*)—*Scope—Application for eviction for arrears of rent—Proper procedure for disposal of—Notice calling upon the tenant to pay the arrears —When to be issued.*

There are two stages in the disposal of an application for eviction on the ground of non-payment of rent. The first stage is an inquiry into the objections raised on behalf of the tenant, followed by a decision by the Revenue Court. If the decision is against the land-owner, the application is dismissed straightaway. But if the decision is in favour of the land-owner, a notice is issued calling upon the tenant to tender the rent in arrear and costs within thirty days of the notice. If by the date of expiry of thirty days from the date of the notice, the tenant does not comply with the notice and pay up the arrears of rent and costs, the Revenue Court shall pass an order for his eviction. A notice issued before deciding the amount of rent due cannot be used to sustain an order for eviction.

*W. App. No. 7 of 1955. 31st March, 1955.

1. (1894) I.L.R. 18 Mad. 233 (F.B.).

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Rajagopalan dated 20th January, 1955 and made in Writ Petition No. 647 of 1954 presented to the High Court under Article 226 of the Constitution of India for the issue of a Writ of certiorari or any other appropriate Writ or Order or Direction calling for the records relating to Petition No. 560 of 1954 on the file of the Revenue Court, Tanjore and for quashing the order thereon dated 28th September, 1954.

K. S. Naidu for Appellant.

The Special Government Pleader (*V. V. Raghavan*) on behalf of the State.

S. Ramachandra Aiyar for 2nd Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This appeal against the judgment of Rajagopalan, J. arises in the following circumstances: The contesting respondent (Respondent No. 2), the landlord, filed an application on 21st May, 1954 in the Revenue Court, Tanjore, under section 10 of Madras Act XIV of 1952 for eviction of the appellant on the ground that he had failed to pay the arrears of rent. The arrears, according to the landlord, amounted to 49 kalams and 6 measures of paddy and a sum of Rs. 265 as cash rent for the punja, 18 kalams of blackgram, and the landlord's share of the gingelly crop. The appellant pleaded in defence that the rent claimed was not fair rent and the yield was very poor and the paddy already delivered by him to the 2nd Respondent was sufficient in the circumstances. He denied liability to pay the cash rent, because most of the coconut trees in respect of which the rent was payable had been uprooted in the cyclone of 1952. During the pendency of the petition, the appellant applied to the Conciliation Officer to fix the fair rent. He, therefore, prayed for a postponement of the hearing of the eviction petition till the Conciliation Officer had fixed the fair rent. On 12th July, 1954, the Revenue Court issued a notice purporting to be under section 10 (2) (*c*) as follows :—

"Whereas it has been brought to the notice of this Court that you as tenant under Venugopala Odayar (Name of the landowner) have failed to pay the rent due, *viz.*, 49 K. 6 M. paddy and 18 K. blackgram and cash 265 (Here enter the quantity if in kind and the amount if in cash) for the agricultural year 1953-54, you are hereby called upon to tender to the landowner the said rent together with Rs. 4 (four) being the costs of this proceeding within 30 days from the date of this notice failing which an order will be passed for your eviction."

It appears from the Notes paper that after directing issue of the above notice the Revenue Court adjourned the petition to 13th August, 1954. The petition was further adjourned to 27th August, 1954. Meanwhile, on 31st July, 1954, the Conciliation Officer passed an order fixing the paddy rent due as 374 kalams. The result was that the no arrears were due in respect of paddy rent. There was some dispute as to whether the kist for fasli 1362-63 was paid by the landlord or the tenant. The Revenue Court found that the landlord had paid the kist for fasli 1362. On 28th September, 1954, the Revenue Court passed an order directing the eviction of the appellant. The material portion of this order runs as follows :—

"I heard the pleading and arguments of the counsel for both sides and as there were no witnesses to be examined on either side, I issued a 10 (2) (*c*) notice on 12th July, 1954 for the arrears due. After the issue of 10 (2) (*c*) notice the decision of the Conciliation Officer was received. According to this order, the counter petitioner need not pay paddy rent. As regards the blackgram and cash rent, the counter petitioner did not discharge the arrears till today. Today he filed a petition stating that he will pay the cash rent and the petitioner's share of blackgram within a period of one month. The counter petitioner has already been given sufficient time. The time granted in the 10 (2) (*c*) notice has already expired. He is therefore ordered to be evicted from the lease lands."

The appellant thereupon filed an application to this Court under Article 226 of the Constitution for the issue of a Writ of certiorari or other proper writ or order or direction calling for the records and quashing the aforesaid order of eviction passed by the Revenue Court, Tanjore. The main ground on which the appellant attacked the order of the Revenue Court was that under section 10 (2) (*c*) the Revenue Court, should, before passing an order for eviction, call upon the tenant by notice in the prescribed manner to

tender to the landowner the rent in arrear together with the cost of the proceeding within thirty days of the date of the notice. This notice could be issued only after the determination of the quantum of arrears. The contention of the appellant was that as such determination by the Revenue Court was only on 28th September, 1954 after receipt of the order of the Conciliation Officer, he was entitled to be given thirty days' time from that date for payment of the arrears so determined. The notice issued on 12th July, 1954 was not a proper notice such as was contemplated by section 10 (2) (*c*) of the Act. Rajagopalan, J., overruled this contention and dismissed the application. Hence this Appeal.

Section 10 of Madras Act XIV of 1952, in so far as it is material for this appeal, runs as follows :—

"(1) No cultivating tenant shall be evicted except as provided in section 6, or unless——

. . . .

(*b*) he has failed to pay any rent accruing due after the commencement of this Act within two months of the date stipulated in the lease deed or in the absence of a lease deed, within one month of the due date according to the usage of the locality or village;

(2) (*a*) No tenant shall be evicted under this section except on an application made in that behalf to the Revenue Court.

(*b*) The Revenue Court shall on such application inquire into the matter and give its decision.

(*c*) Upon any application made for the eviction of a tenant on the ground of non-payment of rent or of any amount made payable by a condition imposed in pursuance of section 6, the Revenue Court shall, before passing an order for eviction, call upon the tenant, by notice in the prescribed manner, to tender to the land owner the rent or amount in arrear together with the cost of the proceedings within thirty days from the date of the notice, and if the tenant does not comply with such notice, the Revenue Court shall pass an order for his eviction."

The petition for eviction in this case was on the ground that the tenant had failed to pay the rent. In such a case, if any objection is taken by the tenant to the rate of rent claimed, or liability is denied on any other ground, it is the duty of the Revenue Court to inquire into the matter and give its decision. In the case of an application on one or other of the grounds specified in clauses (*a*) to (*g*) except (*b*), if the Revenue Court gives its decision in favour of the landlord, forthwith an order of eviction should follow. An exception is, however, made in section 10 (2) (*c*) in the case of an application for eviction on the ground of non-payment of rent or of any payment made payable by a condition imposed in pursuance of section 6. The Revenue Court, before passing an order of eviction, should call upon the tenant by a notice in the prescribed manner to tender to the landlord the rent or amount in arrear together with the cost of the proceedings within thirty days from the date of the notice. It is only if the tenant does not comply with the notice that the Revenue Court shall pass an order for his eviction. It is clear, therefore, that there are two stages in the disposal of an application for eviction on the ground of non-payment of rent. The first stage is an inquiry into the objections raised on behalf of the tenant, followed by a decision by the Revenue Court. If the decision is against the landowner, the application is dismissed straightaway. But if the decision is in favour of the landowner, a notice is issued calling upon the tenant to tender the rent in arrear and costs. Then, we get the next stage after the expiry of thirty days from the date of the notice. If by that date, the tenant does not comply with the notice, that is, does not pay up the arrears of rent and costs, the Revenue Court shall pass an order for his eviction.

From a persual of the record, it appears to us that the Revenue Court did not pay sufficient attention to the special provisions made for the disposal of an application for eviction on the ground of non-payment of rent. No doubt, a notice purporting to be under section 10 (2) (*c*) was issued on 12th July, 1954. Before the issue of a notice, there should have been a decision by a Revenue Court of the exact amount of arrears due. Learned counsel for the landowner-respondent (as well as the learned Judge, Rajagopalan, J.) placed very much reliance on the following passage in the final order of the Revenue Court :—

"I heard the pleading and arguments of the counsel for both sides and as there were no witnesses to be examined on either side, I issued a 10 (2) (*c*) notice on 12th July, 1954 for the arrears due."

We have perused the entire record and have not found anywhere a decision of the Revenue Court on the objections raised by the tenant. We found an application made by the tenant to postpone the inquiry till the receipt of the order of the Conciliation Officer on the tenant's application for the fixation of fair rent. There is no kind of order made on this application. From what transpired subsequently, it is clear that the Revenue Court did not proceed on the assumption that the inquiry was closed when the notice dated 12th July, 1954 was issued. We find from the Notes paper the petition being adjourned from time to time, from 12th July, 1954 to 13th August, 1954, 27th August, 1954, 13th September, 1954 and 28th September 1954, on which day the final order was passed. On 27th August, 1954, the petition was adjourned for examining witnesses. Section 10 (2) (*c*) of the Act does not contemplate any inquiry, including the examination of witnesses, after the issue of a notice calling upon the tenant to tender the arrears of rent and costs. In the final order dated 28th September, 1954, the Revenue Court deals with the order of the Conciliation Officer fixing the paddy rent at 374 kalams. The result of this was that there was no arrear of paddy rent. The most reasonable way of construing the proceedings is to hold that the order dated 28th September, 1954 embodies the decision of the Revenue Court fixing the amount of rent in arrear. It was thereafter that a notice should have been issued calling upon the tenant to pay the arrears so determined and the costs. This was not done. On the other hand, by the very same order in which the Revenue Court determined the amount of arrears, the tenant was also directed to be evicted without the tenant being given the time of thirty days to pay up such arrears. The Revenue Court observes that the time granted in the 10 (2) (*c*) notice had already expired. But it has apparently overlooked that the amount mentioned in the notice was not the amount due. The tenant offered to pay the arrear within a period of one month, but the Revenue Court refused to grant him any time.

Mr. Ramachandra Ayyar for the landowner-respondent urged that the pendency of proceedings before the Conciliation Officer did not deprive the Revenue Court's power under Section 10 of the Act. We agree with him. But then the Revenue Court should proceed to inquire and decide on the matter. From the order of the Conciliation Officer, it is amply evident that both the landowner and the tenant adduced a great deal of evidence on the question of fair rent. The parties evidently did not want to duplicate the evidence again before the Revenue Court. In these circumstances, the notice issued on 12th July, 1954 could not have been intended as a final order impliedly holding that the amount claimed by the landowner was lawfully due.

The order of eviction passed by the Revenue Court in disregard of the provisions of section 10 (2) (*c*) of the Act (Madras Act XIV of 1952) must therefore be, and is hereby, quashed. The matter will go back to the Revenue Court for the issue of a proper notice under section 10 (2) (*c*) calling upon the tenant to tender the amount in arrear together with the cost of the proceedings within thirty days from the date of such notice. If the tenant does not comply with such notice, the Revenue Court shall then pass an order for eviction.

The appeal is allowed, but in the circumstances, there will be no order as to costs.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

Bhagwandas Goel & Sons .. *Appellants**,

v.

Uleechalla E. Hanumanthiah Chetty .. *Respondents.*

Civil Procedure Code (V of 1908), Order 9, rule 13—Applicability to the original side of the High Court —Madras High Court Original Side Rules—Order 6, Rule 2—Undefended board—Disposal of a case under— If ex parte *decree could be set aside.*

Order 1, rule 3 of the Original Side Rules of the Madras High Court only provides that the provisions of the Code of Civil Procedure in so far as they are inconsistent with the said Rules and Forms are repealed and superseded. Otherwise, the provisions of the Code will apply. There is nothing in the Original Side Rules or Forms which is inconsistent with Order 9, rule 13 of the Code. Hence there is no reason why the said provisions of the Code should not apply to a decree passed *ex parte* on the Original Side. Order 6, rule 2 of the Original Side Rules prescribes the procedure in posting cases in the undefended Board. These cases are heard and disposed of *ex parte*. But such suits are decided on merits. The fact that the defendant is set *ex parte* does not dispense with the necessity of plaintiff proving his claim. But even in such cases the Court has the power to set aside a decree passed *ex parte*.

On appeal from the order of the Honourable Mr. Justice Ramaswami dated 27th January, 1955 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 5142 of 1954 in C.S. No. 227 of 1954.

C. Srinivasan for Appellants.

V. Tyagarajan and *M. A. Rajagopalan* for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the Judgment of Ramaswami, J., dismissing an application by the defendant in C.S. No. 227 of 1954 on the Original Side of this Court for setting aside an *ex parte* decree passed against him in the suit. The order of Ramaswami, J., under appeal runs thus :—

"This suit has been disposed of on merits. Therefore the proper and only course is to prefer an appeal against my decree. With these remarks this petition is dismissed. No costs."

With respect to the learned Judge, we are unable to understand exactly the ground on which the petition was dismissed. Every *ex parte* decree except in cases of suits filed under Order 7 of the Original Side Rules is a decree passed on merits. The fact that the defendant is set *ex parte*, does not dispense with the necessity of the plaintiff proving his claim. If the learned Judge meant that an application to set aside an *ex parte* decree was not maintainable, we must express our disagreement with him. Order 6, rule 2 of the Original Side Rules prescribes the procedure in posting cases in the list of undefended cases. These cases are "heard and disposed of *ex parte*." The rule goes on to say that the Court shall not set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim. This provision is a clear indication that the Court in proper cases has the power to set aside a decree passed *ex parte*. Moreover, we see no reason why the provisions of Order 9, rule 13 of the Code of Civil Procedure should not apply to a decree passed *ex parte* on the Original Side, of this Court. Order 1, rule 3 of the Original Side Rules only says that the provisions of the Code, so far as such provisions are inconsistent with the Original Side Rules and Forms are repealed and superseded. Otherwise, the provisions of the Code will apply. There is nothing in the Original Side Rules or Forms which is inconsistent with Order 9, rule 13 of the Code.

Mr. Tyagarajan, learned counsel for the respondent, drew our attention to two decisions of the Calcutta High Court. In *S. N. Banerjee* v. *H. S. Suhrawardy*[1], it was held by Rankin, C.J., and Mitter J., that though Order, 9, rule 13, may not

* O.S.A. No. 26 of 1955. 15th March, 1955.

1. (1927) I.L.R. 55 Cal. 473; A.I.R. 1928 Cal. 772.

apply in terms to decrees passed on the Original Side of the Calcutta High Court, it was the general practice in that Court to follow the analogy of Order 9, rule 13, on general principles of justice. The same view was taken in a subsequent decision in *Haji Ramjan Ali* v. *Hafiz Abdul Gaffur*[1]. We would, however, prefer to rest our decision on the applicability of Order 9, rule 13 of the Code.

We cannot uphold the learned Judge's order dismissing the application merely on the ground that the suit had been disposed of on the merits. The appeal must therefore be allowed.

The question is whether it is necessary to remand the application to the learned Judge in chambers for fresh disposal. Learned counsel on both sides have asked us to dispose of the application on the affidavits, and we shall do so.

In the circumstances alleged in the affidavit filed in support of the application, we are of opinion that this is a case in which the *ex parte* decree should be set aside. Learned counsel engaged by the defendant could not obtain instructions in time to file a written statement, and subsequently when the suit was posted in the undefended board, unfortunately he and his clerk missed noting the case and the suit was decreed *ex parte*. We think that there was sufficient cause which prevented the defendant from appearing in person or by advocate on the date on which the suit was taken up for final disposal. The defendant ought to have an opportunity to defend the suit.

At the same time, it cannot be denied that there was some negligence on the part of the defendant. Therefore, there cannot be an unconditional order setting aside the *ex parte* decree. We think that the interests of justice would be amply met if as a condition we direct the defendant to deposit a sum of Rs. 20,000 or furnish security for the said sum to the satisfsction of the Second Assistant Registrar within a month from this date. On his depositing such sum or furnishing security therefor, the defendant will be allowed to file his written statement within six weeks from to-day.

The plaintiff will also be entitled to the costs thrown away as it were by reason of the defandant's default. The costs of the suit as such will, of course, abide the final disposal. But irrespective of the event, we direct the defendant appellant to pay a sum of Rs. 250 to the plaintiff as costs thrown away.

The appeal is allowed and the order of the learned Judge dismissing the appellant's application to set aside the *ex parte* decree is vacated, and instead there will be an order setting aside the *ex parte* decree on the conditions above mentioned. No order as to costs of this appeal.

R.M. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Ramalinga Padayachi .. *Appellant**

v.

Srinivasalu Naidu *alias* Booraswami Naidu and others .. *Respondents.*

Hindu Law—De facto *guardian of minor—If could contract a debt in the name of the minor—Alienation of minor's property by* de facto *guardian for a debt so contracted—Binding nature—Right of re-imbursement when arises—Discharge of binding debts of a Hindu minor by guardian—If necessaries—Contract Act (IX of* 1872), *section* 68.

A *de facto* guardian of a Hindu minor could not in law execute a promissory note in the name of a minor even in respect of a debt binding on the minor's estate and a sale of the minor's property by such a *de facto* guardian in discharge of such promissory note executed by him would not bind the minor.

Sriramulu v. *Pundarikakshayya*, (1949) F.C.R. 65 : (1950) 1 M.L.J. 586 (F.C.) followed.

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1. A.I.R. 1928 Cal. 864.

* L.P.A. Nos. 15 and 26 of 1951. 4th February, 1955.

Where a loan is taken for the purpose of necessity or benefit of the minor's estate by a *de facto* guardian he cannot effect the transaction so as to exclude his own liability.

In the case of contractual debts borrowed by a *de facto* guardian on simple bonds or promissory notes the creditor can have recourse to the minor's estate indirectly on the principle of subrogation, when the guardian has the right of indemnity against the estate of the ward and he could have the right of direct reimbursement out of the properties of the infant only when the debt is for necessities supplied to the infant. But the principle of subrogation is not applicable to support an alienation by the guardian.

Quaere: Whether the discharge of a binding debt of a Hindu minor by the guardian amounts to necessaries within the meaning of section 68 of the Indian Contract Act.

Appeal under Clause 15 of the Letters Patent against the judgment and decree of the Honourable Mr. Justice Viswanatha Sastri dated 5th January, 1951 and passed in Appeal No. 602 of 1946 preferred against the decree of the Court of the Subordinate Judge of Cuddalore dated 12th March, 1946 and passed in O.S. No. 36 of 1944.

S. Ramachandra Aiyar, M. K. Nambiar and *R. Viswanathan* for Appellant.

M. S. Venkatarama Aiyar, S. Nagaraja Aiyar and *T. Muniswami Reddi* for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—These are two appeals under the Letters Patent against the Judgment of Viswanatha Sastri, J., in A.S. No. 602 of 1946, which was an Appeal preferred against the decree and judgment of the Court of the Subordinate Judge of Cuddalore in O.S. No. 36 of 1944. That was a suit for possession of properties which had belonged to the 1st respondent and which had been alienated by the 1st defendant acting as his guardian when the 1st respondent was a minor. The 1st respondent alleged that the alienations were not binding on him. The impugned alienations were four sales of which we are concerned in these appeals with two only, *viz.*, those covered by sale deeds, Exhibits D-33 and D-1 dated 16th September, 1936 and 29th November, 1936 respectively. The properties in suit belonged to the joint family consisting of the plaintiff 1st respondent and his father, one Sundararajalu Naidu who died on 29th December, 1928. Sundararajalu Naidu is alleged to have left a will dated 29th December, 1928 appointing the 1st defendant a relation, as the guardian of his minor son, the 1st respondent, and his properties. The 1st defendant, it is common ground, managed the affairs of the 1st respondent during his minority. It was not disputed before us that the appointment of the 1st defendant as the testamentary guardian of the 1st respondent was not valid in law, and therefore the status of the 1st defendant was only that of a *de facto* guardian. Both the alienations with which we are concerned in these appeals can be traced to a debt which was admittedly due by Sundararajalu Naidu under a promissory note, Exhibit D-28 dated 4th February, 1926, executed by him and the 2nd defendant for a sum of Rs. 4,200-2-3. This promissory note itself appears to have been in renewal of an earlier promissory note, but that is of no consequence. It was alleged, and it has been found, by both the trial Court and by the learned Judge on appeal, that in respect of this promissory note the 2nd defendant was only a surety and it was the father of the 1st respondent who was the principal debtor. After the father's death, a promissory note was executed by defendants 1 and 2 on 17th October, 1930, Exhibit D-29, for discharge of the amount due under Exhibit D-28. In this promissory note, the 1st defendant is thus described :—

"Rangaswami Naidu son of A.S. Veeraswami Nayudu, guardian of minor Srinivasulu *alias* Bhuvarahaswami Nayudu, son of late A.S. Sundararajalu Naidu."

There were several successive endorsement of this promissory note, till finally it was transferred to one Pankajammal. There were two payments in October, 1933 and March, 1934, which were acknowledged by the 1st and 2nd defendants on the promissory note. On 20th March, 1935, defendants 1 and 2 executed a fresh promissory note in favour of the said Pankajamma for Rs. 5,898-2-0 in discharge

of the debt due under Exhibit D-29. This promissory note (Exhibit D-32) was in its turn endorsed to the 3rd defendant on 15th July, 1935. It purports to be executed by the minor represented by his guardian, the 1st defendant. The 1st defendant executed a sale deed, Exhibit D-33, on 16th September, 1936 in favour of the 3rd defendant, conveying some of the suit items for Rs. 4000, the consideration going in partial discharge of the promissory note, Exhibit D-32. On 29th November, 1936, the 1st defendant conveyed certain other items in suit to the 2nd defendant himself (Exhibit D-1) for a sum of Rs. 1500 which amount was paid by the 2nd defendant to the 3rd defendant, in partial discharge of Exhibit D-32. The 1st respondent impuged these two sale deeds as not binding on him. The learned Judge, who tried the suit, held that they were binding on the 1st Respondent and dismissed the suit in respect of these two alienations. The plaintiff appealed to this Court (A.S. No. 602 of 1946). Viswanatha Sastri, J., allowed the appeal in respect of these two sale deeds, which he held were not binding on the plaintiff-respondent. L.P.A. No. 15 of 1951 is by the 5th defendant, and L.P.A. No. 26 of 1951 is by the 1st and 2nd defendants and relate to the two alienations respectively.

On the facts set out above, there appears to us to be no doubts as to the law to be applied, because it has been authoritatively enunciated by the Federal Court in *Sriramulu* v. *Pudarikakshayya*[1]. The facts of the case before the Federal Court are substantially similar to the facts in the case before us. There the plaintiff was the adopted son of one Chalamayya. When he was a minor, his estate was being managed by his adoptive mother. She, as the *de jure* guardian of the minor, executed on 23rd April, 1925 a promissory note in renewal of an earlier promissory note which had been executed by Chalamayya himself in 1923 to the defendant. On the same date, she also executed another promissory note to the defendant for the fees due to him for professional work done during the lifetime of Chalamayya. On 23rd April, 1928, she executed a consolidated promissory note in renewal of the two previous notes. She died in November 1928 and thereafter the plaintiff's natural father China Seshayya, entered upon the management of the estate. He acted as the *de facto* guardian of the minor plaintiff. On 23rd June, 1931, Seshayya, professing to act as the guardian of the plaintiff, purported to renew the promissory note of 1928. On 2nd June, 1932, Seshayya conveyed immoveable properties belonging to the minor to the defendant in discharge of the debt due under the promissory note and a sum of Rs. 4,596-9-6 paid to another creditor. The plaintiff, after attaining majority, instituted a suit in which he attacked the validity of this alienation. It was held both by this Court and by the Federal Court that a *de facto* guardian of a Hindu minor could not in law execute a promissory note in the name of the minor even in respect of a debt binding on the minor's estate, and a sale by such a *de facto* guardian in discharge of such promissory note executed by him would not bind the minor. In the face of this decision Mr. Ramachandra Aiyar, learned counsel for the 5th defendant, appellant in L.P.A. No. 15 of 1951, could not and did not, contend that the promissory note Exhibit D-32, was binding on the minor, nor that the sale to the 3rd defendant could be supported on the ground that it was in partial discharge of that promissory note. He, however, sought to sustain the validity of the sale on two grounds. The first ground was based on section 68 of the Contract Act which runs as follows :—

> "If a person incapable of entering into a contract, or any one whom he is legally bound to support is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person."

His argument was that the term, "necessaries" in this section would include discharge of binding debts in the case of a Hindu minor. But assuming this is so, we fail to see how this section can in any way help the appellant to maintain the validity of the sale. No one here has advanced moneys to discharge any debt binding on the minor to entitle that person to be reimbursed from the property

1. (1950) 1 M.L.J. 586 : (1949) F.C.R. 65 (F.C.).

of the minor. Nor does the following passage from Trevelyan on the "Law relating to Minors", 5th Edition, carry the matter any further :—

"The circumstances that to meet the necessities of his ward the guardian has pledged his personal credit, does not disentitle him to charge or sell the ward's property, but he can only charge or sell it for the purpose of paying money which the minor was under an obligation to pay."

We have found that the minor is not under an obligation to pay anything under the promissory note, Exhibit D-32, to discharge which the alienation was made. The decision in *Maharana Shri Ranmal Singji* v. *Vadilal Vakhat Chand*[1], has no direct bearing on this case. There, a creditor sued to recover from the minor and his estate a sum advanced by him for the purpose of a pilgrimage undertaken by the minor's mother and to defray the expenses of the minor himself. The learned Judges held that the debts were not contracted for necessary purposes, and could not be recovered from the minor's estate.

The second ground was based on the principle of subrogation. Certain passages from the judgments of the learned Judges in the decision of the Federal Court were relied upon by Mr. Ramachandra Ayyar. Kania, C.J., observed (at page 591) :—

"In my opinion it is therefore right to hold that when a loan is taken for the purpose of necessity or benefit of the minor's estate by a *de facto* manager, he cannot effect a transaction so as to exclude his own liability. So far as the creditor is concerned, this involves no hardship because he can proceed against the *de facto* manager and make the minor's estate liable on the principle of subrogation."

Fazl Ali, J., said (at page 596) :—

"There may however be cases in which the minor's needs have to be met and in such cases, the third principle enunciated by the Privy Council can come into play, that is to say, the manager or guardian can show that the estate ought to bear the burden which he had taken upon himself. In such cases, by the principle of subrogation the creditor might be allowed to stand in the shoes of the guardian and invoke the latter's right to reimbursement out of the minor's estate. The right might usually be subject to the state of accounts between the guardian and his ward."

Mukerjea, J., deals with this point at greater length than the other two learned Judges thus : (page 609) :—

"When the guardian himself is a party to the contract in his capacity as guardian, a suit can certainly be instituted against him and a decree obtained. But simply because the defendant is sued in his capacity as guardian, the estate of the ward cannot be proceeded against in execution of the decree obtained in such suit. In order to bind the minor's estate, the minor must also be made a party to the suit property represented. Now on what basis can a decree be made in such a suit making the minor's estate liable for the money borrowed by the guardian ? The minor being incapable of being a party to a contract there could be no direct contractual liability established against him or his estate. But as the guardian was personally liable under the contract, he would be entitled to reimbursement from the minor's estate under the rule of Hindu Law if the borrowing was for necessity or benefit of the minor. The creditor in such circumstances can invoke the equitable doctrine of subrogation in his favour and claim to be placed in the position of the guardian for enforcement of the latter's right of reimbursement against the minor's estate. Instead of there being two suits, one by the creditor against the guardian and the other by the guardian against the minor, both the reliefs may be worked out in one and the same suit and thereby multiplicity of litigation could be avoided. This is the only proper way in which the Hindu Law rights of the guardian in the matter of contractual debts for necessity or benefit of the minor could be given effect to in perfect consonance with the well established principles of law of contract and the ordinary rules of procedure in personal actions. The application of this rule would be just and equitable to the minor also. As the creditor stands only in the shoes of the guardian and can claim the rights of indemnity which the latter can assert against the minor's property it would be open to the minor to show that the guardian himself was in default and would not be entitled to any indemnity if accounts were properly taken.

Again at page 610 :—

The position therefore is that in case of contractual debts borrowed either on simple bonds or promissory notes, the creditor can have recourse to the minor's estate indirectly on the principle of subrogation, when the guardian has the right of indemnity against the estate of the ward ; and he would have the right of direct re-imbursement out of the properties of the infant, only when the debt is for necessaries supplied to the infant."

In our opinion, there is no scope for the application of this principle of subrogation in this case. In the first place, there was no pleading raising this question. And as the learned Judge, Viswanatha Sastri, J., points out, there was no attempt to justify

1. (1894) I.L.R. 20 Bom. 61.

a claim based on the right of indemnity available to a *de facto* guardian. There was no evidence of the state of accounts as between the *de facto* guardian and the minor. Under Exhibit D-32 in partial discharge of which the sale deed, Exhibit D-33, was executed, the 1st defendant was not personally liable, and this position is accepted by Mr. Ramachandra Aiyar. He, therefore, fell back on the prior promissory note Exhibit D-29. But the learned counsel for the Appellant was unable to cite any decision in which the principle of subrogation has been invoked successfully to support an alienation by the guardian. We, therefore, agree with Viswanatha Sastri, J., that the alienation under Exhibit D-33 could not bind the 1st Respondent. L.P.A. No. 15 of 1951 is dismissed with costs.

The alienation, which is the subject-matter in L.P.A. No. 26 of 1951 in favour of the 2nd defendant stands on a different footing. As already mentioned, Viswanatha Sastri, J., did not disturb the finding of the trial Court that the primary liability for the debt due under Exhibit D-28 was of the plaintiff's father and that the 2nd defendant was only a surety. This finding was not challenged before us. The learned Judge, however, held that under Exhibit D-29 the 2nd defendant must be deemed to be only a surety for the 1st defendant and the creditor could not have enforced the payment of the debt from the plaintiff or his estate under Exhibit D-29 or the later promissory note, Exhibit D-32. Mr. Viswanathan, learned counsel for the appellant, contended that the 2nd defendant as surety had always a right to proceed against the plaintiff's father, and after his death against the plaintiff and his estate, after discharging the debt, and this right would not be lost even if the original liability of the plaintiff's father did not subsist on the date of the discharge. The 2nd defendant was undoubtedly acting within his rights in renewing his liability by executing the two later promissory notes, Exhibits D-29 and D-32. The alienation in his favour (Exhibit D-1) must be deemed to be in discharge of the liability of the plaintiff and his estate, to indemnify the 2nd defendant as surety in the sum of Rs. 1,500 which he paid to the creditor. We see considerable force in this contention of the appellant's counsel. Mr. Venkatarama Ayyar for the plaintiff—1st Respondent urged that there was no evidence that the surety was called upon by the creditor to pay the debt. But this objection is not tenable in the face of Exhibit D-2, a notice issued by the creditor, the 3rd defendant, on 19th July, 1935, calling upon the plaintiff's guardian and the 2nd defendant to pay the principal and interest due under Exhibit D-32. Mr. Venkatarama Ayyar then relied upon the fact that a fresh promissory note was taken by the creditor, Exhibit D-29. The result of which in law will be the extinguishment of the liability under the prior note Exhibit D-28. He relied upon the following passage in Bashyam and Adiga on the Negotiable Instruments Act :—

> "If the creditor takes a fresh security on a separate bill or note from one of several partners who are already his debtors or parties to a bill or note or otherwise, it has ordinarily the effect of discharging the other co-partner."

But, immediately, we find the following :—

> "But he may reserve his right against the others."

There is no scope in this case for the application of this rule. The creditor did not take a fresh security or bill from one of the debtors. He in effect took from both the debtors, because it is obvious that the 1st defendant executed the promissory note as guardian of the minor plaintiff. There is no intention manifest to discharge either of the debtors. The decision in *Subramanian Chetty* v. *Muthia Chetty*[1], has no bearing on the facts of the case before us.

In our opinion, the 1st defendant, even as a *de facto* guardian of the minor was entitled to alienate the minor's property to discharge an obligation binding on the minor's estate, namely, the obligation to reimburse the 2nd defendant in the sum of Rs. 1,500, which went in partial discharge of the liability which can be traced to Exhibit D-28. This aspect of the case was not evidently emphasised

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1. (1911) I.L.R. 35 Mad. 639.

before Viswanatha Sastri, J. In this view, L.P.A. No. 26 of 1951 must be allowed. The decree against the 2nd defendant in respect of the property covered by Exhibit D-1 passed in A.S. No. 602 of 1946 is set aside and the decree of the trial Court dismissing the suit as against the 2nd defendant is restored. The appellant 2nd defendant will be entitled to the costs of the appeal here and before Viswanatha Sastri, J.

R.M. ——— *L.P.A. No.* 15 *of* 1951 *dismissed and L.P.A. No.* 26 *of* 1951 *allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE MACK.

The State of Madras, represented by the District Collector of Madurai .. *Petitioner**

v.

V. Swaminathan, L.R. of the deceased plaintiff and another .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948)—Suit for a declaration that certain lands (in respect of which plaintiff really wants a ryotwari patta under the Act) are ryoti lands—Not maintainable in a Civil Court—It is a Settlement Officer that must decide the question.

It is the Settlement Officer in the first instance who should decide in accordance with the statutory requirements of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, whether a person is entitled to a ryotwari patta. The Act cannot be circumvented by filing a plaint in a civil Court for a declaration that the lands in respect of which the plaintiff really wants a ryotwari patta under the new Act are ryoti lands. Such a plaint has to be dismissed as not maintainable in a civil Court and the plaintiff referred to his remedy by way of an application under section 11 of the new Act before the Settlement Officer.

Petition under section 115 of Act V of 1908 to revise the order of the District Court of Madurai dated 21st July, 1953, in C.M.A. No. 29 of 1952, preferred against the decree of the Court of the District Munsif of Madurai Taluk dated 23rd July, 1952, in O.S. No. 87 of 1951.

Government Pleader (*C. A. Vaithiyalingam*) for Petitioner.

N. R. Govindachari, *N. T. Raghunathan* and *N. T. Ramanujam*, for Respondents.

The Court delivered the following

JUDGMENT.—This is a Revision Petition by the State of Madras against an order passed by the District Judge of Madurai setting aside the Order of the District Munsif directing a plaint to be returned for disposal by the Settlement Officer under the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948).

The short facts are these: The plaintiff filed this suit after this Act was passed for a declaration that 2 acres of land in S. No. 244 and 1 acre of land in S. No. 215 in the village of Narasingam of the Thirumuhur Devasthanam were his ryoti lands and for a permanent injunction restraining the Government of Madras from in any way interfering with his enjoyment. The plaintiff relied mainly on the fact that he filed a suit for a patta against the Collector in respect of these lands, which was dismissed in the first instance, but decreed by the District Judge of Madurai in A.S. No. 103 of 1927 on 8th December, 1927. The two suit items were admittedly in land registered as tank poromboke. The proprietor of the estate was a Devasthanam. The plaintiff relied on the fact that one manager made an assignment to him for which he paid some money and then went out of office. According to the judgment in A.S. No. 103 of 1927, the assignment was cancelled by the subsequent manager on the 7th June, 1926. The Deputy Collector dismissed the suit for patta on two grounds: (1) that the lands applied for were not ryoti lands, but tank bed lands, and (2) that the assignment was invalid because it was made by the senior proprietor alone without the consent of the remaining proprietors. As regards the first ground, the District Judge held that there was no doubt that the lands were originally tank

* C.R.P. No. 2043 of 1953. 3rd January, 1955.

bed and were still registered as tank bed in the accounts. He, however, took the view on the footing of some evidence recorded in the suit that the lands were not required for the water spread of the tank and as the karnam examined deposed to some other assignments of tank bed, he decreed the suit for patta.

It is however common ground that since that judgment in 1927 these lands have still remained registered in the revenue accounts as tank bed poromboke. The plaintiff applied under section 20-A of the Estates Land Act on 22nd April, 1926, for conversion of these two items from tank poromboke to ryoti land. This application, according to the plaint, was rejected by the Collector and an appeal was dismissed by the Board of Revenue. Paragraph 5 of the plaint alleges that the plaintiff in April, 1941, applied to the Tahsildar of Madurai Taluk for permission to use the Periyar water for these lands. Permission was refused on the ground that the lands were not classified as ryoti in the Government accounts. Plaintiff then applied on 7th April, 1944, to the Collector of Madurai for recognition of the lands as ryoti on the ground that without such recognition it was not possible for him to get a water permit for raising wet crops on his lands. According to the plaint, this petition was rejected with the observation that the plaintiff could make an application under section 20-A of the Madras Estates Land Act. He made his application, which, however, was also rejected and a revision petition to the Board of Revenue, according to the plaint, failed.

The Estates Abolition Act XXVI of 1948 casts upon all applicants, who consider themselves entitled to a ryotwari patta, to make an application to the Settlement Officer to whom the District Munsif referred the plaintiff. There does not appear to have been any attempt made by the revenue authorities to evict the plaintiff from those lands, *i.e.*, if he has ever cultivated them, a matter open to some doubt, without his being able to establish his right to take any water.

The learned Government Pleader urges that under section 3 (*c*) and (*g*) of the new Act,

> "all rights and interests created in or over the estate before the notified date by the principal or any other landholder, shall as against the Government cease and determine,"

and that every application for a ryotwari patta requires in the first place scrutiny by the Settlement Officer whose order is subject to appeal and revision as provided for by the Act. There is a specific provision in section 3 that the Government shall not dispossess any person of any land in the estate in respect of which they consider that he is *prima facie* entitled to a ryotwari patta, if such person is a ryot, pending the decision of the Settlement Officer as to whether he is actually entitled to such patta. The learned advocate for the respondent argues *contra* that this is a case in which the plaintiff's right to a patta has been decreed by a Court and that it is not open to a Settlement Officer, to go behind that decision. This is anticipating the decision of the Settlement Officer, which has to be given judiciously in accordance with the requirements of the Act. There are some difficulties arising on the facts. One of them is that section 3 (16) of the Estates Land Act excludes tank beds from the definition of 'ryoti land', although there was nothing in law to prevent disused tank bed no longer used as such being granted on patta by land-holders. As it appears to me, the main practical purpose underlying the plaint was to obtain a finding that plaintiff is entitled as of right to these lands as ryoti lands in order to enable him to obtain water. I do not propose to make any comment on the merits, as I am definitely of the opinion that the learned District Judge was not correct when he directed this plaint to be returned to the District Munsif's Court, Madurai, for disposal according to law. A point of general principle is involved and if this plaint were to be held to be within the jurisdiction of the civil Courts, it would be difficult to exclude from the orbit of their jurisdiction any application which a seeker after a ryotwari patta is obliged to make under the new Act. It is the Settlement Officer in the first instance, who should decide in accordance with the statutory requirements of the new Act whether a person is entitled to a ryotwari patta. I do not think that the Act can be circumvented by a plaint such as this, which is,

filed for a declaration that these two survey numbers, in respect of which plaintiff really wants a ryotwari patta under the new Act are ryoti lands. I do not think that the plaint as framed should be returned for presentation to the Settlement Officer. The plaint is dismissed as not maintainable in a civil Court and plaintiff referred to his remedy by way of an application under section 11 before the Settlement Officer, who will doubtless give the fullest consideration to his case a point of considerable importance being whether the plaintiff has, in fact, himself cultivated these lands since 1923 as he now claims, without any further objection from the revenue authorities.

The Revision Petition is allowed with costs throughout.

K.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

Chinnayya Koundar and others .. *Appellants**

v.

Muthukonda Reddiar .. *Respondent.*

Deed—Construction—Document termed a 'will' but containing a gift in praesenti—*Nature of document—Test.*

It is not the form that counts but the substance or what the party intended to pass under a document that should determine the real nature of the document.

Where under a document properties are placed in the possession of the beneficiaries immediately on its execution, though absolute rights to the properties could be obtained by the beneficiaries only after the lifetime of the testator the document though termed a will, is really in effect a gift deed.

In order to determine the character of a document as testamentary or not two tests should apply ; one is whether the instrument is revocable and the other is whether it was intended not to take effect until the death of the donor.

Where in a will it is stated that the properties have been reduced to the possession of the beneficiaries and they have been given absolute control of the properties though the right to full ownership would accrue only after the lifetime of the person executing the will, then notwithstanding the fact that the proprietorship or the vesting of the absolute estate is put off, that would not deter against a transfer of the interest *in praesenti* in so far as such interest is only limited to one of enjoyment.

In the goods of *Nicholas Halpin*, Ir. Rep. 8 Eq. 567.

Appeals against the Decrees of the District Court of South Arcot in Appeal Suit Nos. 341, 342, 343 and 344 of 1949, preferred against the Decrees of the Court of the District Munsif of Tindivanam in Original Suit Nos. 549, 550, 551 and 552 of 1948 respectively.

G. R. Jagadisan for Appellants.

M. S. Venkatarama Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The construction of a document which is termed a will executed by one Unnamalai Ammal on 2nd July, 1885 and marked as Exhibit A-1 in the case arises for consideration in this appeal.

Exhibit A-1 purports to deal with certain immovable properties. One of the contentions is that though it is termed a will it is in effect a settlement transferring the properties in favour of the persons mentioned in the document, the other contention being that it is a testamentary disposition as description of the document indicates.

Unnamalai Ammal, an young widow, had no issue but had only a step-daughter, that is, a daughter of her co-wife, by name Kuppammal whom she intended to marry to Murugesa Koundan. It is on the eve of that marriage the document came to be executed. After the execution of the will Kuppammal was married to Murugesa Koundan and they lived together with Unnamalai Ammal. Unnamalai Ammal lived up to a few years before the suits were filed in 1948.

* Second Appeals Nos. 619, 620, 621 and 622 of 1950. 29th July, 1954.

The relevant portion of the will Exhibit A-1 is as follows :—

> "Whereas I have no male heir, whereas I belong to the aforesaid caste, whereas I have not any other person to look after me, whereas I have agreed to give in marriage Kuppammal, the aforesaid girl, to you Murugesa Koundan and have made arrangements therefor, both of you shall, during my lifetime, take care of me, shall perform at the time of my death, all the funeral rites, and shall hold and enjoy after my lifetime the undermentioned properties, with the powers of alienation such as gift, exchange, sale, etc., yourself being liable for all the liabilities and assets."

The will is executed in favour of two persons, *viz.*, Murugesa Koundan and Kuppammal. Then the description of the properties are given and at the end of the document the following recital appears :

> "I have given possession to both of you of the aforesaid house, etc., you shall be in enjoyment of my one-fourth share in the well of brick and mortar situate in the land sold to Solai Goundan in Puthur village aforesaid."

The Document was registered on 7th August, 1885.

Soon after the execution of the will the marriage took place and thereafter it is common ground that the properties came into the possession of Murugesa Koundan and the patta was also transferred in his name. On 10th June, 1928, Murugesa Koundan executed a mortgage over some of the properties in favour of Komarappa Reddiar under Exhibit B-1. On 4th February, 1933, Unnamalai Ammal brought into existence a gift deed Exhibit A-3 giving the properties which had already been dealt with under the will Exhibit A-1 to the daughters-in-law of Murugesa Koundan. The mortgagee died and his son Muthukonda Reddiar instituted a suit on the mortgage and eventually purchased the properties in execution of the mortgage decree obtained by him. In the proceedings for delivery of possession, the donees under Exhibit A-3 resisted delivery of possession. They were directed to be removed and they filed suits out of which these appeals arise to set aside the order directing their removal and delivery of possession of the properties. The question therefore that arises is whether Murugesa Koundan had obtained any interest in these properties under Exhibit A-1 or whether Exhibit A-1 was a will liable to be revoked at any time by Unnamalai Ammal enabling her to execute the gift deed. The decision depends on the construction of the document Exhibit A-1. Notwithstanding that the document is termed a will, still if the terms of the document show that a present demise was intended Murugesa Koundan and Kuppammal would be entitled to the properties as donees and not as legatees under a will. The circumstances under which the document came to be executed will also be relevant in construing the terms of the document.

Unnamalai Ammal was an young widow. There was no body to look after her and the only nearest relation was the daughter of her husband by the second wife whom she intended to be married to Murugesa Koundan. And, being a woman she was apparently not capable of, at any rate not willing to be in possession and management of the properties and, with that view must have considered Murugesa Koundan to be the proper person to be married to her step daughter and also to take charge of the properties. Unnamalai Ammal was only anxious that she should be suitably maintained. All this is evident from the preamble of the document extracted above. She makes it clear that she has no male heir, that there is no other person to look after her and that she has agreed to give in marriage Kuppammal to Murugesa Koundan and that arrangements have been made for that purpose. For these reasons she says that during her lifetime they must maintain her. The Tamil words used are "நீங்கள் இருவரும் என்னுடைய ஜீவதசை காலம் வரையில் என்னை ரக்ஷணை செய்து கொண்டு" etc. and, at the time of her death they should perform all the funeral rites. The real words of disposition come in afterwards which are in the following terms :

> "Shall hold and enjoy after my lifetime the undermentioned properties, with the powers of alienation such as gift, exchange, sale, etc., yourself being liable for all the liabilities and assets."

If the document had stood at that there can be little doubt that her intention was, as could be ascertained from the languages of the dispositive clause, that the properties should go to the two individuals after her lifetime. But, there is the

further recital which says that possession had been given to two persons of the properties described in the will and that they shall be in enjoyment of also the well.

A will is defined in section 2 of the Indian Succession Act as follows :—

> " ' Will ' means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death."

So in order to constitute a document a will the intention of a testator must be manifest that whatever directions he gives in respect of his property should take effect after his death. In the document what is to take effect after her lifetime is that the two individuals should hold and enjoy with powers of alienation such as gift, exchange, sale, etc. The right to enjoy the properties with powers of alienation, etc., is expressly made clear to take effect only after her death.

The question then remains whether the interest in the properties was intended to pass during her lifetime. That could be found only from the other terms of the document, *viz.*, that she directed that she should be maintained, which, if read along with the statement that possession of the properties had been delivered over to them and that they should be in enjoyment, certainly indicate that they should take possession of the properties and enjoy them and maintain her, perform her ceremonies and after her lifetime take the properties absolutely. The question still remains whether the taking possession of the properties could be in their capacity as agents or managers or in their own right. There is no indication that an agency is intended since she only desires that she should be maintained and does not stipulate for any other condition attaching itself to the possession and enjoyment of the properties. And, it is not likely that she expected them to maintain her without their having any interest in the properties and wait till her death with the remote chance of getting the properties absolutely. It is further to be noted whether there are any words or anything to indicate that she reserved to herself a power of revoking the devise in their favour. Except that it is described as a will there are no words reserving to herself a power of revocation. She could not have intended to retain such a power in the face of the express recitals in the document as to what she expected from out of the properties which was nothing else but a bare maintenance. It cannot therefore be said that a power of revocation could be implied though it is not expressed by the terms of the document.

Apart from the construction of the terms of the document, the subsequent conduct in relation to the properties by Murugesa Koundan and Kuppammal will also be material in ascertaining the intention of Unnamalai in executing Exhibit A-1, whether she intended a present demise or only intended that it should take effect after her lifetime. The possession of the properties having been taken it is common ground that the properties were enjoyed as if they belonged to Murugesa Koundan and that accounts for his executing the mortgage as owner under Exhibit B-1. The transfer of the pattas is also another strong circumstance to show that the document has been given effect to, that is, the persons mentioned in the document have obtained possession in their own right and not on behalf of Unnamalai Ammal.

Mr. Jagadisa Ayyar urged that the mere transfer of possession does not affect a testamentary disposition since possession can be called back at any time as long as there is nothing in the document to suggest a present demise. But, in the present case, it is not the mere circumstance of possession being given to Murugesa Koundan after the document but possession having been directed to be taken as a prime condition of the bequest which shows that the lady intended to transfer the interest in the properties subject however to the two conditions, *viz.*, that she should be maintained and that the beneficiaries would be entitled to absolute rights only after her death.

Learned counsel referred to the observations of the Privy Council in *Thakur Ishri Singh* v. *Baldeo Singh*[1]. In that case it was held,

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1. (1884) L.R. 11 I.A. 135 : I.L.R. 10 Cal. 792 (P.C.).

"that an instrument which had been executed by a talukdar (reserving a life interest) for the purpose of effecting after his death a transfer of property to the respondent must, having regard to its substantial characteristics to its answering the definition of a will contained in section 2, Act I of 1869, and to its having been registered as a will, and setting aside mere technical expressions such as "tamlik," be regarded as a will and not as a transfer operating *inter vivos*."

The following passage from the judgment of Sir Arthur Hobhouse is relied upon :—

"Mr. Woodroffe, in his argument, relied very strongly upon the use of the word "assign" and upon the reservation of a life interest to the donor. No doubt both these circumstances tend towards the conclusion to which Mr. Woodroffe wished to lead their Lordships, but they are by no means conclusive. If they had "been the words of an English conveyancer preparing an English instrument, they would have afforded a very strong argument ; but the instrument was prepared by Lal Sundar, and we must not construe with too great nicety, or assign too much weight to, the exact words that he uses for a transfer of property, as if he were accurately weighing the difference between a testamentary instrument and one operating *inter vivos*. We must remember that wills are comparatively new in any part of India, and are of more recent introduction in Oudh in respect to this class of property. So with respect to the reservation of a life interest. The will being not a very familiar instrument to the people who prepare it or who sign it, the testator often does express a great anxiety that he shall not be considered to have parted with anything in his lifetime, and their Lordships have seen here instruments which most unquestionably were wills, and intended to operate as such, in which nevertheless there have been expressions upon the face of them intimating that the testator intends to remain the owner of his property until he dies.

Upon the whole, therefore, looking at what are the substantial characteristics of the document which have been referred to, setting aside mere matters of form and what may be considered as technical expressions, their Lordships think that the reasons for holding it to be a will have decided preponderance over those which would lead them to hold it to be a deed."

The above observations lend support to the contention that it is not the form that counts but the substance or what the party intended to pass under the document that should determine the real nature of the document. The judgment of their Lordships is of the year 1884 and the suit document is of the year 1885, and, at that time, as observed by the learned Judge, wills were comparatively new in any part of India, and the mere circumstance that the document was termed a will should not be given weight and the construction of the document should not therefore depend upon its nomenclature but upon the effect arrived at by examining its recitals.

It is urged that so long as the previous purpose for which the document is brought into existence has not taken place till after the death it should be considered as a will. But, here the purpose is to place the properties in the hands of the beneficiaries immediately on the execution of the will and not till after her lifetime though absolute rights to the properties could only be obtained after her lifetime.

An Irish case has been cited by Mr. Venkatarama Ayyar reported in In the goods of *Nicholas Halpin*[1]. In that case the document which was attested by two persons was in the following terms :—

"I, Nicholas Halpin, of Spiddal, on an agreement of marriage with my son James to Margaret Tate, that I fully and freely give them supreme command, and after my death he to be whole proprietor, and that his two brothers, whatever time they would think to leave, would receive the sum of £50, that is £25, that is my whole farm in the townland of Spiddal, that is James Halpin after my death. Dated 15th February, 1873, Nicholas Halpin. Witness present, Michael Lynch, John Tato".

The document is dated 15th February, 1873. His son was married on 19th February, 1873, to Margaret Tate. On 25th July, 1873, Nicholas Halpin died. An application was made on 19th December, 1873, for probate of the above instrument as a will and, the question that arose was whether the paper signed by the late Nicholas Halpin should be admitted to probate as will. It was held that the instrument could not be admitted to probate as a will. After referring to the definition of "will" in Jarman on his "Treatise on Wills" as being an instrument by which a person makes a disposition of his property to take effect after his decease, and which is in its own nature ambulatory and revocable during his life, the learned Judge observed as follows :—

"This definition suggests two tests to be applied to informal papers, executed according to the statute of wills, in order to determine their character as testamentary or not ; one is whether the

1. Ir. Rep. 8 Eq. 567.

instrument is revocable, the other is whether it was intended not to take effect until the death of the donor ? These tests were so applied in the case of In the goods of *Robinson*[1], where Lord Penzance says, " One of those invariable tests is whether the paper is revocable ;" and further on he adds, " it does not require the death of the alleged testator for its consummation."

Applying these tests, the learned Judge further observed,

" Firstly, it appears that the paper was the expression of an ante-nuptial contract ; and, the contemplated marriage having been solemnized, I apprehend that the paper was absolutely irrevocable ; secondly, although the gift of the farm was not to take effect immediately in full enjoyment, the postponed interest appears to me to have been vested immediately ; and the words " I give them the supreme command " are words of present operation, and seem to have been correctly understood by the parties, for James Halpin says, " After our marriage we resided with my father, and we managed (*i.e.*, took under our command) the farm for his benefit."

The terms of the suit document appear to be similar to the one which was the subject of consideration in the Irish decision. Here the statement in the will that the properties have been reduced to the possession of Murugesa Koundan and Kuppammal shows that they have been given absolute control of the properties though the right to full ownership would accrue only after the death of Unnamalai Ammal. Notwithstanding that the proprietorship or the vesting of the absolute estate is put off after the lifetime, that would not deter against a transfer of the interest *in praesenti* in so far as such interest is only limited to one of enjoyment. On a careful examination of the terms of Exhibit A-1 and reading the several parts of the document together and taking into consideration the manner in which the properties were held after the execution of the document, the reasonable conclusion that could be arrived at is that the intention of Unnamalai Ammal in executing the document was to divest herself of any interest in the properties except to the extent of being maintained out of them. There is therefore a gift *in praesenti* on the date of the execution of Exhibit A-1 and Murugesa Koundan had therefore the right and title to deal with the properties as he has done by mortgaging in 1928. The document, though it is termed a will, is therefore really in effect a gift deed.

The result is, the appeals are dismissed with costs in S.A. No. 619 of 1950 only.

R.M. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Kannagara Ismail .. *Appellant**

v.

Palayat Kappadakkal Pavu Amma and others .. *Respondents.*

Civil Procedure Code (V of 1908), sections 153 and 141—Powers of Court under—Suit instituted against dead person—Validity—Such suit if could be amended by substituting the legal representatives.

It is well settled that a plaint filed against a dead person is *non est* and no proceedings can be deemed to be pending in Court by the filing of such a plaint as there is nothing in the Civil Procedure Code which authorises the institution of a suit against a dead person. A Court has no power to amend a plaint filed against a dead person by substituting the names of the representatives of the deceased person if the suit claim would be barred at the time the application for amendment of the plaint is made. But if a fresh suit could still be filed against the representatives on the date when the amendment is sought for the Court is not deprived of its power of allowing the amendment which will result in making the suit a new one filed afresh.

Section 153 of the Code of Civil Procedure gives the Court ample powers to amend any defect or error in any proceeding in a suit.

Veerappa Chetti v. *Tindal Ponnan*, (1907) 17 M.L.J. 551 : I.L.R. 31 Mad. 86; *Rasa Goundan* v. *Pichamuthu Pillai*, (1916) 42 I.C. 539; *Arunachala Chettiar*, In re, (1915) 2 L.W. 828; *Calicut Municipal Council* v. *Kunhipathamma*, (1932) 37 L.W. 489 and *Chidambaram Chettiar* v. *Narayanaswami Aiyar*, (1938) M.W.N. 240, referred and distinguished.

Gopalakrishnayya v. *Lakshmana Rao*, (1924) 49 M.L.J. 590 : I.L.R. 49 Mad. 18 (F.B.), followed.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Kozhikode in A.S. No. 61 of 1948, preferred against the decree of the Court of the District Munsif, Kozhikode, in O.S. No. 1170 of 1945.

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* Second Appeal No. 133 of 1951. 15th February, 1955.

1. (1867) L.R. 1 P & D. 384, 387.

B. Pocker for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The 11th defendant in O.S. No. 1170 of 1945 on the file of the District Munsif's Court, Kozhikode, out of which this second appeal arises is the appellant. The suit was for setting aside the decree in O.S. No. 1150 of 1944 on the ground that the Court had no jurisdiction to pass the same and hence the delivery that followed it is void and inoperative. Both the lower Courts have decreed the suit. The short facts are these :—

The first defendant Mana had leased out the plaint property on 22nd May, 1920, to one Ukkappan Nair, who was the karnavan of the plaintiffs and defendants 2 to 6 on behalf of their tarwad and to Cheria Chandu the father of the defendants 7 to 10 the two named individuals being joint lessees. As rent was in arrears O.S. No. 1150 of 1944 was brought for recovery of possession with arrears of rent from 1936-37 to 1943-44. To that suit the two defendants were the lessees Ukkappan Nair and Cheria Chandu but after summons was taken out it was discovered that both the defendants were dead. Therefore by I.A. 4233 of 1944 the legal representatives of the two defendants were brought on record as defendants 2 to 6 and 7 to 10 respectively, who contested the suit on the ground that part of rent had been paid, that what was paid towards the revenue had been credited towards the rent due, that the price of paddy claimed was excessive and that the plaintiff was not entitled to evict them. Despite these contentions the suit was decreed and in execution of the decree the first defendant herein recovered possession of the property and thereafter demised it to the 11th defendant who was put in possession.

The allegations in the present suit are, that the decree in O.S. No. 1150 of 1944 was void and did not affect the suit property on the ground that both the lessees who were impleaded in that suit were dead at the time the suit was filed and despite the knowledge of that fact a false affidavit has been filed in support of the application for bringing on record the legal representatives of the two deceased and it was only on the strength of the averments contained therein that the present defendants 2 to 6 and 7 to 10 were added as the legal representatives of the original defendants. It was therefore alleged that the Court had no jurisdiction to bring on record the legal representatives of persons who had died before the institution of the suit for the reason that a plaint filed against a dead person cannot be considered to be in existence at all and the whole proceedings were *ab initio* illegal and void. The plaintiffs also contended that the defendants 2 to 10 were guilty of fraud and negligence in the conduct of the suit in not raising proper pleas which if raised would have non-suited the plaintiff in O.S. No. 1150 of 1944. The present plaintiffs being the other members of the tarwad of defendants 2 to 6 and as Ukkappan Nair was a lessee on behalf of the tarwad are not bound by the decree in O.S. No. 1150 of 1944. As stated already the lower Courts have found that the entire proceedings in O.S. No. 1150 of 1944 were void from the very inception and have decreed the suit and hence the present second appeal.

That Ukkappan Nair and Cheria Chandu were not alive when the plaint in O.S. No. 1150 of 1944 was filed in Court admits of no doubt and there is no dispute whatever that in ignorance of that fact and on the assumption that they were alive on the date of the suit the District Munsif by I.A. No. 4233 of 1944 ordered their legal representatives to be brought on record. What has now to be considered is how far that procedure is justified in law. There is also no contention that if a suit for recovery of property with arrears of rent were to be filed on the date when the application to bring on record the legal representatives was filed the proper persons against whom such a suit ought to be filed are the proposed legal representatives and that the relief claimed against such persons would not be barred. In these circumstances the point for consideration is whether it can be

held that the entire proceedings in O.S. No. 1150 of 1944 which was hotly contested by the present defendants 7 to 10 should be deemed to be void *ab initio*.

The proposition of law is well settled that a plaint filed against a dead person is *non est* and that there are no proceedings that can be deemed to be pending in Court by the filing of such a plaint as there is nothing in the Civil Procedure Code which authorises the institution of such a suit against a deceased person. There is no jurisdiction in the Court to allow the plaint in such a case to be amended, by substituting the names of the representatives of the deceased person even when the suit was instituted *bona fide* and in ignorance of the death of the defendant. *Vide* the decision in *Veerappa Chetti* v. *Tindal Ponnan*[1]. It is on this principle that both the lower Courts have held that the entire proceedings in O.S. No. 1150 of 1944 were void and inoperative. It has to be mentioned that section 153 of the Civil Procedure Code was not in existence at the time of the decision in *Veerappa Chetti* v. *Tindal Ponnan*[1]. Supposing the plaintiff in O.S. No. 1150 of 1944 when apprised of the fact of the death of the persons impleaded as defendants in the plaint before the filing of the suit, took return of the plaint and by using the same stamps scored out the names of the existing defendants and in their place had the proper persons impleaded and presented the plaint as a fresh one, can it be said that such plaint cannot be treated as instituted on the day on which the fresh presentation was made. In my opinion there is nothing wrong in that procedure. All the cases in which it has been held that the Court has no power to amend the plaint filed against a deceased person by substituting the names of the representatives of the deceased person arose out of the applications for amendment of the plaint made at a time when the suit if instituted would have become barred. The result of the amending would put back the suit to the date of the original presentation of the plaint and thereby save the period of limitation. No case has been cited before me at the bar in which it has been held that even if a fresh suit filed on the date when the amendment was made is not barred, still the Court is deprived of the power of amending which results in making the suit a new one filed afresh. I shall now examine the cases on the point.

The facts of the case in *Veerappa Chetti* v. *Tindal Ponnan*[1], are as follows :— A suit was filed on 5th September, 1905, on two promissory notes dated 25th September, 1902 and 16th October, 1902, respectively. On the date of the plaint the executant of the promissory notes was dead but in ignorance of that fact he was impleaded as defendant. On the 19th of April, 1906, a petition was put in to the effect that the defendant was dead and asking for his legal representatives to be brought on record and the plaint was amended accordingly on 27th April, 1906. The point for consideration was whether such an amendment made on a petition was justified or not. The result of the amendment was as if the suit had been filed properly on the 5th of September, 1905. The learned Judges following the decision in *Mohun Chundar Koondoo* v. *Azeem Gazee Chowkeedar*[2], that the Court had no jurisdiction to amend the plaint by adding legal representatives on the principle laid down in *Swindell* v. *Bulkeley*[3], that the issue of a writ against a dead person could be nothing but a nullity, held that the presentation of the plaint corresponding to the issue of writ should stand on the same footing. There is no consideration of the correctness or otherwise of the proposition regarding the validity of the amendment if the amended plaint were to be considered as having been filed on the date when the amendment was sought for and when the suit against the persons newly impleaded would not be barred. This point of view might receive some support from the decision in *Mallikarjuna* v. *Pullayya*[4], where the amendment was sought for in appeal against the decree in a suit in which at the time the plaint was filed the defendant had died and the learned Judges held that by allowing the amendment the plea of limitation would have been denied to the persons sought to be impleaded under the amendment In *Rasa Goundan* v. *Picha*

1. (1907) 17 M.L.J. 551 : I.L.R. 31 Mad. 86.
2. (1869) 12 W.R. 45.
3. (1886) L.R. 18 Q.B.D. 250.
4. (1892) I.L.R. 16 Mad. 319.

muthu Pillai[1], Srinivasa Ayyangar, J., followed *Veerappa Chetti* v. *Tindal Ponnan*,[2] and held that the suit filed against a dead person is no suit at all and no question of amendment of the plaint arose in such a case and that there was no power of amendment vested in the Court. There is nothing to show that in this case, at the time the amendment was sought for the suit if instituted as a fresh one would be barred by limitation. *Veerappa Chetti* v. *Tindal Ponnan*[2] was again followed in *Arunachala Chettiar*, In re[3]. The distinction which is now sought to be made was not considered there, for at the time the amendment was sought for the suit might have been barred by limitation. The facts were slightly different in *Calicut Municipal Council* v. *Kunhipathumma*[4]. There, a suit was filed on the 10th of March, 1928, for recovery of property tax for the year ending 31st March, 1925, but the defendant had died on the 2nd of March, 1928. On the 21st of April, 1928, that is, more than three years after the due date, an application was made under Order 1, rule 10, Civil Procedure Code, to have the legal representatives of the deceased person impleaded and recourse was sought under section 14 of the Limitation Act. It was held that section 14 of the Limitation Act had no application as in the first instance there was no suit pending at all. It has to be remembered that the plea put forward by the alleged legal representatives against their impleading was that the suit was barred by limitation against them under section 22 of the Limitation Act. Even here the facts of the case show that at the time the application to implead the legal representatives was made a suit if instituted on that date would have become barred. The decision in *Chithambaram Chettiar* v. *Narayanaswami Aiyar*[5] also lays down the same principle. Even there at the time the application for amendment was made the suit if instituted would have been barred by limitation. Following *Veerappa Chetti* v. *Tindal Ponnan*[2] Ananthakrishna Iyer, J., held that where at the time of the institution of the suit, the sole defendant is dead, an application to amend the plaint by bringing the legal representatives of the deceased defendant on record is not maintainable. What would have been the decision if on the date when the amendment was sought for, a suit against the legal representatives had not become barred, it is impossible to say. The learned Judge referred to the full bench decision in *Gopala Krishnayya* v. *Lakshmana Rao*[6] and distinguished it on the ground that it related to a case of an appeal being preferred against the respondent who was dead. It is clear from a review of the cases already made that in not one of them was the suit in time if it could have been filed on that date when the application for amendment was made. The principle enunciated in *Veerappa Chetti* v. *Tindal Ponnan*[2] was as already stated, before the enactment of section 153 of the Civil Procedure Code which gives ample powers to amend any defect or error in any proceeding in a suit and all amendments shall be made for the purpose of determining the real question or issue raised by or depending upon such proceeding. That the power conferred under section 153, Civil Procedure Code, is applicable to appeals is clear from the provisions of section 141, Civil Procedure Code.

The full bench decision in *Gopala Krishnayya* v. *Lakshmana Rao*[6], runs somewhat counter to the cases already referred to. The full bench held that if an appeal is presented against a person who is dead at the date of presentation, the Court may under section 153, Civil Procedure Code, permit the cause-title to be amended or may return the appeal memorandum for amendment and re-presentation. If the appeal memorandum is not allowed to be amended, the party may apply for refund of the spoilt stamp and may present a fresh appeal. But if the appeal is out of time against the legal representatives, the Court has always power to excuse the delay in presentation before it can proceed to hear the appeal but it is a matter for its discretion whether it would excuse the delay. The learned Judges follow the earlier decision in C.M.P. No. 2807 of 1923 where it was held that after all the question resolves itself into one of court-fees only. In my opinion the principles laid down in the full bench case apply to the facts of the present case. Section

1. (1916) 42 I.C. 539.
2. (1907) 17 M.L.J. 551 : I.L.R. 31 Mad. 86.
3. (1915) 2 L.W. 828.
4. (1932) 37 L.W. 489.
5. 1928 M.W.N. 240.
6. (1924) 49 M.L.J. 590 : I.L.R. 49 Mad. 18 (F.B.).

153, Civil Procedure Code, in so many words speaks of an amendment by a Court of first instance and this can be extended so far as the appellate Court is concerned, by the operation of section 141, Civil Procedure Code. That being the case there is nothing that prevents the trial Court from considering the plaint as if it was filed against the new parties on the date the application for amendment was made. In the present case it seems clear that on the date of the amendment no portion of the suit was barred by limitation even if any suit was barred the defendant not having raised the question of limitation the decision is binding on them. The present plaintiffs have withdrawn all pleas relating to fraud and collusion and they have rested their case solely on the circumstance of *ab initio* void nature of O.S. No. 1150 of 1944. No authority has been placed before me to the effect that it is not possible to consider the plaint as freshly instituted against the new defendants on the date when the amendment was sought for. The principles laid down in *Gopala Krishnayya* v. *Lakshmana Rao*[1] cannot be restricted to the case of appeals alone. If the appeal memorandum filed against a dead person can be returned and the same stamp used for presenting the appeal afresh against his legal representatives there cannot be any difference in principle in the matter of re-presenting a plaint in a suit after adding the legal reprsentatives of a dead person.

If the plaintiff in O.S. No. 1150 of 1944 had taken back the plaint and after scoring out the names of the deceased individuals, inserted the names of the present defendants 2 to 10 and re-presented the plaint making the necessary corrections and alterations and if such a suit was not barred against the defendants on the date it was re-presented then nothing could be said against the correctness or propriety of such a procedure. I do not think there is any reason why the plaint should not be deemed to have been newly presented. If that is so, after a contest there has been a decree by a competent Court against defendants 2 to 10 which would bind the plaintiffs herein, in the absence of any fraud or collusion on the part of defendants 2 to 10. In this view it seems to me that the decree in O.S. No. 1150 of 1944 cannot be declared *ab initio* void. The second appeal is, therefore, allowed and the suit is dismissed but as the question in the form in which it has been presented before this Court by Mr. Pocker was not raised in the Courts below each party will bear his or their costs throughout.

No leave.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Appa Rao .. *Appellant**

v.

Salem Motors and Salem Radios and Electricals .. *Respondents.*

Contract—Pledge—Nature of and what constitutes—Re-delivery of the pledge by pledgee to pledgor for a limited purpose—Effect of mistake on the part of a bailee as to the identity of the subject of the bailment.

A pledge is a species of bailment and is constituted by the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. In order that there might be a valid pledge there must be (1) a contract in relation to an identified chattel whereby this object is to be delivered to the pledgee as security and (2) actual delivery of possession of the identified chattel in pursuance of the contract. If the delivery is not in fulfilment of the previous contract which alone effected the pledge, the mere delivery of a chattel unaccompanied by any contract does not constitute a pledge and would not suffice to create a security over the chattel. A re-delivery of the pledge to the pledgor by the pledgee for a limited and defined purpose does not constitute a renunciation of the security sufficient to take out of the latter the pledgee's qualified property in the chattel ; for there can be no doubt that the pledgee might hand back to the pledgor as his agent for the purpose of sale the goods he had pledged without in the slightest degree diminishing the full force and effect of his security.

North-western Bank v. *Poynter*, L.R. (1895) A.C. 56, referred.

*Original Side Appeal No. 20 of 1951. 11th November, 1954.

1. (1924) 49 M.L.J. 590 : I.L.R. 49 Mad. 18 (F.B.).

Delivery and receipt are acts with which mental intention enters and there is in law no delivery and receipt unless the giver and receiver intend to give and to receive respectively what is respectively given and received. There is no real delivery for want of concurrent intention of the giver to hand over and of the receiver to accept the same thing. The principle is the same whether it is a mistake on the part of the bailor on the identity of the thing which is the subject of the bailment or in the converse case of a mistake on the part of the bailee when so far as the bailor is concerned there is no mistake.

Queen v. *Middleton,* (1873) L.R. 2 C. C. 38 ; *R.* v. *Ashwell,* (1885) L.R. 16 Q.B.D. 190, referred and followed.

Where there is no mistake on the part of the bailor but the bailee purports to receive delivery of something which he never intended to receive and did not know he was receiving there can in such cases be no real delivery of possession at all.

R. v. *Riley,* 22 L.J. M.C. 48 and *Ruse* v. *Read,* (1949) 1 All E.R. 398, distinguished.

On appeal from the judgment and decree of the Hon'ble Mr. Justice Mack, dated 20th July, 1950 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 387 of 1947.

R. Gopalaswami Aiyangar and *V. Srinivasan* for Appellant.

K. Subrahmanyam and *Messrs. Soundararajan* and *Sivaswami* for Respondents.

Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This is an appeal against the judgment of Mack, J., directing the appellant who was the 3rd defendant in the suit C.S. No. 387 of 1947 to pay to the plaintiffs a sum of Rs. 7,150 with interest as damages for the conversion of a motor van belonging to the plaintiffs.

The plaintiffs are a firm of motor dealers carrying on business in Salem. They filed the suit C.S. No. 387 of 1947 out of which this appeal arises, against two defendants for reliefs under several heads. There has been a decree by consent against the 1st defendant in respect of certain claims made against him for refund of advance, etc. and we are no longer concerned with those claims. The 2nd defendant has by consent been discharged from the case and the appeal is concerned merely with the rights as between the plaintiffs and the 3rd defendant against whom a decree has been passed.

The 1st defendant Alavandar Naidu was carrying on business in Madras under the name and style of " The National Motors, Madras" and "The East India Corporation " who were the distributors for certain motor vehicles including Bradford vans, an English product. The plaintiffs indented for sale through the 1st defendant a Bradford van. The makers of these vans were Messrs. Jowett Cars, Ltd., Bedford, England. This along with other cars ordered by the 1st defendant was received in India in or about December, 1946. The van which bore engine No. D-7 C.A. 3654 was sold to the plaintiffs on 18th February, 1947, for a sum of Rs. 7,125 and the vehicle was delivered over. On that date there were regulations in existence controlling the sale and acquisition of motor vehicles including motor vans and before a purchase could be effected an allotment had to be made by the Provincial Transport Controller. This authority allotted the plaintiff's van to one V. K. Kalliappa carrying on a beedi factory at Jalarpet, North Arcot District. Intimation in regard to this was given by the 1st defendant to Kalliappa on 20th March, 1947. But for reasons unnecessary to be discussed Kalliappa did not avail himself of this allotment. The result therefore was that though the plaintiffs had paid the full purchase price of the vehicle to the 1st defendant, the vehicle was left within their hands and they were unable to effect a sale immediately. Under the rules in force if an allottee did not purchase the vehicle, the owner could sell it without a permit to any prospective purchaser. But the plaintiffs found it difficult to find a purchaser for this van. Accordingly they wrote to the 1st defendant on 16th April, 1947 :

" We regret very much for not having the van sold though the Controller has issued the permit. At present we find no offer for the van and we suggest you to find the party who is in need of the van and we will arrange to deliver the van.

All the customers who are in need of the van ordered for a van with the other companies and on freeze of the time issued by the Controller there is no offer for the same to which you have to arrange to dispose of the same. We would also like to bring to your kind attention that it is passed nearly three months since we have taken the van to our place and we are unfortunate enough to have the van disposed though we were in receipt of the permit.

As we will be much pleased to hear from you to return the van which should be disposed at your earliest convenience."

The plaintiffs reminded the 1st defendant again by a letter dated 13th May, 1947, requesting him to make arrangements for the disposal of the vehicle. As no reply was received, a further letter, dated 29th May, 1947, was written reminding him of the necessity for an early sale and suggesting that he would prefer the first defendant taking back the van at cost price and arranging to pay this amount, without waiting for a sale to a third party. The 1st defendant however was not willing to take back the van and refund the purchase price. He therefore replied on 31st May, 1947, disclaiming all responsibility for the vehicle being on the plaintiffs' hand without a sale thereof being effected and blaming the plaintiffs for not sending the vehicle on to his show room for attracting prospective buyers. Subsequently, on 5th June, 1947, the plaintiffs brought this van to Madras and left it with the 1st defendant taking a receipt in these terms:

" This is to inform you that we have this day received a Bradford van bearing engine No. D.7/C.A 3654 sent by you."

It will be convenient to complete the narrative of the manner in which this vehicle was dealt with before adverting to the case of the plaintiffs as regards the terms on which this vehicle was left with the 1st defendant and the legal consequences arising out of that version if accepted.

On 7th June, 1947, this van belonging to the plaintiffs was sent by the 1st defendant to the 3rd defendant in these following circumstances. As early as the 19th March, 1947, the 1st defendant had borrowed from the 3rd defendant a sum of Rs. 50,000 on a pledge of six Bradford chassis and three Bradford vans. In the letter of pledge executed by the 1st defendant on that date the engine numbers of the six chassis were detailed and similarly the numbers of two of the vans but not the third but as the suit van was not with the 1st defendant at the time, the van without the number could not obviously be the plaintiffs'. Out of these the 1st defendant retained one van and one chassis with himself for demonstration purposes stipulating expressly in a letter of even date that the property in the van and chassis continued with the lender and that he was having merely the custody of the vehicles for the specific purpose of display. On the maturity of this loan, only a small portion was repaid a considerable amount of the debt still remaining undischarged. There was a fresh pledge on 5th May, 1947, in favour of the third defendant for a sum of Rs. 41,000 being the amount outstanding on the original loan of March, 1947, with interest. As security for the due discharge of this indebtedness, the 1st defendant pledged with the 3rd defendant four chassis and three Bradford vans, no engine numbers being specified to enable the chattels to be identified. Just as on the previous occasion, the 1st defendant retained one chassis and one van with himself for demonstration purposes executing a letter disclaiming all proprietary interests in the vehicles left with him. Hundies were executed for the outstanding loan and these fell due on 4th June, 1947. As the 1st defendant did not honour the hundies on the due date the 3rd defendant insisted by letter, dated 4th June, 1947, that the chassis and the van left with him for demonstration purposes should be returned to him within 24 hours. The 1st defendant however was not in a position to return the van which had been left with him by the 3rd defendant. As stated earlier it is clear from the evidence that the suit van bearing engine No. 3654 could not have been pledged with the 3rd defendant in March, 1947 since the vehicle had been delivered to the plaintiffs as early as 18th February, 1947 and had been removed by them to Salem immediately. On 19th March, 1947, however the 1st defendant had in his possession a van bearing engine No. 3651 and this must obviously have been the van which was pledged with the 3rd defendant and retained with the 1st defendant for demonstration purposes in his show

room. This van however the 1st defendant sold to one V. K. S. Mani on 17th April, 1947 and the transfer was registered by the Motor Vehicle Authorities on 5th May, 1947, so that after this date he never had in his possession any Bradford van. The sale of this van was effected without the knowledge and consent of the 3rd defendant. The result of this sale was that when the pledge was effected in favour of the 3rd defendant on 5th May, 1947, though it was mentioned in the document of pledge that four chassis and three vans had been delivered to the pledgee as security for the repayment of Rs. 41,000 and that one van and one chassis had been retained with himself for demonstration purposes the pledgor could not have had in his hands a third van in respect of which he could effect a pledge. The 3rd defendant was obviously not aware of the fraud of the 1st defendant and proceeded under the impression that there was still a third van in the possession of the 1st defendant which he was in a position to deliver when called upon.

The amount due to the pledgee became payable in the first week of June, 1947. As the hundie was not met on the due date the 3rd defendant wrote a letter to the 1st defendant on 4th June, 1947, in these terms :—

" Reference—One Bradford chassis and one delivery van taken for demonstration purposes and return. You have taken the above two vehicles from us for demonstration purposes and return. This is to call upon you to return to us at our godown, Appa Rao Gardens, No. 84, Sydenhams Garden, Vepery, Madras, within 24 hours from the receipr of this letter failing which necessary steps will be taken to recover the same ".

Just at this moment as luck would have it, the plaintiffs brought their van from Salem and left it with the 1st defendant as mentioned earlier. The 1st defendant found the presence of this vehicle very handy and proceeded immediately to utilise it for the purpose of effecting the "redelivery ". On 6th June, 1947, the 1st defendant wrote to the 3rd defendant a letter in which after referring to the purpose for which the vehicles were left with him he stated

" Since you are asking us to return the same, we have no objection to do so and we wish to inform that we have one or two prospective buyers coming up for demonstration to-day. and tomorrow. Hence we shall be pleased to send the van tomorrow after 2 P.M."

In accordance with the terms of this letter the plaintiffs vehicle was sent on 7th June, 1947, in lieu of the vehicle supposed to have been left by 3rd defendant and it was taken possession of by him. The debt due to the 3rd defendant not having been discharged, the former had the vehicles in his possession including the Bradford van belonging to the plaintiffs sold through Messrs. Chari & Co., Auctioneers, Madras, on 27th July, 1947. These vehicles were purchased at this auction by one Khemchand Nanalal who has been impleaded as the 2nd defendant in this suit.

The 1st defendant however contested the validity of the sale by auction as not *bona fide* or proper and filed a suit C.S. No. 309 of 1947 in this Court against, among others the 2nd and 3rd defendants and the auctioneers for a declaration that the sale of the vans, etc., was invalid and for a decree for the redemption of the properties pledged as security. The fact that the Bradford van sold or purported to be sold by or on account of the pledgee belonged to the plaintiffs was not mentioned in the plaint ; nor were the plaintiffs made a party to that suit. While this suit was pending, the plaintiffs finding their vehicle missing brought the present action. Originally the defendants were only two the 3rd defendant not being impleaded in the suit as originally framed. The case put forward in the plaint was that the plaintiffs had left the suit van with the 1st defendant only for demonstration purposes, that the 1st defendant had no authority to effect any sale or pledge of the vehicle and that consequently its pledge by the 1st defendant in favour of the 3rd defendant was invalid and that the 2nd defendant who had purchased the van in auction could not obtain a valid title thereto and was bound jointly and severally with the 1st defendant to return the vehicle or its value. The plaint was filed on 11th September, 1947. Along with the plaint, the plaintiffs also filed an application for the appointment of a Commisssioner to inspect and report whether the Bradford delivery van which was lying in the premises of the 3rd defendant did or not bear the engine No. 3654 so that the identification of this with the plaintiff's

vehicle might be established. They also prayed for an injunction restraining the 2nd defendant from dealing with or in anyway disposing of the delivery van bearing engine No. 3654 belonging to the plaintiffs. This application for a Commissioner and for an injunction was ordered in the terms prayed for and the Commissioner Mr. Narasinga Rao an advocate of this Court submitted a report stating that the delivery van bearing the engine number of the plaintiffs' van was in a shed in the 3rd defendant's compound.

The plaintiffs in order to prove that the van which was the subject of the original pledge was not the van belonging to themselves took out a subpoena to the 3rd defendant for producing the records and accounts relating to the pledge. In the letter addressed by the plaintiffs' advocate to the 3rd defendant dated 14th November, 1947, it was stated :

"** I have to inform you that the van taken from you for demonstration by B. G. A. Naidu was sold on 5th May, 1947, to K. V. S. Mani, son of V. K. Kaliappa Beedi Factory, No. 72, Thayar Sahib Street, Madras and registered at the office of the Deputy Commissioner of Police, Traffic and Licence, Madras, on the same day as M.S.P. No. 2699. Now that records establish that your security was sold off as aforesaid and that the van substituted therefor is my client's van obtained from them for the specific purpose of display on 5th June, 1947, while you were pressing the debtor for the redelivery of your van on his failure to meet his dues to you on 4th June, 1947, you cannot delay any longer instituting proceedings for the recovery of your van by instituting a prosecution against your debtor or by proceedings against him and his purchaser. I hope you will not thereafter delay such proceedings."

In reply to this, counsel on behalf of the 3rd defendant wrote on 19th November, 1947, as follows :—

"My client states that whatever records are available will be produced by his clerk on the date of the hearing, namely, the 20th November, 1947, which you state is the adjourned date. My client states that he had already set out the defence to your client's action in the written statement filed by him in the suit and for the reasons stated in the said written statement my client does not feel called upon to institute any of the proceedings suggested in your letter under reply."

It might be noticed that the 3rd defendant had not been yet impleaded and the written statement referred to was that of the 2nd defendant.

The next event that happened to which it is necessary to refer was the compromise of the suit C.S. No. 309 of 1947. This was effected on 4th December, 1947 and a consent decree was passed. Under the compromise the original sale by auction was annulled, the security was revived and the amount due to the pledgee was determined as Rs. 40,700. It was also agreed that if the amount due to the 3rd defendant was not paid before a named date the original sale should stand confirmed. There was failure on the part of the pledgor to avail himself of the right of redemption afforded to him by this consent decree with the result that the equity of redemption was extinguished and the title of the pledgee stood confirmed. The expression ' the title of the pledgee ' has been used designedly because it was one of the terms of the compromise between 2nd and 3rd defendants that the former should be repaid the amount for which he had originally purchased at the auction in July, 1947, by the pledgee and that the pledgee should thereafter become the full owner of the property in the event of the 1st defendant not paying up the amount due and redeeming the pledge. The application for the temporary injunction in this suit came on for final orders on 5th February, 1948. The arrangements embodied in the compromise in C.S. No. 309 of 1947 were not however brought to the notice of the Court and the injunction against the 2nd defendant was dissolved, he agreeing to keep the sale proceeds with himself pending the result of the suit.

Upto this stage the plaintiffs were not aware that the 3rd defendant had stepped into the shoes of the 2nd defendant by reason of the settlement effected in December they not being parties to C.S. No. 309 of 1947. The plaintiffs came to know of this only on receiving a letter from the 1st defendant's advocate on 31st March, 1948, that under the compromise the 2nd defendant had ceased to have any interest in the van and the only person in possession of and responsible for it was the 3rd defendant. The letter suggested the impleading of the 3rd defendant as a party to this suit. On being apprised of this situation the plaintiffs took the necessary steps for impleading the 3rd defendant and the plaint was amended so as to claim as against the 3rd defendant the relief originally prayed for against the second.

The 3rd defendant filed a written statement in which the position taken up was that he stood in the same situation as the 2nd defendant, the other defences being identical with those originally put forward by his predecessor-in-title. The 2nd defendant having ceased to have any interest in the vehicle he dropped out of the scene and the plaintiffs were content practically to withdraw the suit as against him. As the 1st defendant consented to a decree being passed against him in respect of this van, the only contest in the case was as regards the claim of the plaintiffs against the 3rd defendant.

The ground upon which the learned Judge upheld the plaintiffs' claim was that the 3rd defendant purchased the suit van from the 2nd defendant under the compromise decree in C.S. No. 309 of 1947 in spite of an order of injunction passed in the present action. He held that the 3rd defendant could not be treated as a *bona fide* purchaser for value because he had knowledge of the injunction notwithstanding he was not a party to the suit and concluded by saying that the 3rd defendant

> " cannot be permitted to base title in the van on the material he has placed before the Court as having been lawfully acquired in good faith from Khemchand who was an innocent purchaser for value in an open auction."

The learned Judge did not give any finding regarding the case of the plaintiffs that when they left the vehicle with the 1st defendant on 5th June, 1947, it was not for the purpose of sale but merely for the purpose of demonstration so that the 1st defendant would not have any authority under the law to effect a pledge or sale of this vehicle so as to be binding upon the real owner. On the reasoning above set out, the learned judge gave the plaintiffs a decree against the 3rd defendant as prayed for. It is from this decree that the 3rd defendant has filed the present appeal.

There was not any serious controversy about the facts as we have narrated above and the main steps on which the appellants' learned counsel rested his case were these :—

(1) There was an effective pledge of a Bradford van in March, 1947, when the 3rd defendant advanced a sum of Rs. 50,000 on the pledge of the vehicles and the pledge continued notwithstanding that two of the vehicles were left in the possession of the pledgor for a special purpose. (2) There was again a valid pledge of the vehicles on the 5th May, 1947, including three delivery vans, though it might be that one of the vans was ultimately sold and delivered to V. K. S. Mani. The pledge right over the van continued, though it was left with the 1st defendant for display. (3) The 1st defendant was a mercantile agent and when the plaintiffs left the suit vehicle with him for the purpose of sale in June, 1947, he had authority in law to pledge or sell the vehicle so as to pass a valid title, the appellant's case in this regard being that the story put forward in the plaint that the vehicle was left on 5th June, 1947, for demonstration purposes is false. A valid pledge was therefore effected in respect of the suit vehicle when this van was sent up to the 3rd defendant on 7th June, 1947. (4) In the present plaint there is no attack upon the sale by Messrs. Chari & Co., on 27th July, 1947 and therefore a valid title in the van passed to the 2nd defendant by his purchase at this auction. By reason of the compromise decree in C.S. No. 309 of 1947, the 3rd defendant has stepped into the shoes of the 2nd defendant and the learned Judge is wrong in considering that the 3rd defendant's title or bona fides are affected by reason of the injunction in the present action. On the pleadings in this suit, read in the light of the affidavits and orders in interlocutory proceedings therein, it is clear that no challenge was made regarding the *bona fides* of the 3rd defendant and he stands or falls by the title, which the 2nd defendant obtained at the sale in the auction at the instance of the pledgee. As the 2nd defendant has obtained a valid and unimpeachable title as against the true owner and therefore he is not guilty of any conversion the 3rd defendant standing in his shoes cannot be made liable as the learned Judge has done by the decree against him. . . .

This in short is the argument of the learned counsel for the appellant. Before dealing with the legal points that arise for consideration we might mention at the outset that we see considerable force in the arguments of the learned counsel in so far as it is directed to the reasoning of the learned Judge in deciding the suit. But that cannot by itself be sufficient to dispose of the appeal.

It is therefore necessary to analyse the legal position in order to examine the effect of the several transactions on the rights of the parties. There can be no doubt that the transaction of 19th March, 1947, did constitute a valid pledge in favour of the 2nd defendant of six Bradford chassis and the three Bradford vans which were listed in the document of pledge though the engine number of one van was not set out. Pledge is a species of bailment and bailment is constituted by the delivery of goods by one person to another for some purpose, upon a contract that they shall when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them (*vide* sections 148 and 172 of the Indian Contract Act.) There was here a delivery of nine vehicles. Of course the plaintiffs' vehicle was not among those which could have been delivered to the 3rd defendant at this time because it had been removed to Salem almost a month previously and still continued to be there. The van therefore of which no engine number was given in this document of pledge must obviously have been the van bearing engine No. 3651 which was ultimately sold to V. K. S. Mani and registered in his name on 5th May, 1947. Therefore on 19th March, 1947, there was a valid pledge *inter alia* of the van bearing engine No. 3651 and this must have been left with the pledgor for demonstration, under a letter specifically setting out this purpose. The pledgee did not lose his security over the van No. 3651 by reason of parting with the possession of the vehicle pledged for

> "a re-delivery of the pledge to the pledgor by the pledge for a limited and defined purpose does not constitute a renunciation of the security sufficient to take out of the latter the pledgee's qualified property in the chattal for there can be no doubt that the pledgee might hand back to the pledgor, as his agent for the purpose of sale the goods he had pledged without in the slightest degree diminishing the full force and effect of his security." See *Northwestern Bank, Ltd.* v. *Poynter*[1].

The next event that had happened was the sale of the van No. 3651 left for demonstration purposes by the 1st defendant to V. K. S. Mani on 17th April, 1947, though registration in favour of the purchaser was effected only on 5th May, 1947, (Exhibit P-7). It is clear that as the 1st defendant had possession of the vehicle only for the purpose of demonstration under the specific instructions of the 3rd defendant the sale to V. K. S. Mani without the knowledge and consent of the pledgee was a tortious act which did not have any effect upon the security in favour of the pledgee, so that the position was that notwithstanding this sale the 3rd defendant continued to have a pledge over this vehicle also along with those in his possession.

The next stage of the case is the pledge effected by the 1st defendant on 5th May, 1947. At this time also, the pledge note recited in its schedule four Bradford chassis and three Bradford vans as being the subject of the pledge and by letter of even date the pledgor represented that he was retaining one van and one chassis for demonstration purposes, the same to be delivered whenever the pledgee required them. It is not clear whether at this date the pledgor was in possession of the van sold and delivered to V. K. S. Mani. If he had not the statement in the document of pledge regarding the delivery of the three vans must obviously be a mistake or a mis-representation and similarly the statement in the other letter that the 1st defendant had retained one van for demonstration purposes could not also be true. In any event, the suit van was certainly not with him at this stage for the purpose of being delivered over to the 3rd defendant as part of the security. At the same time, it has to be remembered that the security which the 3rd defendant had over the van which was the subject matter of sale and delivery to V. K. S.

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1. L.R. (1895) A.C. 56 at 68.

Mani bearing engine No. 3651 was not extinguished but continued in full force notwithstanding the sale.

Then we have the delivery of the plaintiffs' vehicle to the 1st defendant on 5th June, 1947. In connection with this there is an allegation which has been put forward by the plaintiffs as to the circumstances in and the purpose for which this delivery was made on which was founded the case as to detinue and trover as against the 2nd defendant. The allegation is that the plaintiffs brought the vehicle to Madras and entrusted it to the 1st defendant merely for the purpose of displaying in the latter's show-room the understanding being that the 1st defendant was not to have any authority to effect the sale but had merely to communicate to the plaintiffs any offers received from prospective buyers so that they might make up their mind whether to effect a sale or not. If this were made out, there can be no doubt that the pledge to the 3rd defendant and the auction sale by the latter would all be wrongful and the plaintiffs' rights in relation to the vehicle would not be affected. On the facts of the present case as disclosed by the correspondence the plaint allegations are not made out. The previous correspondence ending with the letters almost upto the end of May, 1947, establish beyond doubt that the purpose for which the vehicle was being brought to Madras was for the 1st defendant effecting a sale on behalf of the plaintiffs. There is absolutely no documentary evidence to support the case of the plaintiffs as regards any change being made regarding the original intention. The receipt dated 5th June, 1947, issued by the 1st defendant acknowledging the vehicle does not indicate the purpose of the bailment. The whole case of the plaintiffs is rested upon the oral evidence which is directly contrary to the previous correspondence in which there is nothing to indicate that there was at any time any departure from the intention of the plaintiff to entrust the vehicle with the 1st defendant for the purpose of effecting a sale. In these circumstances we have no hesitation in rejecting this part of the plaintiff's case.

We have therefore to proceed upon the footing that the suit vehicle was with the 1st defendant at the instance of the plaintiffs for the purpose of sale. It is not disputed that the 1st defendant fulfils the definition of a mercantile agent within the meaning of section 178 of the Indian Contract Act. If therefore he was left in possession of this vehicle for the purpose of sale, it would follow that any pledge effected by the 1st defendant to a person who took the pledge *bona fide* would be binding upon the plaintiffs. The case of the appellant is rested on this statutory provision; and the title of the pledgee and the validity of the sale effected at his instance are grounded upon his being a *bona fide* pledgee of this vehicle from the 1st defendant.

Is this contention made out is the next question to be considered. This might be viewed from two aspects, (1) was there a pledge of this vehicle in favour of the 3rd defendant? (2) is he a *bona fide* pledgee without notice of the plaintiff's title?

The contention that is raised on behalf of the appellant is that the pledge was effected by the delivery of the suit vehicle by the 1st defendant sending it on 7th June, 1947, to the 3rd defendant as part of the original pledge. In order that there might be a valid pledge there must be (*a*) a contract in relation to an identified chattel whereby this object is to be delivered to the pledgee as security (*b*) actual delivery of possession of the identified chattel in pursuance of the contract. It will be seen that in the present case the so-called pledge on 7th June, 1947, does not satisfy either of the two conditions. When the 3rd defendant demanded the return of the vehicle which had been left with the 1st defendant for display by his letter, dated 4th June, 1947, he was obviously wanting the return of the Bradford van which, without his knowledge had been improperly sold and delivered over to V.K.S. Mani in April—May, 1947 but over which his pledge rights still continued notwithstanding the transfer. As if in compliance with this demand, the 1st defendant sent to him the van belonging to the plaintiffs. The delivery was not therefore in fulfilment of the previous contract which alone effected the pledge for the mere delivery of a chattel unaccompanied by any contract does not constitute a pledge and would not suffice to create a security over the chattel. Moreover

so long as the security over the vehicle sold to V. K. S. Mani continued there was no intention on the part of the pledgee to demand additional secutiry and the subsistence of this pledge in June, 1947, is fatal to any contention which posits a contract to effect a pledge over the suit vehicle by the delivery on 7th June, 1947.

Apart altogether from this there is one other aspect of the matter which deserves to be examined. Let us assume that there was an intention on the part of the 1st defendant to effect a pledge of the suit vehicle with the 3rd defendant on 7th June, 1947 and that in pursuance of this intention he sent up the plaintiffs' van as part of the security. At that time the 3rd defendant was under the impression that the vehicle being delivered to him was one which in March, 1947, he had left with the pledgor there thus being a mistake in the identity of the article delivered to the pledgee. The question that immediately arises for consideration is the effect of this mistake in delivery on the operative character of the pledge, assuming that the sending up of the vehicle on 7th June, 1947, was intended to effect a pledge.

Numerous cases are to be found in the reports as to the effect of a mistake on the part of the bailor on the identity of the thing which is the subject of the bailment. No case however appears to have arisen of a converse case of a mistake on the part of the bailee when so far as the bailor is concerned there is no mistake, but the principle cannot be different. In the cases which will be referred to the matter has been discussed as to how far delivery under a mistake enables possession to pass to the bailee. The first case to be referred to is the decision in *Queen* v. *Ashwell*[1], where there is an interesting discussion as to what constitutes delivery of possession. The facts of the case were simple but it raised legal problems giving rise to an acute difference of opinion among the Judges. Fourteen Judges participated in the case and they were equally divided with the result that the conviction was confirmed. The facts were that the prisoner asked the complainant for the loan of a shilling He was given a sovereign, the complainant beliving it to be a shilling and the prisoner taking the coin under the same belief put it in his pocket. When however the latter looked at the coin he found it was a sovereign and immediately appropriated it to his own use by obtaining change for it and utilised the money himself. The question was whether the accused was guilty of larceny at Common Law which involved a felonious taking *animo furandi*. The main point of difference of opinion among the Judges related to the question whether there was any point of time during which the accused was lawfully in possession of the coin before the appropriation. The Judges who upheld the conviction held that there was such point of time while the others thought there had been an interval during which period the accused was innocently in *legal* possession of the coin and that the subsequent fraudulent appropriation would not convert it into the Common Law offence of larceny. The point however relevant to the present discussion is whether possession is legally transferred when there has been a delivery under a mistake. In regard to this a passage in the judgment of Coleridge, C.J., is very illuminating. The learned Chief Justice said at page 224 of the report :—

> "But then it seems to me very plain that delivery and receipt are acts into which mental intention enters, and that there is not in law any more than in sense a delivery and receipt, unless the giver and receiver intend to give and to receive respectively what is respectively given and received. It is intelligent delivery, as I think, which the law speaks of, not a mere physical act from which intelligence and even consciousness are absent. I hope it is not laying down anything too broad or loose, if I say that all acts, to carry legal consequences must be acts of the mind; and to hold the contrary, to hold that a man did what in sense and reason he certainly did not, that a man did in law what he did not know he was doing and did not intend to do—to hold this is to expose the law to very just but wholly unnecessary ridicule and scorn. I agree with my brother Stephen that fictions are objectionable and I desire not to add to them, but it seems to me, with diffidence, that he creates the fiction who holds that a man does what he does not know he does and does not mean to do, not he who says that an act done by an intelligent being for which he is to be responsible is not an act of that being unless it is an act of his intelligence."

This passage was no doubt intended by the learned Judge to apply to a case where there was a mistake on the part of the bailor not shared by the taker. But in our

1. (1885) L.R. 16 Q.B.D. 190.

opinion this would equally apply to a case where there is no mistake on the part of the bailor but the bailee purports to receive delivery of something which he never intended to receive and did not know he was receiving. There can in such cases be no real delivery of possession at all. Cave, J., who was also among the Judges who upheld the conviction put the matter this way. He said at page 203 :—

"The acceptance by the receiver of a pure benefit unmixed with responsibility may fairly be, and is in fact presumed in law until the contrary is shown, but the acceptance of something which is of doubtful benefit should not be and is not presumed. Possession unaccompanied by ownership is of doubtful benefit ; for although certain rights are attached to the possession of a chattel, they are accompanied also by liabilities towards the absolute owner which may make the possession more of a burden than a benefit. In my judgment a man cannot be presumed to assent to the possession of a chattel ; actual consent must be shown. Now a man does not consent to that of which he is wholly ignorant. Moreover in order that there may be a consent, a man must be under no mistake as to that to which he consents ; and I think therefore Ashwell did not consent to the possession of the sovereign until he knew that it was a sovereign."

A similar view as to the effect of delivery in such circumstances is taken by Messrs. Pollock and Wright in their essay on "Possession in the Common Law". They say at page 103 dealing with a case of mistake :

"There is equally no real delivery for want of a concurrent intention of the giver to hand over and of the receiver to accept the same thing.'

Their view of the *Queen* v. *Ashwell*,[1], is that in that case the accused did not get possession but only a bare custody (page 110). It is no doubt true that at page 114 the learned authors say :

"There are various dicta as to the effect of ignorance upon possession. It has been said and argued that a man cannot acquire legal possession without intention or knowledge ; but it is impossible to reconcile these dicta, as general propositions of law, with the judgment of Parke, B. in *Riley's case*[2], which has now been accepted as authoritative, though not always without reluctance for more than thirty years."

Riley's case[2], however and the observations of the learned authors do not really touch the present point. The accused in *Riley's case*[2], (*R.* v. *Riley*) had penned a flock of sheep, 29 in number in a field and there were other sheep in a neighbouring field. Early one misty morning, the prisoner, drove out his flock, but instead of taking his 29 sheep, he drove away, without knowing it, 30 including one belonging to his neighbour. The sheep were taken to the market where they were sold. The buyer after the sale, counted the sheep and found 30 and not 29. The prisoner then demanded the price of the 30th lamb and was paid the same. The question was whether the accused was not guilty of larcency at common law by reason of the appropriation of the price of the lamb after he had discovered the mistake. The learned Judges upheld the conviction, Parke, B. resting it on the ground that the original driving of the lamb of the neighbour was wrongful and a trespass notwithstanding that at that moment there was no *animo furandi*. He laid down the rule in these terms :—

"As the original taking was not lawful it was a trespass, the prisoner being a trespasser the moment he took the lamb with a felonious intent he became a thief."

Though this decision has been severely criticised by J. W. C. Turner in a very learned article in 58 Law Quarterly Review 340 it has been as we have seen, accepted as laying down the correct law by Pollock & Wright, and was approved by Humphrey, J., in *Ruse* v. *Read*[3]. The correctness or otherwise of *R.* v. *Riley*[2], does not raise for consideration the elements necessary to constitute delivery of possession in a bailment but deals rather with the law relating to a finder and the problems connected with that species of what might be termed quasi bailment in which there is no giver only a taker and no question of any possession under a contract. We are here concerned with the sole question as to whether, in cases of mistake, there is really any legal transferance of property without a conscious acceptance of it by the bailee. The reasoning of Coleridge, C.J. and of Cave, J., extracted already established in our opinion that no title could pass to the bailee and there

1. (1885) L.R. 16 Q.B.D. 190.
2. 22 L.J.M.C. 48.
3. (1949) 1 All E.R. 398.

could be no delivery of possession in the legal sense without a conscious act on the part of the bailee. The following passage from the judgment of Bovil, C.J., in *Queen* v. *Middleton*[1], also expounds the point now under consideration. Dealing with the delivery in that case, where there was a mistake on the part of the giver but none in the taker the learned Chief Justice said :

"It was simply a handing it over by a pure mistake and no property passed. But let us suppose that a purchaser of beans goes to the warehouse of a merchant with a genuine order for so many bushels of beans, to be selected from the bulk and so become the property of the vendee, and that by some strange blunder the merchant delivers to him an equal bulk of coffee. If that coffee was sold (not in market overt) by the recipient to a third person, could he retain it against the merchant, on the ground that he had bought it from one who had the property in the coffee though subject to be divested ? We do not remember any case in which such a point has arisen, but surely there can be no doubt he could not ; and that on the principle enunciated by Lord Abinger in *Chanter* v. *Hopkins*[2], when he says ' If a man offers to buy peas of another and he sends him beans, he does not perform his contract, but that is not a warranty ; there is no warranty that he should sell him peas ; the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it."

In our view these observations apply with force to the present case and deprive the delivery on 7th June, 1947, of the plaintiffs' vehicle of the character of a pledge.

There is one other aspect from which the position can be viewed. Stripped of non-essentials, the intention of the bailor was that the bailee should accept the plaintiffs' vehicle in substitution for the vehicle originally pledged but which had been sold and delivered to V. K. S. Mani. The idea however of the bailee was to receive the vehicle in the belief that it was the self-same vehicle as had been left with the pledgor in March, 1947, assuming that he saw and identified that vehicle at the time of the original pledge though some doubt is thrown upon this by reason of the engine number of the van being omitted to be mentioned in the document of pledge. It will be noticed that the idea of the pledgee when he received the plaintiffs' vehicle was not to abandon or extinguish his rights of security quod the vehicle sold to V. K. S. Mani ; nor had he any intention of receiving the plaintiffs' vehicle as additional security the original van also being considered as remaining under pledge. What we desire to point out is that as the 3rd defendant had no intention or cannot be presumed to have any intention to give up his rights to the van originally pledged, he cannot in law be presumed or treated as having an intention to receive the plaintiffs' van as part of the pledge security. In other words, though there can be substitution of security either by operation of law or by contract between the parties, there cannot be any substitution by the unilateral action of one party not consciously assented to or accepted by the other. For this reason also there was never any valid pledge of the plaintiffs' vehicle created in favour of the 3rd defendant as a result of the suit van being delivered to him on 7th June, 1947.

Learned counsel for the appellant appreciating the legal difficulty in contending that a pledge right was created in favour of his client at the moment of the delivery of the suit vehicle argued that the title must be deemed to have passed to him when he innocently sold the vehicle at the end of July, 1947. In other words, though the pledge in regard to the suit vehicle was not operative on the date of the delivery, the appellant obtained rights and the 2nd defendant an indefeasible title by reason of the auction sale held at a time when the pledgee had no notice of the plaintiffs' title. We are of the opinion that for the reasons already discussed this contention is unsound in law and that the true position is that no title of the pledgor could accrue to the pledgee untill he consciously gave up his rights as against the vehicle originally pledged and accepted the suit vehicle as a substitute not having knowledge at the time of such acceptance of the plaintiffs' ownership of the vehicle. But even if there is any substance in this contention, on the facts of the present case there are other legal difficulties in the way of the appellant. The auction sale at which the 2nd defendant purchased the suit vehicle was challenged as *mala fide* and invalid by the pledgor and C. S. No. 309 of 1947 was filed to obtain a decision on this matter. During the pendency of this action the 3rd defendant had clear notice by the letter, dated 14th November, 1947, from the plain-

1. (1873) L.R. 2 C.C. 38.
2. (1838) 150 E.R. 1484 : 4 M. & W. 399at 404.

tiffs' advocate that the vehicle originally pledged with the appellant had been improperly sold away by the pledgor and that the plaintiffs were the owners of the vehicle bearing engine No. 3654 which remained at that time in the premises of the 3rd defendant. He had full knowledge of the real situation. It was subsequent to this that C. S. No. 309 of 1947 was settled out of Court and the terms of the settlement were to annul the sale held by public auction under which the 2nd defendant became the purchaser, revive the pledge and security and finally in default of redemption within a time limit vesting the vehicle in the 3rd defendant. The title of the 2nd defendant therefore was displaced by the compromise and he was never to have any rights thereafter except to a claim for the purchase price from the 3rd defendant. This sale having been annulled and the pledge revived the 3rd defendant was relegated to the position which he would have occupied at the moment of the original pledge and as at the time when he is said to have become a pledgee once again under the compromise he had full notice of the plaintiffs' title by reason of the contents of the letter, dated 14th November, 1947, already referred to, he cannot invoke the provisions contained in section 178 of the Indian Contract Act for sustaining the pledge over the plaintiffs' title by reason of the content of the vehicle. It follows that the appellant derives no benefit even if the theory of the appellants' counsel pushing back the date of his accrual of rights to the auction sale were accepted. We are of the opinion that section 178 of the Indian Contract Act on which reliance has been placed to sustain the plea of the appellant is not available to him and that he was guilty of conversion of the plaintiffs' Bradford van by unlawfully effecting sale of it and appropriating the proceeds thereof.

In the foregoing discussion we have proceeded on the assumption that the 1st defendant had in his possession the van bearing engine No. 3651 on 5th May, 1947, so that he could create a valid pledge over the vehicle in favour of the 3rd defendant on that date. On the evidence that this van was sold as early as the 17th April to V. K. S. Mani it is more than probable that it had been delivered to the buyer long before 5th May, 1947. If so, there was no pledge of a third van on that date and there could be no foundation for the theory of substituted security on which learned counsel for the appellant rested his case. Nor is there basis for any contention that the despatch of the plaintiffs' vehicle to the appellant on 7th June, 1947, itself constituted a pledge of it for securing the earlier loan, for there was no intention even on the part of the pledgor to do so as is clear from the letter by the 1st defendant dated 6th June, 1949, in pursuance of which the van was sent up. On this state of facts therefore the case of the appellant is weaker than if there had been a valid pledge of a third van on 5th May, 1949.

There is no dispute as regards the amount of the decree. The original side appeal fails and is dismissed with costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR AND MR. JUSTICE BASHEER AHMED SAYEED.

Palani Moopan .. *Prisoner (accused)**

Criminal Procedure Code (V of 1898), sections 164 and 364 and Criminal Rules of Practice (Madras) Rule 85—Recording of confession—Procedure—Warning to accused that he is not bound to make the confession—If should be in the form of a question and answer—Confession if to be recorded in the form of questions and answers—Magistrate seizing blood-stained clothes from accused appearing for making confession—If offends Constitution of India (1950), Article 20 (3).

Sections 164 and 364 of the Criminal Procedure Code as well as Rule 85 of the Criminal Rules of Practice (Madras) do not require that the warning that the accused is not bound to make any confession, should be in the form of a question and answer and should be recorded like that by the Magistrate. What section 164 (3), Criminal Procedure Code, requires is that a Magistrate before recording a confession from an accused shall explain to the accused making it that he is not bound

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* R.T. No. 129 of 1954. 11th January, 1955.

to make a confession and that if he does so it may be used as evidence against him and that no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily, and that when he records any confession, he shall make a memorandum at the foot of such record to the effect.

Rule 85 of the Criminal Rules of Practice does not require that the Magistrate should record the confession in the form of questions and answers.

The Magistrate seizing the blood-stained clothes which were worn by the accused when he appeared before him to make his confession does not amount to compelling the accused to be a witness against himself as contemplated by Article 20 (3) of the Constitution of India.

Trial referred by the Additional Sessions Judge of the Court of Sessions of the Coimbatore Division for confirmation of sentence of death passed upon the said Prisoner in Case No. 69 of the Calendar for 1954 on 30th October, 1954.

P. S. Kailasam for the Accused.

R. Santhanam for the Public Prosecutor (*V. T. Rangaswami Ayyangar*) for the State.

The Judgment of the Court was delivered by

Basheer Ahmed Sayeed, J.—Palani Moopan, aged about 24, has been found guilty of murder of his wife Karuppayye, aged about 20, on 26th January, 1954, at Kuppandampalayam, by inflicting injuries with a tapper's knife and has been sentenced to death subject to confirmation by this Court by the learned Additional Sessions Judge, Coimbatore Division.

The prosecution case is this. In January, 1953, the appellant and the deceased were married. They lived together happily for three months. Thereafter misunderstandings arose between them by reason of misconduct of the appellant exhibited in beating and abusing his wife. Constantly the appellant quarrelled with his wife. Consequent upon such beating and illtreatment, his wife, the deceased, used to go to her parent's house. Some time thereafter, a panchayat was held and the deceased returned to the appellant's house. Even after such return, there were frequent quarrels between them. After some days subsequent to the return of the deceased to the appellant's house the appellant shifted to his sister's house leaving his wife in his house. On 26th January, 1954, the deceased went to a shandy in Kewani village situated just 3 miles away from Kuppandampalayam. While she went to the shandy, she is said to have worn gold koppus and kammals in her ears, a gold thali on her neck and silver bangles. At about sun-set time she left the shandy and was returning to the village with a basket containing provisions on her hand. When she came near the temple on the outskirts of the village, a few furlongs away, she was being followed by P.Ws. 2, 3, and 4. The deceased and those witnesses crossed the temple and were passing through the itteri. The point at which the itteri and the temple crossed each other was apparently a dangerous place where offences like robbery and murder had been committed. When the deceased reached that place, the prosecution evidence is that the appellant approached her and cut her. This was seen by P.Ws. 2, 3 and 4 who were coming a little behind. P.W. 2 reported the matter to P.W. 1 and P.W. 1, the brother of the deceased, gave a statement to the village munsif about what he had learned from P.W. 2. In the meanwhile, P.W. 8 a potter, who is an undesirable character, having been guilty of theft on prior occasions, and P.W. 9, a Koravan, said to be a registered K. D. happened to pass by the spot where the deceased lay dead. They saw the body of the deceased an aruval, M.O. 1 and a basket M. O. 2 in which the deceased was bringing certain provisions from the shandy. They removed these two articles to their custody and it transpires that P.W. 9 used for himself some of the quantity of rice found in the basket. The village munsif, P.W. 12 who recorded Exhibit P. 1 and P.W. 1 made the usual report to the police authorities. The Sub-Inspector of Police P.W. 13 arrived at the village in the early hours of the 27th morning. He saw the body of the deceased and held the inquest and after completing the preliminaries, he sent the body for post mortem examination. The lady Doctor, P.W. 5 who conducted the autopsy and issued Exhibit P. 4, the post mortem certificate, found on the body of the deceased 6 injuries. The first injury was an incised circular wound 2 inches in diameter and slicing off a flap of skin

which was attached by 2 inches anteriorly and situated over the left shoulder joint. The second injury was an incised vertical wound 1 inch by 1/2 inch situated in part of right axella. The third injury was an incised gaping wound 3 inches in length and cutting into the body of the second vertebra and into the muscles of the neck and situated on the back of the neck. The fourth and fifth injuries were also incised gaping wounds of various dimensions. The sixth injury was an abrasion 2½ inches by 3/4 inch situated on the posterior surface of the upper half of right thigh. The Doctor was of opinion that the deceased would appear to have died of shock and haemorrhage as a result of the injuries.

A day after the occurrence, namely, on 27th January, the appellant went to Bhavani, 15 miles away from his village and appeared before the Sub-Magistrate P.W. 10, and surrendered before him at about 4 P.M. while he was holding Court in the Court hall. The appellant stated that he was wanted by the police in connection with his wife's murder and so he surrendered. The Magistrate, on finding his dhoti and upper cloth blood-stained directed his clerk and peon to seize them. In his presence they were seized, and Exhibit P. 6 was drawn. Thereafter, the Magistrate remanded the appellant to the sub-jail. The dhoti, M.O. 3 and the upper cloth, M.O. 4 were sent for chemical examination, and the Imperial Serologist has certified that they had been stained with human blood. P.W. 13 the Sub-Inspector, was informed of the surrender of the appellant before the Sub-Magistrate, and after he interviewed the appellant, at about 10-15 A.M. on 28th for half an hour or thereabouts, he came to know that the appellant was willing to make a confession. Thereupon P.W. 13 made a requisition to the Sub-Magistrate to record his confession. The appellant was produced on 28th January, at about 3-30 P.M. before the Sub-Magistrate who recorded Exhibit P. 8 which is in the following terms :—

"The accused Palani Moopan, is produced before me by the warden at 3-30 P.M. He is warned against making any statement concerning the crime. No police is present in the vicinity of the Court."

Thereafter the Sub-Magistrate gave time to the appellant for reflection, and the appellant appeared before the Sub-Magistrate again on 29th January, 1954. After administration of the necessary questions found in Exhibit P. 9 (*a*) the Sub-Magistrate proceeded to record his confession as contained in Exhibit P. 9.

In his confessional statement the appellant said that his wife had been in illicit intimacy with one Latchmanan, his co-brother-in-law, that there were misunderstandings between him and his wife, and so he left her in her mother's house at Kuppandampalayam, that Latchmanan abused him and beat him, and subsequently tendered an apology to the appellant, that on account of his wife's abandoning him, the appellant was compelled to cook for himself; that his wife, without going over to him went to Latchmanan in Mevani and remained there ; that there was a panchayat held by Ramandi and Sinnappayya Asari ; that after 10 days, in the month of Karthigai, they took the deceased and left her with him, that on a Wednesday he went out to harvest the paddy ; that his wife gave him a bundled food, that he drank in the field to the half of his belly ; that he vomitted and fell down ; that the food was mixed with "Aralikottai powder" (Oleander seed and powder) ; that one Papayi Ammal also saw it ; that in the night, at 10 o'clock, she and others took him to the house ; that he informed his elder brother, that he was taking his food separately, keeping his wife alone ; that his sister-in-law told him the next day when he went for shandy, Latchmanan came and enjoyed a jolly life with his wife ; and that he went and enquired where his brother-in-law was. He confessed that on Tuesday, that is, on the day of occurrence, he went to Keevani shandy. His wife also went to the shandy before him and was selling chillies. Latchmanan was sitting by her side and talking. The accused was purchasing ragi. At that time she said to Latchmanan "My husband is not keeping me properly : I will come to Mevani to-morrow." The appellant kept the ragi in the garden. He could not endure the disgrace on account of her and he was angry. He went out taking a knife from the house of Muthu Moopan.

His wife was returning from the shandy. He dragged her saying "we shall go to Mevani now itself". In reply to that his wife said "who are you (fellow) to drag me? I will go anywhere". Enraged at this reply, the appellant stabbed his wife with the knife. Afterwards he threw the knife there and went to Bhavani direct.

Before the learned Sessions Judge, in all about 13 witnesses were examined for the prosecution. P.Ws. 2 and 3 went back upon what they had said in the committal Court. The evidence of P.W. 2 and P.W. 3 in the committal Court are marked as Exhibits P. 2 and P. 3 respectively. The appellant when questioned by the learned Sessions Judge, said that the evidence given by the P.Ws. against him was false, and he denied that the confession made before the Sub-Magistrate was true and voluntary. He stated that the confession was made under the inducement of the police that they would help him if he were to confess in the manner he did. The learned Sessions Judge, however, believing the evidence as recorded in the committal Court and finding that they corroborated the accused's confession in material particulars came to the conclusion that the offence against the appellant has been proved and convicted and sentenced him under section 302 of the Indian Penal Code as stated above.

Mr. Kailasam, appearing on behalf of the appellant, in the first instance, urged that the confession ought not to have been acted upon or accepted by the learned Sessions Judge for the reason that the learned Sub-Magistrate, who recorded the confession, did not conform to the requirements of section 164, Criminal Procedure Code or section 364 thereof. His point is that from Exhibits P. 9 and P. 9 (*a*) and the evidence of the Sub-Magistrate, it appeared that the Magistrate did not put a question to the appellant if he knew that he was not bound to make any confession, and why he was making the confession. On that ground, the learned Counsel has argued that the confession is in violation of sections 164 and 364, Criminal Procedure Code. We are unable to accept this contention. In Exhibit P. 8 the learned Sub-Magistrate has clearly stated that he has warned the appellant against making any statement concerning the crime. At the end of Exhibits P. 9 and P. 9 (*a*) the learned Magistrate (P.W. 10) has also appended a memorandum, as required by section 164 (3), Criminal Procedure Code that he had explained to the appellant that he was not bound to make any confession and that if he did so, any confession he might make might be used as evidence against him. The Magistrate has also stated that he believed that the confession was voluntarily made and that the confession was taken down by him and was read to the appellant and admitted by him to be correct and that it contained full and true account of what the appellant had stated to the Magistrate. P.W. 10 was not shaken regarding these. Sections 164 and 364, Criminal Procedure Code as well as rule 85 of the Criminal Rules of Practice, do not require that the warning that the accused is not bound to make any confession, should be in the form of a question and answer and should be recorded like that by the Magistrate. What section 164 (3), Criminal Procedure Code requires is that a Magistrate, before recording a confession from an accused, shall explain to the accused making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and that no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily, and that when he records any confession, he shall make a memorandum at the foot of such record to the effect. We find in this case as evidenced by Exhibit P. 8 and the certificate appended to Exhibits P. 9 and P. 9 (*a*) that the Magistrate has substantially complied with the requirements of section 164, Criminal Procedure Code and that there is no infirmity in the recording of the confession. Indeed section 164 (3), Criminal Procedure Code itself simply says "explain" and it is obvious that an explanation is possible without a question or answer. We find that section 364, Criminal Procedure Code has also been complied with by the Magistrate in recording the confession. Rule 85 of the Criminal Rules of Practice does not require that the Magistrate should record the confession in the form of questions and answers. What that rule requires is that no Magistrate shall record any statement

or confession made by an accused person under section 164 of the Code of Criminal Procedure (1) until the Magistrate has first recorded in writing his reasons for believing that the accused is prepared to make the statement voluntarily and (2) until he has explained to the accused that he is under no obligation to answer any question at all and has warned the accused that it is not intended to make him an approver and that anything he says may be used against him. Therefore, we do not find any substance in the contention of the learned Counsel that the confession in this case should not be acted on and accepted. Even otherwise, the provisions of section 533, Criminal Procedure Code are sufficient to cure any of the procedural defects that might have arisen in the matter of recording the confession in the present case.

The next point urged by the learned Counsel is that no weight should be attached to the discovery of M.Os. 3 and 4, the dhothi and the upper cloth worn by the appellant when he appeared before the Magistrate. The learned Counsel has argued that, under Article 20 (3) of the Constitution of India a person accused of an offence cannot be compelled to be a witness against himself. His point is that these M.Os. which were seized from the appellant at the instance of the Magistrate by his clerk and peon, evidencing blood stain on them, amounted to compulsory production of the M.Os. by the appellant. We do not think that this argument can be sustained. What the learned Magistrate says is that when the appellant appeared before him he saw the M.Os. worn by him stained with blood and so, he directed his clerk and peon to seize them from the appellant. This procedure does not compel the appellant to be a witness against himself. The securing of the blood stained clothes on a person like the appellant who wanted to report and surrender before the Magistrate would be very material and relevant, and the Magistrate, situated as he was, was bound to take possession of them (as of a blood-stained weapon) from the appellant. Such being the case, it cannot be said that there has been any compulsion exercised upon the appellant to produce the M.Os. and be a witness against himself in this murder case. The learned Counsel relied upon the Supreme Court ruling in *M. P. Sharma* v. *Satish Chandra*[1] and he read to us relevant passages from it. We have carefully examined the passages and we do not think that they have any relevancy or bearing to the facts of the present case.

Mr. Kailasam then urged that the learned Sessions Judge went wrong in accepting the evidence of P.Ws. 2 and 3 in chief examination in the committal Court and in finding that their evidence corroborated materially the confession made by the appellant. The point raised by the learned Counsel was that section 145 of the Evidenee Act had not been complied with in the matter of marking the evidence of P.Ws. 2 and 3 recorded in the committal Court. It is true that the depositions of P.Ws. 2 and 3 in the committal Court had not been marked in full as required by section 288, Criminal Procedure Code. But we do not find that there is really any violation of section 145 of the Evidence Act. It is no doubt true that only a portion of the evidence of P.Ws. 2 and 3 that the appellant has cut the deceased with an amarakathi on her neck and she fell down, has been marked as Exhibits P. 2 and P. 3 and that the rest of their depositions has not been marked. This procedural defect in our opinion does not militate against Exhibits P. 2 and P. 3 which have been accepted and acted upon by the learned Sessions Judge. What section 145 of the Evidence Act says is that a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. This section in substance had been complied with so far as the parts of the deposition of P.Ws. 2 and 3 are concerned. If this section is read with section 288, Criminal Procedure Code all that can be said in favour of the argument of the learned counsel for the appellant is that there has been a

1. (1954) I M.L.J. 680 : (1954) S.C.J. 428 (S.C.).

procedural defect. But this defect, in our opinion, does not affect the course adopted by the learned Sessions Judge in accepting and acting upon the evidence of these witnesses. Mr. Santhanam, appearing for the learned Public Prosecutor has invited our attention to *Pakira* v. *King Emperor*[1] for the contention that a deposition before a committing magistrate admitted under section 288, Criminal Procedure Code is to be treated as evidence in the case for all purposes, and that this procedural defect does not make the evidence actually marked as absolutely useless for the purpose of acting upon it. As a matter of fact, the entire depositions of P.Ws. 2 and 3 in the committal Court are before us, and we are able to look into it. It does transpire that P.Ws. 2 and 3 went back upon what they had stated in the committal Court. In this connection Mr. Santhanam has invited our attention to *Bhagwan Singh* v. *The State of Punjab*[2], where it has been held that where two conflicting versions are given by a prosecution witness in chief and in cross-examination, the prosecution has a choice. It is entitled to use the former statement (in the committing Court) either to contradict what was said in cross-examination or to corroborate what was said in chief. In either event section 288, Criminal Procedure Code, could be used to make the former statement substantive evidence. In our opinion, the learned Sessions Judge has acted in accordance with the ruling given in this decision. And no prejudice also has been caused to the accused.

Coming to the merits of this case, we have to state that the confession, which rings true and voluntary, sets out the particulars of the offence admitted to have been committed by the appellant, that the appellant approached the deceased when she was returning from the shandy, and that it was the appellant who inflicted the injuries as spoken by P.Ws. 2 and 3 in their evidence in the committal Court marked here under section 288, Criminal Procedure Code. There is no reason why the Prosecution should not rely upon the corroboration found in the evidence of P.Ws. 2 and 3 so far as the material particulars of the confession are concerned. We are therefore not prepared to reject the confession on any ground urged by the learned counsel for the appellant, and we think that the confession has been voluntarily made, and it is true since it finds material corroboration in the evidence of P.Ws. 2 and 3. We are of opinion that the learned Sessions Judge has come to a right conclusion that the offence against the appellant has been proved beyond any doubt.

A suggestion was made by the learned Counsel for the appellant before us that P.Ws. 8 and 9 from whom M.Os. 1 and 2 were recovered, might have been responsible for the murder of the deceased. We do not think that there is any basis for this suggestion though it has been put to the witnesses in the cross-examination. We do find that P.Ws. 8 and 9 are not desirable persons by reason of their antecedants. Still we do not think that they have been responsible for the murder of the deceased.

On a consideration of the entire evidence, and the circumstances of the case we are of opinion that the offence has been committed only by the appellant, and that his conviction under section 302, Indian Penal Code is right. But in awarding sentence to the appellant, the fact that he was provoked by the insolent answer given by the deceased when he questioned her about her misconduct with his co-brother-in-law ought to be taken into consideration. We think that the ends of justice will be amply met if we confirm the conviction under section 302, Indian Penal Code and reduce the death sentence to one of transportation for life, which we accordingly do. The appeal is otherwise dismissed.

K.S. *Sentence reduced.*

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1. (1937) 2 M.L.J. 323 : L.R. 64 I.A. 148 : I.L.R. (1937) Bom. 711. (P.C.).

2. (1952) 1 M.L.J. 816 : (1952) S.C.J. 284. (S.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE MACK AND MR. JUSTICE KRISHNASWAMI NAYUDU.

Rajammal .. *Appellant**

v.

A.T. Krishnaswami Mudaliar and another .. *Respondents*

Madras Indebted Agriculturists (Temporary Relief) Act (V of 1954), sections 3 and 4—Scope of—Protection if available to a person who is not a party to the suit but is only a surety for the judgment-debtor.

Sections 3 and 4 of the Madras Act (V of 1954) must be read together to find out the nature and scope of the protection given under it to agriculturists. A reading of the sections together makes it clear that section 4 is wide enough to include applications of the nature mentioned in section 3 in which relief is claimed against an agriculturist. It contemplates a relief claimed against an agriculturist who may not be a party to the suit itself. The words " of the nature mentioned in section 3 " merely mean that the recovery sought to be made shall be of a debt, whether in a suit or an application in execution for its recovery against an agriculturist.

An agriculturist, who furnished security on behalf of a plaintiff who withdrew moneys from Court during the pendency of an appeal, is entitled to stay of proceedings for restitution by the defendant by enforcing the security after the appeal has been disposed of in his favour.

Appeal against the Order of the Court of the Subordinate Judge (II Additional) of Coimbatore dated 27th February, 1954 and made in E.A. No. 173 of 1954 in E.P.R. No. 110 of 1953 in O.S. No. 226 of 1946.

M. R. Narayanaswami for Appellant.

K. Rajah Aiyar and *K. S. Ramamurthy* for Respondents.

The Judgment of the Court was delivered by

Mack, J.—The appellant is a surety who furnished security in substantial immoveable property to enable the plaintiff-decree holder in O.S. No. 226 of 1946 to withdraw a substantial sum of money said to be over Rupees One lakh decreed to him, pending an appeal filed by the defendants. The appeal was allowed and the suit dismissed. The defendants then filed E.P .No. 110 of 1953 for restitution by enforcing the security bond against the appellant. Her application under Act V of 1954 for stay of execution was dismissed by the learned Subordinate Judge who took the view that the Act had no application to recovery of money in restitution proceedings.

The case is governed by sections 3 and 4 of Act V of 1954 which, we agree with Mr. Rajah Ayyar for the respondents, must be read together. According to section 3,

> " no suit for the recovery of a debt shall be instituted, no application for the execution of a decree for payment of money passed in a suit for the recovery of a debt shall be made......against any agriculturist in any civil or revenue Court before the expiry of a year from the date of commencement of this Act ".

Then under section 4,

> " all further proceedings in suits and applications of the nature mentioned in section 3 in which relief is claimed against an agriculturist......but otherwise inclusive of proceedings consequent on orders or decrees made in appeals, etc., shall also stand stayed until the expiry of a year from the date of commencement of this Act."

Mr. Rajah Ayyar urges that section 4 is governed by section 3 and that it is only to cases in which the defendant is an agriculturist that section 4 applies. On a careful reading of the two sections together, we are unable to accept this contention. Section 4 is wide enough to include applications of the nature mentioned in section 3 in which relief is claimed against an agriculturist. That is, it contemplates a relief claimed against an agriculturist who may not be a party to the suit itself. The words " of the nature mentioned in section 3", in our view, merely mean that the recovery sought to be made shall be of a debt, whether in a suit or an application in execution for its recovery against an agriculturist. The word ' debt ' is defined

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*Appeal against Order No. 328 of 1954. 28th January, 1955.

in section 2 (*b*) of the Act as any sum of money which a person is liable to pay under a contract (express or implied) for consideration received. The view that we take would also be in consonance with the preamble of the Act which is intended to bring relief to agriculturists as a class who have borrowed or added to their debts during the years of drought and who should in the interests of the general public be spared the distractions and expenditure involved in litigation launched by their creditors.

It is obvious that the appellant is an agriculturist from the fact that her husband has given substantial agricultural land by way of security. We think that she clearly comes within the protection of sections 3 and 4 of Act V of 1954 read together and that as an agriculturist, she is entitled to have execution stayed against her, for the period contemplated by the Act.

The appeal is allowed with costs, and execution against the appellant stayed.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT : MR. JUSTICE MACK.

A. Arunachala Naicker .. *Petitioner**

v.

V. Gopal Stores represented by its proprietor V. Gopal. .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 7 (3) (c) and proviso—Landlord requiring additional accommodation—Application if could be maintained in respect of a different building—Two buildings situated contiguously—If one could be asked as an additional accommodation of another—Equities to decide balance of convenience—Availability of alternative accommodation—If could be taken into consideration.

The proviso to section 7 (3) is of particular application to cases coming under section 7 (3) (*c*) which applies only to landlords occupying only a part of a building seeking to evict a tenant occupying the whole or other parts of the same building, if he requires additional accommodation. Part of a building also comes within the scope of the definition of the word 'building' under section 2 (1) of the Act and it is in the light of this definition that section 7 (3) (*c*) of the Act has to be interpreted.

A landlord doing business in one building purchasing a building next to his cannot seek to evict the tenant of that building under section 7 (3) (*c*). The mere fact that two buildings let separately and as such constituting separate buildings under the Act, are comprised in one structural building does not make any difference. It is sufficient for the purpose of excluding the operation of section 7 (3) (*c*) of the Act if the petitioner and respondent were in occupation of separate buildings as defined in the Act.

Equitable protection is afforded to long standing tenants under the proviso to section 7 (3). In the Madras Buildings (Lease and Rent Control) Act, there is no reference to availability of alternative accommodation as under the English Act. But this is undoubtedly a circumstance to be taken into consideration in applying the equitable proviso, which gives the Court very wide discretion to reject an application for eviction, if it is satisfied that the hardship which may be caused to the tenant, will outweigh the advantage to the landlord. In case of conflict of equities a Courthas to resolve it by considering the balance of equity in the light of the proviso.

Petition under section 12-B of Madras Act XXV of 1949 praying the High Court to revise the order of the Court of Small Causes at Madras dated 22nd September 1954 and made in H.R.A. No. 235 of 1954 preferred against the order of the Court of the House Rent Controller, Madras dated 24th May, 1954 and made in H.R.C. No. 961 of 1954.

V. Srinivasa Aiyar and *K. Raman* for Petitioner.

W. S. Venkataramanjulu for Respondent.

The Court delivered the following

JUDGMENT :—The petitioner, a revenue peon drawing Rs. 51 a month employed in the office of the Chief Engineer for Irrigation seeks to revise an order passed by the Additional Judge of the Court of Small Causes confirming an order by the Rent Controller directing his eviction from a portion of a building with a separate door number 543 in Pycrofts Road, Triplicane. It is not disputed that this peon's wife did here a business in betel and curd and that the petitioner has

*C.R.P. No. 32 of 1955. 28th April, 1955.

been in occupation as a tenant for twenty-five years. The respondent was also a tenant from the same landlord of premises with a separate door number, 542 until by a registered sale deed, Exhibit P. 2 dated 9th October, 1953, he purchased both the door numbers, 542 and 543. He, then, on the footing of his purchase and on the plea that he wanted the premises occupied by the petitioner for an extension of his own maligai and provision stores, applied to evict the petitioner. Both the Courts concurred in finding that the respondent *bona fide* required premises No. 543 for an extension of his own business. Both Courts also concurred in holding that this was not an application for eviction which could be dismissed under the proviso to section 7 which requires its rejection if the Controller was satisfied that the hardship which may be caused to the tenant by granting it will outweigh the advantage to the landlord. I can only express my surprise at both the Courts taking this view, as both petitioner and respondent were both tenants in the same position and doing business in these adjacent premises. Respondent prospered in his maligai business and after purchasing the entire building he is seeking to evict the petitioner out of his long standing tenancy of about twenty-five years, leaving him no place to carry on his business. It is all very well for the Courts to take the view that the petitioner can find some other place in which to carry on with his wife business in betel and curd. This proviso is of particular application to cases coming within the scope of section 7 (3) (*c*) and applies to a landlord who is occupying only a part of the building, whether residential or non-residential, seeking to evict a tenant occupying the whole or any portion of the remaining part of the building, if he requires additional accommodation for residential purposes or for the purposes of a business which he is carrying on. A building is defined in section 2 (1) as "any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes." Part of a building also, therefore comes within the scope of the definition of the word "building" and it is in the light of this definition that section 7 (3) (*c*) has to be interpreted. It is under this section that the landlord seeks eviction of the petitioner. The learned Additional Judge rejected the legal position taken for the petitioner that the premises Nos. 542 and 543 were separate buildings with separate entries into the road and no inter-connecting door from one to the other. From the sketch filed, they appear to be structurally in one building in the ordinary sense in the ownership of one owner before the entire building was purchased in 1953 by the respondent. There can, however, be no doubt at all that premises 542 and 543 were each a building as defined by section 2 (1) of the Act and the fact that a municipal assessment notice Exhibit P. 3 showed that these two door numbers were treated as only one property does not affect this legal position. For purposes of the Madras Buildings (Lease and Rent Control) Act, 1949 a building means any building or hut or part of a building let separately for residential or non-residential purposes. Assuming that the premises let to the petitioner and occupied by him for the past twenty-five years were part of the same structural building, nonetheless the premises would fall within the definition of a building under section 2 (1). Nor can the purchase by the respondent himself, a tenant of a separate building under Exhibit P. 2 as defined by section 2 (1) give him any right to evict this long standing tenant under section 7 (3) (*c*). It is true that the respondent by his purchase has become a landlord and there seems at first blush some force in his plea that by reason of his purchase he is now occupying only part of building, though what he did occupy as tenant before his purchase was a building as defined by section 2 (1) and that he is therefore entitled to evict the respondent from the premises as part of his building though they constituted a 'building' under section 2 (1). The position is not free from difficulty in view of the statute defining a building as also part of a building. It is in the light of this definition that section 7 (3) (*c*) has to be applied to the present case. As I see it, the position is in no way different to that of a landlord doing business in one building purchasing a building next to his and seeking to eject from it a long standing tenant doing business there for twenty-five years. To such a case section 7 (3) (*c*) would in my opinion not apply. Nor will it apply to the present case merely by reason of the fact that the portions of this building in which petitioner and respon-

dent did business separately are comprised in one structural building, the whole of which was purchased by the respondent. As it appears to me, it is sufficient for purpose of excluding the operation of 7 (3) (*c*) if petitioner and respondent were in occupation as tenants of two separate buildings as defined in the Act. I do not see how the building so defined in the occupation of the petitioner who is in the occupation of such building is protected, can cease to be a 'building' and only become part of a building merely by virtue of the respondent's purchase of both premises. To take a different view would be to put a premimum on tenants of portions of buildings, after becoming prosperous and expanding their business, acquiring the entire building and then seeking to evict other tenants in occupation of parts of the building each of which is nonetheless defined as a "separate building" under that Act.

Even assuming that section 7 (3) (*c*) which is far from easy to interpret, is held to be applicable, equitable protection is accorded to a long standing tenant under the proviso to section 7 (3). In the present case the Rent Controller took into consideration against the petitioner that he was a Government servant not permitted to conduct business, who allowed his wife to run this betel and curd shop. This is, as it appears to me, a wholly irrelevant consideration. The petitioner is a peon in the Chief Irrigation Engineer's office on leave preparatory to retirement on a pension of Rs. 12 a month. Even while he was working as a peon, his wife was perfectly entitled to supplement his meagre pay of Rs. 51 in all by running a betel and curd shop. Nor does the fact that the shop was rented in the name of the peon make any difference. The view of the Rent Controller is summed up in these two sentences :

> "Admittedly he has not been personally conducting the business but it was being conducted by his wife, who is a different legal entity and he is a Government servant who gets a regular monthly income. Since the respondent had not put forth that he has not been able to get alternative accommodation, and since he happens to be a Government Servant who is not expected to trade, I am inclined to believe that no hardship would be caused to him which would outweigh the advantage to the petitioner."

With this view in its relevancy to the equities in this case I must express my emphatic dissent. I am unable to see anything improper in the wife of a peon helping to supplement the scanty income of the husband by earning separately nor in the peon giving her all the assistance he could without detriment to his official duties. It is not disputed that this family with several children to support have done this business in these premises for twenty-five years. They are said to live in a separate house about three-fourth furlong away. But the small premises in which this shop was run is next to Pycroft's Market and so far as I can see, the respondent has not been able to suggest any alternative premises for this tenant whom he seeks to evict. Under section 5 (2) of the English Increase of Rent and Mortgage Interest (Restrictions) Act of 1919, where a person has purchased a house, a Court may make an order for recovery of possession if he requires it for his own occupation or that of some person in his employ if after considering all the circumstances of the case, including especially the alternative accommodation available to the tenant, the Court considers it reasonable to make such an order.

The onus of finding alternative accommodation does not wholly rest upon the tenant and in such a case it is open to the landlord to indicate alternative accommodation available and suitable for his purposes without severely damnifying any business he may be running. In the India Act there is no reference to availability of alternative accommodation but this is undoubtedly a circumstance to be taken into consideration in applying the equitable proviso, which gives a Court a very wide discretion to reject an application for eviction, if satisfied that the hardship which may be caused to the tenant will outweigh the advantage to the landlord. In this case I am quite satisfied that the desire of the respondent to get extra accommodation for the expansion of his business is perfectly *bona fide*. His advocate complains that there is only a 6½ feet narrow passage available to him for carrying provisions into his shop. But he started his grain business a few years ago under these conditions knowing perfectly well that the petitioner was a long established

tenant of the adjacent No. 543 for more than twenty years. This is a case of conflict of equities which a Court has to resolve in the light of the proviso. As it appears to me, the Rent Controller relied on irrelevant considerations in coming to his decision. This is a case in which this peon due to retire shortly with his family are going to be put to very great hardship indeed if they are to be evicted out of their business premises where they ran a shop in betel and curd to eke out their small salary. Particularly on the eve of his retirement eviction from these premises would be a far greater hardship than if the peon was in service. I have no hesitation in holding that the balance of equity contemplated by this proviso is clearly on the side of the petitioner and that he cannot be evicted by the respondent whose application under this proviso must be rejected. The petition is allowed but in the circumstances I direct the parties to bear their own costs throughout.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

N. Venkatavaradan .. *Petitioner**

v.

The Sembium Saw Mills, Sembium, Madras .. *Respondents.*

Payment of Wages Act (IV of 1936), *section* 17 (1) (*b*)—*Jurisdiction of Commissioner under—If could determine whether the termination of a service was valid or not and direct payment of wages for period in which the employee did not work.*

A claim by an employee which is in effect a claim for damages for wrongful termination of service is not one which a Commissioner under the Payment of Wages Act is competent to enquire into. The remedy in such cases is by a suit in a Civil Court and not an application before the Commissioner under the Payment of Wages Act.

The jurisdiction of the authority under the Payment of Wages Act is limited to all claims arising out of reduction of wages and delay in payment of wages only and it is competent to the authority to construe the terms of the contract of employment, if any, to determine if wages are payable even on termination of the employment, to determine the factum of employment and the liability of the employer under the contract with regard to wages. The jurisdiction which the Commissioner possesses does not, however, extend to determination of the question whether the contract has been terminated or is subsisting. The question whether there has been proper termination of the services is a matter outside the scope of the authority appointed under the Act

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of Small Causes, Madras, dated 4th April, 1952 and made in Payment of Wages Act Appeal No. 3 of 1951.

S. Krishnamurthi for Petitioner.

T. Ramaprasada Rao for *Messrs. John and Row* for Respondents.

The Court delivered the following

JUDGMENT.—This revision is against the order of the Chief Judge, Court of Small Causes, Madras, dismissing an appeal by the petitioner under section 17 (1) (*b*) of the Payment of Wages Act (IV of 1936).

The petitioner was employed as a stenographer with the respondents, the Sembium Saw Mills, Ltd., on a salary of Rs. 85 per month and a dearness allowance of Rs. 35. Early in December, 1950, he applied for leave for a week, which was sanctioned. But before the expiry of the week he wrote to the respondents that he extended his leave by a further period of one week. The respondents informed him by their letter, dated 11th December, 1950, that he should join duty on or before 13th December, 1950. The petitioner states that he received that letter only on 17th December, 1950 and in reply he wrote a letter stating that he was extending his leave by another fortnight from the 18th December. On 3rd January, 1951, after the reopening of the Mills in the New Year, the petitioner presented himself for work and on that day the respondents paid his salary till the 31st December, 1950 and intimated him that he was under suspension pending

* C.R.P. No. 1841 of 1952. 28th January, 1955.

enquiry into his conduct for having continued to absent himself without permission. There was an enquiry and he was finally discharged from service by an order, dated 13th February, 1951, by which his services were terminated as and from 1st January, 1951. The petitioner applied to the Commissioner under the Payment of Wages Act and claimed a sum of Rs. 160 as salary and dearness allowance for January, 1951, Rs. 80 as salary for 13 days in February, 1951, Rs. 63 as salary for the privilege leave period of 11 days and Rs. 960 for damages. He thus inflated his claim to a sum of Rs. 1,263. He claimed that the wages were delayed by his employers and prayed for an order from the Commissioner for payment of the amount claimed. The claim for salary for January and for the 13 days in February was dismissed on the ground that the petitioner did not work during that period. So also the claim for damages. But as regards the wages for the period of 11 days, during which he claimed to be entitled to privilege leave, an order for payment of Rs. 36-8-3 was passed. The respondents have agreed to pay this sum. As against this order of the Commissioner, the petitioner appealed and the learned Chief Judge of the Court of Small Causes held that the Commissioner was right in holding that he had no jurisdiction to entertain the claim for salary and dearness allowance for the period for which the petitioner was not admittedly working under the respondents, following the decision of the Bombay High Court in *The Controller of Stores, B.B. & C.I. Railway* v. *B C. Patil*[1] and dismissed the appeal. Hence this revision.

The right of the petitioner to recover wages arises under section 15 of the Payment of Wages Act, and section 15 (1) of the Act provides that the Provincial Government may appoint any Commissioner for Workmen's Compensation as the authority to hear and decide for any specified area all claims arising out of deductions from the wages, or delay in payment of the wages, of persons employed in that area. It is sought to be argued that the failure to pay salary for the period from the 1st January to the 13th February, 1951, amounts to delaying payment of the wages and as such it is urged that the Commissioner has jurisdiction to enquire into the claim. Reliance is also placed on the definition of wages in the Act. "Wages" is defined as meaning " all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable, whether conditionally upon the regular attendance, good work or conduct or other behaviour of the person employed, or otherwise, to a person employed in respect of his employment or of work done in such employment, and includes any bonus or other additional remuneration of the nature aforesaid which would be so payable and any sum payable to such person by reason of the termination of his employment. . . . . ." The argument is that the definition of " Wages " would bring within it not only wages earned during the period the employee has actually worked, but that even if he had not worked for the period and was otherwise entitled to the wages, it would still be wages, which the Commissioner would be competent to enquire as to whether it was deducted or delayed under section 15. Emphasis is laid on the word " otherwire " in the definition. But it has to be noted that the payment of the wages, whether conditional upon the regular attendance or otherwise, must form part of the terms of the contract. It is not suggested that the terms of the employment of the present petitioner were such that irrespective of his irregular attendance, he would be entitled to wages for any particular period. Obviously, wages will be paid for work done and regular attendance as the definition of the word indicates. It cannot be said therefore that the amount of salary and dearness allowance claimed for the period from 1st January, 1951 to 13th February, 1951, during which period he did not work, could be considered to be " Wages " within the definition of the term under the Act and as such the Commissioner was not competent to enquire into the present claim as it was neither deduction nor delayed payment. The claim is in effect damages for wrongful termination of services, and the proper course, if any, for him is to institute a suit for damages and not to claim wages under the

1. A.I.R. 1951 Bom. 423 : (1951) 2 Lab. L.J. 188.

Act and the forum is not the Commissioner but a Civil Court. The position is made clear by the Bench of the Bombay High Court in the case relied upon by the lower Court, where it is held that the jurisdiction of the authority under Payment of Wages Act is limited to all claims arising out of deduction of wages and delay in payment of wages only and it is competent to the authority to construe the terms of the contract to determine wages payable even on termination of the employment, to determine the factum of employment, and the liability of the master under the contract with regard to wages. It is clear that "wages" is dependent upon the terms of the contract and not otherwise, and if the terms of the contract do not show that the petitioner is entitled to continue in service irrespective of his not attending or working, then it may not be open to him to claim the sum as wages. Further, as pointed out in the Bench Judgment, the jurisdiction which the authority possesses does not extend to determine the question whether the contract has been terminated as alleged by the employer or the contract is still subsisting as alleged by the servant. The short question that requires to be considered in the present claim is as to whether there has been proper termination of the services according to the respondents, or whether the termination is wrongful according to the petitioner, which is a matter outside the scope of the authority appointed under the Act.

The Civil Revision Petition is dismissed. No costs.

R.M. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Valliammal and others .. *Appellants**

v.

Palani Goundan .. *Respondent.*

Civil Procedure Code (V of 1908), *section* 11—Res judicata—*Previous suit by* X *as presumptive reversioner for a declaration that the widow was entitled only to a life interest and a conveyance by her in favour of her daughter was not binding on the reversioner—Finding that* X *was the nearest reversioner—If operates as* res judicata *in subsequent suit by* X *after the widow's death for possession of the property as nearest reversioner.*

A finding that the plaintiff was the nearest reversioner in an earlier suit filed by the plaintiff as presumptive reversioner for a declaration that a conveyance executed by a widow (who suceeded to her umarried son's estate) in favour of her daughter does not operate as *res judicata* in a subsequent suit by the plaintiff as the nearest reversioner after the widow's death for possession of the property. The daughter though *eo nomine* impleaded in the first suit will be entitled to the estate to the exclusion of the plaintiff in accordance with the provisions of Act II of 1929. The question, who would be entitled to succeed to the estate on the death of the widow, did not arise for decision in the earlier suit.

Sarangapani Ayyangar v. *Narasimhacharyulu*, (1951) 2 M.L.J. 464, approved.

Appeal against the Decree of the Court of the Subordinate Judge of Coimbatore in Appeal Suit No. 136 of 1950 (A.S. No. 408 of 1949, District Court, Coimbatore) preferred against the Decree of the Court of the District Munsif of Erode in Original Suit No. 456 of 1948.

S. T. Srinivasagopalachari and *S. V. Venkatasubramaniam* for Appellants.

K. S. Desikan and *K. Raman* for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This second appeal involves a question of *res judicata.* It arises out of a suit for possession brought by the respondent claiming to be the reversioner to one Subbanna Goundan *alias* Subbaraya Goundan, who died in 1916. Subbaraya Goundan left behind him his widow, Pavayi Ammal, a son, Nachimuthu, and a daughter, Valliammal, the 1st defendant. The 2nd defendant is the son, and the 3rd defendant, the husband of the 1st defendant. Nachimuthu died unmarried on 6th December, 1928, and on his death his mother Pavayi Ammal

* Second Appeal No. 1680 of 1950. 3rd February, 1955.

succeeded to the properties left by Subbanna Goundan. Pavayi died in 1947. The suit was brought in July, 1948. There could be no doubt whatever that in accordance with the provisions of Act II of 1929, the 1st defendant would be entitled to succeed to the exclusion of the plaintiff. The plaintiff, however, claimed that he would be entitled to succeed because of the decision in a prior suit, O.S. No. 933 of 1932, brought by him in the following circumstances: On 22nd September, 1932, Pavayi executed a deed, in and by which she purported to convey the suit property to her daughter, the 1st defendant in the suit and her son, the 2nd defendant. The plaintiff brought a suit for declaration that as Pavayi was entitled only to a widow's estate in the properties under the Hindu Law, the deed, dated 22nd September, 1932, would not be binding on Nachimuthu's reversioners alive at the time of the death of Pavayi. Pavayi and her daughter resisted the plaintiff's suit on two grounds *viz.*, (1) that the plaintiff was not the nearest reversioner of the deceased Nachimuthu, and (2) that the settlement deed operated as a surrender by Pavayi to defendants 2 and 3. The learned District Munsif who tried the suit held that the plaintiff was the nearest reversioner of Nachimuthu, having regard to the decision in *Gavarammal* v. *Manickammal*[1]. He also held that as Pavayi had only a limited estate in the properties, she was not competent to convey them to the 1st defendant. The suit was, therefore, decreed. On appeal, the decision of the District Munsif was confirmed by the learned District Judge. He held that on the existing state of law, that is, in accordance with the decision in *Gavarammal* v. *Manickammal*[1], the plaintiff was the nearest reversioner, that the settlement deed was beyond the competence of Pavayi as limited owner and therefore it would not be valid and binding on the reversioner. The learned Judge observed that though ordinarily no Court would give a declaration that a particular person is the nearest reversioner as it was impossible to predict until the succession opened who would be the reversionary heir entitled to succeed, yet in certain circumstances it may be necessary to give an incidental finding whether the plaintiff in a particular suit was the nearest reversioner.

It is on the decision in the said suit that the plaintiff relies, as supporting his plea of *res judicata*. His plea was not accepted by the learned District Munsif. He found that the cause of action for the earlier suit was different from the cause of action for the present suit and the capacity of the plaintiff was also different. The question who would be entitled to succeed to the estate of the deceased Nachimuthu on the death of Pavayi did not arise for consideration in the earlier suit. Therefore, a mere finding that the plaintiff was the nearest reversioner on the date of the prior suit could not preclude the 1st defendant from claiming to succeed to the properties as the heir to her deceased brother. On appeal, however, the learned Subordinate Judge took a different view. He held that in order to decide whether the settlement deed was a valid surrender it was necessary to decide who was the nearest reversioner, and therefore the finding on that issue was necessary for the disposal of that suit and would operate as *res judicata* in the present suit. The fact that the prior decision was rendered on an erroneous construction of Act II of 1929, according to him, would not prevent the application of the rule of *res judicata*. He, therefore, allowed the appeal and granted a decree for possession to the plaintiff. Defendants 1 to 3 are the appellants before us.

We have no hesitation in holding that the learned District Munsif was right, and the learned Subordinate Judge was wrong, on the question of *res judicata* It is true that *eo nomine* the plaintiff in the present suit was the plaintiff in the previous suit, and the 1st and 2nd defendants in this suit were parties to the prior suit. But in law, the plaintiff had brought the previous suit in a capacity different from that on the basis of which he has instituted the present suit. In the prior suit, he claimed to be the nearest presumptive reversioner to the estate on the death of Pavayi. In the present suit, on the death of Pavayi, he claims to be the nearest reversioner entitled to succeed. A finding that on the date of the previous suit the plaintiff was the nearest presumptive reversioner, even though rendered in the presence of the

1. (1933) 66 M.L.J. 70 : I.L.R. 57 Mad. 718.

present 1st defendant, cannot operate as *res judicata* in this suit for possession brought by the plaintiff, after the death of Pavayi Ammal. The issue who is the reversioner entitled to succeed on the death of Pavayi falls to be decided in this litigation. It is common ground that as the law stands at present the 1st defendant would be the person entitled to succeed on the death of Pavayi.

A case in which the facts were very similar to the facts in the present case came up for decision before Viswanatha Sastri, J., in *Sarangapani Ayyangar* v. *Narasimhacharyulu*[1]. There, a person who claimed to be the presumptive reversioner of the last male owner filed a suit for a declaration that a settlement deed executed by the daughter of the last male owner claiming to be entitled to the properties absolutely was not binding on him and other reversioners. Both the daughter and the alienee were impleaded. The suit was decreed. A subsequent suit for recovery of possession of the lands was brought on the death of the daughter. Reliance was placed on the decision in the previous suit as constituting *res judicata*. It was held that the earlier decision to the extent it declared that the settlement was not binding on the plaintiff and other reversioners was *res judicata*. But it was not *res judicata* so as to bar the defendant from raising the question whether the plaintiff was the next heir entitled to succeed to the estate on the death of the daughter. The learned Judge pointed out that the title put forward by the plaintiff was different from or independent of the title put forward by him in the earlier suit and therefore the bar of *res jndicata* would not apply. We are in entire agreement with this decision of the learned Judge, and in particular with the following observations :—

"It is true that in the prior suit there was an issue as to whether the plaintiff was the nearest reversioner entitled to maintain the suit for a declaration of the invalidity of the settlement deed as against the reversioners. This issue was found in favour of the plaintiff, negativing the claim of a rival reversioner who claimed priority to the plaintff. But the question then was whether the plaintiff was the then presumptive reversioner and the question now is whether the plaintiff is now the next heir of the last male owner. A decision on the former question cannot conclude the latter. .... The title now put forward by the plaintiff is different from and independent of the title put forward in the earlier suit, and the bar of *res judicata* would not apply. The present claim of the plaintiff is based on his own individual right as heir which he could not possibly have included in the earlier suit filed as a presumptive reverioner. The prior decision cannot, therefore, be relied upon as *res judicata* on the question of the plaintiff's title to the property as heir-at-law." (page 468).

It follows from the above view that the plaintiff's suit must be dismissed. The second appeal is allowed and the suit is dismissed with costs throughout.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

The Public Prosecutor .. *Appellant**

v.

Annamalai Udayan and another .. *Respondents.*

Criminal Procedure Code (V of 1898), section 423 (1) (a)—Sentence that should be passed by the Appellate Court in case order of acquittal is set aside—Considerations.

Under section 423 (1) (a) of the Code of Criminal Procedure, a Court hearing an appeal may find the accused guilty and pass sentence according to law. The words 'pass sentence according to law' mean any sentence that could be given for the offence.

Maung E Maung v. *The King*, A.I.R. 1940 Rang. 118 and *Muthia Chetti* v. *Emperor*, (1905) I.L.R. 29 Mad. 190, referred.

The power of an appellate Court in hearing appeals against acquittals is not in any way restricted or limited to the powers of the trial Court. Though there is no such limitation or restriction, still, there is one circumstance which altogether cannot be ignored and which must be considered before imposing the sentence. That is, what is it that the accused would have got if he was convicted by the lower Court. The sentence passed by the appellate Court in an appeal against acquittal should not be more severe than what the accused would have got in the trial Court in case of conviction.

The accused should not be given a sentence greater than the maximum which the Magistrate who tried him could have awarded on conviction.

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1. (1951) 2 M.L.J. 464.

* Criminal Appeal No. 309 of 1953. 18th August, 1954.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondents (Accused) by the Stationary Sub-Magistrate of Omalur in C.C. No. 525 on his file.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) the Appellant.

S. Mohan Kumaramangalam for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal preferred by the State against the acquittal of the two accused by the learned Stationary Magistrate, Omalur, in C.C. No. 525 of 1952 on his file. The two accused were tried by the learned Magistrate for an offence under section 325, Indian Penal Code. The Police filed a charge-sheet against the two accused for the murder of one Velayudam who died as a result of injuries he received on 13th December, 1951. The case was taken as a Preliminary Register Case. Bur after evidence was let in, the learned Magistrate passed an order on 30th April, 1952, holding that only a *prima facie* case against the two accused under section 325, Indian Penal Code, was made out and discharged the accused of the offence of murder. A charge for an offence under section 325, Indian Penal Code, was framed against the accused and they were tried for that offence.

[After reviewing the facts and evidence in the case his Lordship concluded :—]

I therefore find both the accused guilty under section 325, Indian Penal Code.

As regards the sentence, the question is what sentence this Court can give in an appeal against acquittal. Under section 423 (1) (*a*), Criminal Procedure Code, the Court hearing the appeal may find the accused guilty and ' pass sentence according to Law '. What is meant by " passing sentence according to Law "? Does it mean any sentence within the sentence prescribed for the offence or is it restricted by the power of the trial Court ? In my opinion the words " pass sentence according to Law " mean any sentence that could be given for the offence. In *Muthiah Chetti* v. *Emperor*[1] interpreting section 106 (3), Criminal Procedure Code, it has been held that power given to an appellate Court to make an order under this section (*i.e.*) section 106 (3), Criminal Procedure Code, is not an unlimited power to make such an order in any circumstances, but is to be taken as giving the appellate Court power to do only that which the lower Court could and should have done, and therefore that the power of the Court to pass such an order is confined to cases where the conviction has been by a Court named in the section and in the circumstances required by the section. In this case, the words " sentence according to Law " mentioned in section 423 (1) (*a*) have not come up for consideration. But the scope of section 106 (3) is quite as wide as section 423 (1) (*a*) and the analogy may perhaps hold good. The above observations were approved and followed in *Maung E Maung* v. *The King*[2]. The facts in the Rangoon case are these :—

A first Class Magistrate convicted the accused on two charges of cheating and sentenced to two years rigorous imprisonment on the first charge and to one year on the second charge, the sentences to run concurrently. In appeal the Sessions Judge held that the obtaining of the two sums forms part of the same transaction and that a single charge must have been framed. The sentence was therefore altered to one of six months rigorous imprisonment and a fine of Rs. 3,000 in default three months rigorous imprisnment. In revision the High Court of Rangoon reduced the fine to Rs. 1,000, holding that the power given to the appellate Court under section 423 is not an unlimited power but is to be taken as giving the appellate Court power to do only that which the Lower Court could and should have done. This again does not touch the point in question. In the above case section 423 (1) (*b*), Criminal Procedure Code has come in for consideration and not (1) (*a*). The powers of an appellate Court in an appeal against a conviction were considered and they are certainly different in their scope from those of an appellate Court in an appeal against acquittal.

1. (1905) I. L. R. 29 Mad. 190. 2. A.I.R. 1940 Rang. 118.

The case in *Ponnuswami Servai* v. *Emperor*[1] is also a case of an appeal against conviction. It is of no assistance to the case under consideration.

In *Emperor* v. *Abasali*[2] the High Court was dealing with an appeal against acquittal. The accused was convicted by the First Class Magistrate and sentenced to one year imprisonment and a fine, but the Sessions Judge on appeal acquitted him. The High Court in setting aside the acquittal and convicting the accused has observed as follows :

> " Under the provisions of section 423, Criminal Procedure Code, I am now empowered to pass a new sentence within the powers of the Magistrate who tried the case."

The Nagpur case is the only case which touches this point, but there is no discussion. The full import of the words " pass sentence according to Law " has not been considered. There is no need to read into the section something which the words in their literal meaning do not imply. As I have said already, in my view, the power of an appellate Court in hearing the appeal against acquittals is not in any way restricted or limited to the powers of the trial Court. Though there is no such limitation or restriction, still there is one circumstance which altogether cannot be ignored and which must indeed be considered before imposing the sentence and that is what is it that the accused would have got if he was convicted by the Magistrate. He would not have got more than six months, the maximum the Second Class Magistrate who tried him can give. The fact that he has been acquitted should not place him in a more disadvantageous position than if he were convicted. The sentence should not therefore be more severe than what he would have got in case of conviction. In this view I would refrain from passing any sentence other than what the Lower Court is competent to give. I would therefore sentence both the accused each to six months rigorous imprisonment for the offence under section 325 read with section 34, Indian Penal Code.

R.M. ——— *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

The Board of Revenue, Chepauk, Madras .. *Referring Officer**

v.

K. Venkataswami Naidu .. *Respondent.*

Stamp Act (II of 1899), Schedule I-A, Article 30 (a) (1)—Lease of properties relating to a touring cinema, though capable of being removed but fastened to earth when in use—If liable to stamp duty as a lease of immoveable property.

A lease of properties relating to a touring cinema (tent and machines) though collapsible and capable of being removed, but permanently fastened to the earth when in use is not chargeable to stamp duty under Article 30 (*a*) (1) of Schedule I-A of the Stamp Act as in the nature of things such properties cannot be immoveable property. The poles of the tent and the machinery are imbedded in the earth only temporarily and not permanently.

A lease of such property is not chargeable to stamp duty under Article 30 (*a*) (1) of Schedule I-A of the Stamp Act.

Case referred to the High Court by the Board of Revenue, Madras, under section 57 of Stamp Act in pursuance of the order of the High Court dated 15th September, 1953 and made in W.P. No. 214 of 1952 for its opinion.

The Government Pleader (*C. A. Vaidialingam*) on behalf of the Referring Officer.

Messrs. *C. Ramanujam* and *V. Ramaswami*, for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—The question referred to us by the Board of Revenue for our opinion is whether on the facts and in the circumstances of the case, the lease

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1. 1938 M.W.N. 39.
2. A.I.R. 1935 Nagpur 139.

* Case Referred No. 102 of 1953. 28th March, 1955.

of properties relating to a touring cinema, though collapsible and capable of being removed, but permanently fastened to the earth when in use is chargeable to stamp duty under Article 30 (*a*) (1) of Schedule I-A of the Stamp Act II of 1899.

The answer to the question depends upon whether the equipment of the touring cinema would fall within the category of immoveable property. We have no hesitation in holding that it does not. In the question referred to us, the properties are described as collapsible and capable of being removed. In the very nature of things properties of that nature cannot be immovable property. The expression "permanently fastened" occurring in the question is a little misleading. Actually some of the machinery or the poles of the tent may be imbedded in the earth, but they are imbedded only temporarily and not permanently. If they were permanently fixed, the equipment would not form part of a touring cinema.

We have been taken through the material provisions of the lease deed and there is nothing therein, which lends support to the view that the lease covers any immoveable property. In our opinion, the lease in question is not chargeable to stamp duty under Article 30 (*a*) (1) of Schedule I-A of the Stamp Act.

K.S. ——— *Referrence answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MACK AND MR. JUSTICE KRISHNASWAMI NAYUDU.

Nariman K. Irani and another .. *Petitioners**

v.

A. Batcha Sahib .. *Respondent.*

Court-fees Act (VII of 1870), section 7 (iv) (c) and Proviso—Suit by mortgagor against mortgagee for a declaration and injunction that the proposed exercise of the power of private sale under 69 of the Transfer of Property Act is not valid—If could be valued notionally.

The expression 'with reference to any immoveable property' in the proviso to section 7 (*iv*) (*c*) of the Court-fees Act means that the dispute should relate to title to immoveable property or to the possession thereof in the sense that the relief sought for must be directly connected with or should be held to affect a plaintiff's rights to possession and ownership of the immoveable property. Unless a decision as to the right of either of the parties to title to possession is necessary, for the plaintiff to obtain the relief prayed for, the mere circumstance that the suit has some connection with immoveable property as in case where a private sale of immoveable property under section 69 of the Transfer of Property Act is sought to be stayed, would not be sufficient to hold that the relief sought for is with reference to immoveable property. The relief sought in such cases relate only to the exercise of the power of sale vested in the morrtgagee under section 69 of the Transfer of Property Act and as such exercise, according to the plaintiff, would be illegal, a declaration is necessary and an injunction has to be granted restraining the mortgagee from carrying out the illegal act. The decision of that dispute, *viz.*, whether the plaintiff's contention that the power sought to be illegally exercised is correct does not involve any adjudication as regards the parties' title to the property or their respective right to possession. The relief is one directed personally against the mortgagee. The plaintiff is entitled to put any notional value in such cases. But the suits in such cases being for a declaration and consequential relief, the notional value put by the plaintiff would be the same for purpose of jurisdiction under the Suits Valuation Act.

Similarly to grant a relief of declaration that any sale of the plaint property without the intervention of Court would be wrongful, illegal and void as a result of certain statutes giving protection to agriculturist debtors and an injunction is sought for on that ground it would not be necessary to embark on an inquiry involving ascertainment of the actual amount due under the mortgage and Court-fee need not be paid on the *ad valorem* basis.

Petition under sections 115 and 151 of Act V of 1908 praying the High Court to revise the order of the II Additional Judge of the City Civil Court at Madras dated 6th September, 1954 and made in O.S. No. 980 of 1954.

R. Gopalaswami Ayyangar, T. T. Srinivasan and *A. N. Rangaswamy* for Petitioners.

T. C. A. Anandalwar, K. Krishnaswami Ayyangar and *K. Venkateswaran* for Respondent.

* Civil Revision Petitions Nos. 1663 and 1666 of 1954. 27th January, 1955.

The Court delivered the following Judgments:

Mack, J.—I have had the advantage of perusing the order of my learned brother on this vexed question of Court-fee arising out of section 7, clause (*iv*) (*c*) of the Court-fees Act which, as it stands, gives a plaintiff a right to value the relief he seeks in any manner he pleases in a suit to obtain a declaratory decree or order where consequential relief is prayed for. This right unrestricted in cases coming within the scope of section 7, clause (*iv*) (*a*), (*b*), (*d*), (*e*) and (*f*) is circumscribed by the proviso added by section 6 of the Court-fees (Amendment) Act, 1922, that in suits coming under section 7, clause (*iv*) (*c*) where the relief sought is with reference to any immovable property, such valuation shall not be less than half the value of the immovable property calculated by section 7 (*v*). If that proviso is applicable to the suits before us filed by a mortgagor and puisne mortgagee for a declaration and injunction to restrain the mortgagees exercising their powers of sale under section 69 (3) of the Transfer of Property Act, the amount due on the mortgages including unscaled interest amounting to about eight lakhs, not only will a very substantial *ad valorem* Court-fee be payable but the suits will be far above the financial jurisdiction of the City Civil Court which is limited to Rs. 10,000.

The petitions raise, as it appears to me, a general and a special point for determination: (1) the valuation for Court-fee and jurisdiction, which under section 8 of the Suits Valuation Act must be the same, on suits such as these by a mortgagor or puisne mortgagee to restrain the mortgagees from exercising their powers of sale under section 69 and (2) the Court-fee payable on a suit or proceeding by a mortgagor who claiming to be an agriculturist seeks to have the scaled down amount declared and to restrain the mortgagee from exercising his powers of sale except to the extent of the scaled down amount.

The short facts relevant to my approach to this fiscal question are these. The original mortgagees, Mr. and Mrs. Irani are the holders of several mortgages, some of them by assignment, from the mortgagor Batcha Sahib, and, acting under section 69 of the Transfer of Property Act notified the hypotheca, which comprises cinemas and urban property in Madras, and also extents of wet and arable land outside the City of Madras for sale in 1953. The mortgagor, Batcha Sahib, first filed a suit, O.S. No. 1490 of 1953, in the City Civil Court for a declaration that the attempt to exercise the power of sale by the mortgagees was wrongful and illegal and for an injunction to restrain the sale notified for 15th October, 1953, or any other date. Various grounds were alleged, namely, that the mortgagors would be put to great loss, that the mortgagees were actuated by a desire to knock away the property for a song, that the statutory requirements of section 69 were not fulfilled and so on. This suit was valued at Rs. 15 for declaration and Rs. 15 for an injunction in accordance with what is stated to be existing practice in the City Civil Court and a very small Court-fee paid. It was dismissed as withdrawn in terms of a consent memo. filed before Satyanarayana Rao and Rajagopalan, JJ., in C.M.A. No. 698 of 1953 which was heard along with a Letters Patent Appeal in an interlocutory matter, by which the mortgagor agreed to pay the mortgagees Rs. 1,60,000 on or before 15th August, 1954 and the mortgagee agreed to release a cinema in Pallavaram and 1.4 acres in a village to enable the mortgagor to make the payment, and the power of sale, if no default was made was not to be exercised on or before 15th August, 1954. Then, in May, 1954, the mortgagor filed O.S. No. 980 of 1954 in the City Civil Court claiming to be entitled to relief under section 13-A of the Agriculturists Relief Act as amended by Act XXIII of 1948. Under this amendment and also under Act V of 1954, known as the Moratorium Act, he sued for a declaration valued at Rs. 100 that a sale by the mortgagee without intervention of Court in any event before 7th February, 1955, the date on which the Moratorium Act expired, will be wrongful, illegal and void and also for an injunction which he valued at Rs. 5 to restrain such a sale and paid a Court-fee of only Rs. 15-8-0. A second suit, O.S. No. 996 of 1954, for the same reliefs and similarly valued was filed by a puisne mortgagee. The suits were vigorously resisted by the mortgagees mainly on the ground that the proviso to section 7 (*iv*) (*c*) was applicable.

The learned City Civil Judge following a line of decisions held that this proviso did not apply to this category of suit. I do not wish to re-traverse the reasons or the case-law which my learned brother has given in support of this view except to say that I find it extremely difficult in view of the language of the Act, the case-law relied on and the existing practice to take a different view. The main difficulty I have felt in deciding this fiscal question is simply that in my view such a suit by the mortgagor to restrain a mortgagee from bringing the hypotheca to private sale under section 69 of the Transfer of Property Act should lie only in the Court which has jurisdiction to try any suits filed on the mortgage itself such as a suit for sale or a suit for redemption. It is not disputed that such a suit would not lie in the City Civil Court within the limits of its present financial jurisdiction. If, however, the proviso to section 7 (*iv*) (*c*) is held not to apply to a suit of this kind, I am unable to think of any legal reason to justify a finding that these suits do not lie in the City Civil Court, but can only be filed for these declarations and consequential reliefs on the Original Side of the High Court. I should have thought that in a case of this kind the parties would ordinarily institute such declaratory and injunction suits in the Court which has jurisdiction to give relief on the mortgage itself. Had the suits been filed in the Original Side of the High Court and had under section 7 (*iv*) (*c*) the suit been valued with the minimum Court-fee payable in that higher forum, I should have felt no difficulty at all in this matter. This, however, is a question which has to be considered separately and I am constrained to agree with my learned brother that as a general principle the proviso to section 7 (*iv*) (*c*) will not govern this category of cases.

Unfortunately in suits filed under section 7 (*iv*) (*a*) to (*f*) a plaintiff is entitled to give a notional value to the relief he claims in the plaint, in other words, to value it as he pleases and therefore he is given a statutory right in fact to choose his own forum. He can go to a Munsif's Court for relief valuing his prayers for declaration and injunction in important and complicated matters where valuable rights are put in jeopardy and from this low forum indulge in a cycle of most expensive litigation on the Court-fee of a few rupees. A great deal of speculative litigation which takes a very great deal of Court time falls within these categories of suits which the plaintiffs have the privilege of valuing at will and a choice of forum. Court-fees have gone higher and higher on plaints seeking relief in money, damages or recovery of possession of property in a straightforward manner. But this privilege which plaintiffs have in suits under section 7 (*iv*) is one which has been abused in an increasing manner, and by way of reaction to the comparatively exorbitant Court-fee charged in suits avenues are being constantly exploited to evade it by couching reliefs in declaratory form to enable them to be valued at will under section 7 (*iv*). The question of Court-fee in suits under section 7 (*iv*) has steadily degenerated into a battle of wits between Courts and litigants with a resulting and continuing headache to Courts and their administrations. The Court-fees Act and the case-law under it has become a compendium of really anomalous absurdity to which with respect I feel we are making a further addition and which can in my view be only relieved by a radical change in the whole system of Court-fees the existing Act violating all accepted canons of Court taxation and opening up avenues for Court-fee evasion and exploitation which have really gone beyond control. It is with the greatest reluctance that in these matters I have no option, with the Court-Fees Act as it stands, but to agree with my learned brother that plaintiffs are entitled to value these suits as they please, and also to institute them in the lowest forum of their choice on this *prima facie* miserably inadequate Court-fee in relation to the mortgage amount and the property involved.

Coming to the special point these petitions raise, Mr. Anandalwar, for the the mortgagor, complained that the simple and easy remedy afforded by section 19-A of the Madras Agriculturists Relief Act of having the scaled down amount under section 13-A determined by the Court having jurisdiction on a simple twelve-anna application was not open to him, and gives this as the reason why he had recourse to this suit for an injunction. The mortgagor was admittedly not an agriculturist as defined by section 3 (2) of Madras Act IV of 1938, but section 13-A

gives relief to persons who would be agriculturists but for the operation of proviso (*b*) or (*c*) to that section, in other words including within the definition of an agriculturist those who pay profession and property tax but excluding those who pay income-tax. The mortgagor's case is that he has not paid income-tax for several years prior to suit. In *Venkatanarayana Rao* v. *Champalal*[1], Rajamannar, C.J. and Venkatarama Ayyar, J., confirming a judgment of Rajagopalan, J., held that an application under section 19-A for a delcaration of the scaled down amount of a debt was not open to a person claiming to be entitled to relief under section 13-A and that the remedy of such a person was by way of a suit or in a suit filed against him. I am in complete agreement with my learned brother that the City Civil Court has no jurisdiction at all to scale down these mortgage debts, the only Court having jurisdiction to do so being the High Court on its Original Side. We observe that there is an issue as regards the quantum of scaling down which the City Civil Court has no jurisdiction to determine.

The scope of these two suits filed in the City Civil Court on arbitrary valuations of the plaintiffs is very limited and only concerns an injunction against the mortgagees restraining their exercise of powers of sale under section 69 pending a determination of the question as to whether the mortgagor is entitled to relief under section 13-A and if so what the scaled down amount is. This is most important as it is obvious that the mortgagee cannot bring the property to sale except for the scaled down amount under section 13-A. Mr. Anandalwar for the mortgagor complains that in order to avoid a suit for redemption of the mortgage on the Original Side of the High Court on which a very heavy *ad valorem* Court-fee would be payable, he even attempted to file some form of petition under section 69-A of the Transfer of Property Act with a prayer for a determination of the scaled down amount but that this was returned with objections. He informs me to-day that it had since been admitted. I make no comment on this new remedy sought which I have not examined. It is ordinarily outside the province of a Judge to suggest remedies, but both the mortgagor and the mortgagees by their contentions in these suits filed have got themselves as it appears to me into unnecessary fiscal difficulties as regards jurisdiction and Court-fees. On the one hand the mortgagee cannot bring the property to sale except for the scaled down amount if the mortgagor is eligible for relief under section 13-A. On the other hand the mortgagor has no right to a permanent injunction restraining the mortgagee from exercising his powers of sale indefinitely. In order to break this deadlock it was I think open to the mortgagor to have filed a regular suit for a determination by way of a declaration of the scaled down amount and for an injunction restraining the mortgagee from exercising his powers of sale under section 69 except for the amount so scaled down but in the proper forum. Such a suit for a declaration and injunction can in my view be valued under section 7 (*iv*) (*c*) but the minimum Court-fee payable on the Original Side of the High Court would have to be paid. The mortgagor will then be in a forum which has full jurisdiction to determine the vital scaling down issue. I do not think that the apprehensions that such a suit would be regarded as one for redemption are well-founded though such an objection may be raised. In such a suit if the mortgagor concedes the right of the mortgagee to bring the hypotheca to sale for the sacled down amount under sction 69 of the Transfer of Property Act the only issue that could arise for determination would be whether the mortgagor was entitled to relief under section 13-A and if so, to what extent.

I have gone out of my way perhaps in indicating to the mortgagor who has landed himself in a fiscal difficulty the correct remedy by way of suit which he should have pursued. I consider, however, that in determining a vexed question of this kind a Judge should do his best to indicate the correct avenue of relief resulting from defective legislation. It may be that the Legislature may in view of the decision in *Venkatanarayana Rao* v. *Champalal*[1], introduce a further amendment to give persons claiming relief under section 13-A the simple and cheap remedy accorded by the Act to other agriculturists. As matters stand, in view of this decision,

1. (1951) 2 M.L.J. 530.

a mortgagor claiming relief under section 13-A need not file a suit for redemption but can obtain much cheaper relief through the avenue I have suggested. The petitions are dismissed but without costs.

Krishnaswami Nayudu, J.—These revision petitions raise the question of Court-fee and jurisdiction in regard to O.S. Nos. 980 and 996 of 1954 on the file of the City Civil Court, Madras. They are suits instituted by the mortgagor and puisne mortgagee of a number of valuable properties in the City and mofussil for a declaration that the sale proposed to be held by the defendants-mortgagees in pursuance of the power of sale vested in them under section 69 of the Transfer of Property Act without the intervention of Court would be wrongful, illegal and void and for an injunction restraining the mortgagees from exercising the right of sale without the intervention of Court. The plaintiffs have put up their own valuation for declaration and injunction, declaration being valued at Rs. 100 and injunction at Rs. 5 and paid a Court-fee of Rs. 15 and annas 8 respectively. The mortgagees contended that the suits have not been properly valued for purposes of Court-fee and jurisdiction and the proviso to section 7, clause (*iv*) (*c*) of the Court-fees Act would be applicable to the case and the suits must be valued at half the value of the immoveable properties mortgaged and not on the basis of notional valuation put up by the plaintiffs. One of the issues raised in the case was whether the suits were properly valued for purposes of Court-fee and jurisdiction, and, if not, whether the suits were within the limit of the pecuniary jurisdiction of the City Civil Court and whether the Court had jurisdiction to entertain the suits. This issue was taken up and argued as preliminary issue and the learned City Civil Judge found that the suits have been properly valued and the proviso to section 7, clause (*iv*) (*c*), has no application to the present cases.

The main contention of the plaintiffs in respect of their claim for declaration and injunction regarding the proposed sale of the propeties was that the mortgagor and the puisne mortgagee are agriculturists both within the meaning of the Madras Agriculturists Relief Act (IV of 1938) and the Moratoriam Act (V of 1954), that the mortgagees are purporting to bring the properties to sale for recovery of a large sum of Rs. 8 lakhs and odd, that, on a scaling down of the mortgage debt, the amount that would be found due would be less than Rs. 4,03,000 and some of the mortgages will be wiped out and discharged and that the mortgagees have therefore no right to sell the properties on the basis of the claim regarding the amount due on the mortgages and that, if the properties are sold on the foot of the mortgagees' present extravagant claims, they would be acting in a fraudulent and improper manner and any such sale in pursuance of the power of sale would thereby be wholly void. They therefore prayed for a permanent injunction restraining the mortgagees from selling the properties without the intervention of the Court. In any event, they claimed that they are entitled to a permanent injunction till 6th February, 1955, the period of the moratoriam specified under Act V of 1954.

The short question therefore is whether the suits being for declaration and for injunction, which is a consequential relief, could be valued on the notional value put up by the plaintiffs, or whether the proviso to section 7, clause (*iv*) (*c*) is applicable, which would then necessitate the valuation both for purpose of Court-fee and jurisdiction at half the value of the immovable properties, which will far exceed the pecuniary jurisdiction of the City Civil Court and the suits therefore could not be considered to have been instituted in a Court of competent jurisdiction. The decision of this question turns upon the meaning to be given to the expression "with reference to any immovable property" in the proviso. Section 7 of the Court-fees Act provides that "the amount of fee payable under the Act in the suits next hereinafter mentioned shall be computed as follows"; and clause (*iv*) (*c*) relates to a suit "to obtain a declaratory decree or order, where consequential relief is prayed" and the computation of the fee shall be according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. The plaintiff therefore in a suit to obtain a declaratory decree or order, where consequential relief is prayed, is entitled to give a notional valuation on both the relief as to dec-

laration and the consequential one and decide on the basis of such valuation the forum for the suit. The proviso to the section is in the following terms :

> " Provided that in suits coming under sub-clause (*c*) in cases where the relief sought is with reference to any immovable property, such valuation shall not be less than half the value of the immovable property calculated in the manner provided for by paragraph (*v*) of this section ".

The contention of the petitioners-mortgagees is that these are suits where the relief sought for is with reference to immovable properties. *Prima facie* this contention appears to be correct, as it cannot be denied that the suit has reference to immovable properties, which have been mortgaged and the relief asked for is that those immovable properties should not be sold without the intervention of Court. The meaning that should be given to the expression "with reference to any immovable property" has been the subject of consideration in a number of decisions of this Court, which were all referred to by the learned City Civil Judge in his judgment, to one of which, one of us, *i.e.*, myself was a party. The view taken by this Court as regards the interpretation of that expression has been that the disputes should relate to title to immovable property or to the possession thereof in the sense that the relief sought for must be directly connected with or should be held to affect the plaintiffs' rights to possession and ownership of immovable properties. Unless a decision as to the right of either parties to title or possession is necessary for the plaintiff to obtain the relief prayed for, the mere circumstance that the suit has some connection with immovable property, as in the present case, where the sales of immovable properties are sought to be stayed, would not be sufficient to hold that the relief sought for is with reference to immovable property.

One of the earliest decisions, which has a bearing on the present question is that of Varadachariar, J., in *Gurunatha* v. *Secretary of State for India*[1], where a mittadar sued for a declaration that in respect of certain lands in his mitta he was entitled to take water from a river free of irrigation cess and sought to recover a sum of money illegally levied from the Secretary of State for India in Council, who was the defendant in the suit. The learned Judge, with reference to a contention that the suit should have been valued under the proviso to section 7, clause (*iv*) (*c*), observed that the *prima facie* interpretation of the expression "that the relief sought is with reference to any immovable property" is that the dispute should in some sense relate to the title to immovable property, following the opinion taken by Jackson, J., in In re *Venkatakrishna Pathar*[2], and agreeing with the view of Jackson, J., as to the difficulties and anomalies to which any other construction will lead. In In re *Venkatakrishna Pathar*[2], the suit was with reference to the right of easement, and Jackson, J., observed that inasmuch as the relief sought is the declaration of the right of easement, the relief may be said to be with reference to immovable property, but the proviso should be read with the clause so as to make 'with reference to' mean 'involving the possession of land, houses or gardens', and then the proviso would not be applicable to easements at all. As regards easements, in the Madras amendment of the Court-fees Act, V of 1922, a separate sub-clause, sub-clause (*e*), has been provided. Varadachariar, J., further observed in *Gurunatha* v. *Secretary of State for India*[1], as follows at p. 965 :

> " In the present case, there is no dispute about the plaintiff's title to his mitta ; nor is he seeking a declaration even in respect of a right of easement in the strict sense. He is merely asking for an immunity from assessment. It seems to me to be putting a very unnatural interpretation on the words of the proviso to say that in the present suit relief is sought with reference to immovable property ".

Similar is the view taken in *K. J. V. Naidu*, In re[3], *Pappukannu Anni* v. *Thoppayya Mudaliar*[4], *Venkateswara Rao* v. *The Municipal Council, Masulipatnam*[5], and *Thrignana Sambanda Pandara Sannadhigal* v. *The State of Madras*[6].

1. (1935) 70 M.L.J. 625: I.L.R. 59 Mad. 962.
2. (1926) 52 M.L.J. 121.
3. (1946) 1 M.L.J. 61 : I.L.R. (1946) Mad. 885.
4. (1952) 2 M.L.J. 108.
5. (1953) 2 M.L.J. 524.
6. (1953) 2 M.L.J. 548.

In *Marimuthu Nadar* v. *Tuticorin Municipality*[1], I had occasion to deal with the question arising out of the interpretation of the expression "with reference to immovable property" and, after reviewing the relevant decisions on the question, I observed that though the reliefs asked for may be in some way connected with immovable property, no question of title to or right to possession of the immovable property arises in the sense that such a right or title has been denied by the defendants and that the declaration and injunction had become necessitated thereby. That was a case in which the plaintiffs asked for a declaration that a certain scheme framed by the Municipality under the Town Planning Act was illegal and *ultra vires* and for an injunction restraining the Municipality from enforcing all or any of the provisions of the scheme against the plaintiff. I observed in that case that both the substance of the plaint and the reliefs asked for related only to the proposed scheme and were not directed against any immovable properties and that the scope of the suit was confined to the defendants' rights to exercise the powers under the Madras Town Planning Act.

The reliefs sought in the present cases relate to the exercise of the power of sale vested in the mortgagees under section 69 of the Transfer of Property Act, as such exercise, according to the plaintiffs, would be illegal and therefore a declaration is necessary that any sale held in pursuance of such an illegal exercise of the power would be invalid and void and an injunction has to be granted restraining the mortgagees from carrying out the illegal act. From the mere fact that the reliefs asked for have some connection with immovable properties, it should not be understood that the relief asked for has reference to immovable properties. The relief must not only have reference or relation to immovable property, but must directly pertain to immovable property in the sense of asking for a declaration of title to or possession of the property or injunction restraining the defendants from questioning the title or interfering with possession or similar reliefs the granting of which would result in establishing some right to or in immovable property either arising out of title or possession. The point in dispute is as to the exercise of the power by the defendants and a decision of that dispute, *viz.*, whether the plaintiffs' contention that the power sought to be illegally exercised is correct, on which decision would depend the granting or othersise of the relief prayed for. No decision or adjudication is required in this case as to the parties' title to the properties or their respective rights to possession. The relief is purely one directed personally against the mortgagees from doing an act which they have been authorised to do under the contract of mortgage by reason of a power vested in them under section 69 of the Transfer of Property Act. The position of a mortgagee exercising the power of sale is that of an agent, the principal being the mortgagor, under whose authority he purports to sell the property. Virtually therefore the suit is by the principal against the agent and the Court's assistance is sought for to restrain the agent from acting beyond the authority conferred on him and contrary to the provision of law under which such authority has been conferred and which is sought to be exercised. In any view, I am unable to discover in this suit any question arising for decision and having any direct relation to the mortgaged properties. The matter in dispute or the subject-matter of the suit is the exercise of the power under section 69 and not the properties mortgaged. Nor could it be suggested that the injunction is to deprive the mortgagees of the power of sale. But it is only to defer it for a limited period until such time as the amount that really becomes payable under the mortgages is ascertained by the application of the provisions of the Agriculturists' Relief Act.

Mr. Gopalaswami Ayyangar sought to distinguish the cases cited on the respective facts of the cases, but we have no doubt that the principles adopted in those cases have direct application to the present cases. Learned counsel further sought to argue that by asking the Court to interfere with the power of sale by issue of an injunction, the real relief prayed for is as regards the right of the mortgagees

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1. (1954) 1 M.L.J. 279.

to convey title to a third party, who might become the purchaser, and as such question of title to property directly arises. I am unable to understand how, before the exercise of the power of sale, any question of title to immovable property could arise. No dispute arises as to whether the mortgagee by exercise of the power could convey valid title to the purchaser. As already observed, the fact that the reliefs may have some bearing or indirect or remote relation would not be sufficient to hold that the suits affect any question of title or involve the decision as to title or possession of immovable property.

It is further pointed out that, on the allegations in the plaint, it will be necessary for the City Civil Court to scale down the mortgage debts and ascertain the amounts due under the Agriculturists' Relief Act (IV of 1938) and therefore the suits are in substance for scaling down the mortgage debts, which, considering the largeness of the amount, would be beyond the pecuniary jurisdiction of the City Civil Court. It is needless to state that the suits being for declaration and consequential relief, the notional value put upon them by the plaintiffs would also be the value for purposes of jurisdiction under the Suits Valuation Act (VII of 1887). It is therefore urged that the plaints are in substance for scaling down the mortgage debt and the proper forum would be the High Court on its Original Side. The question as to whether the scaling down of a mortgage debt, where the debtor becomes entitled to the benefit of scaling down by being an agriculturist under the amended provisions of section 13-A of the Agriculturists' Relief Act, could be by way of an application under section 19-A of the Act or a suit is concluded by the decision of the Bench of this Court in *Venkatanarayana Rao* v. *Champalal*[1], the view being that no such relief could be granted in a proceeding under section 19-A. It is therefore suggested that the proper course would be by a suit, which, considering the pecuniary interests involved, would undoubtedly be beyond the jurisdiction of the City Civil Court, whatever may be the form of the proceeding. Our attention is drawn to the issues raised in the suits, especially to issue 7 in O.S. No. 996 of 1954, *viz.*:

" Are the mortgage debts mentioned in the plaint, or any of them, liable to be scaled down under Act (IV of 1938), and, if so, what is the amount due thereon ".

It is therefore urged that the suits are virtually for scaling down of the mortgage debts, which are obviously beyond the competence of the City Civil Court. It is really unnecessary to make any observations as regards the scope of the suits, as it is not the contention of the mortgagees that the suits have to be valued as proceedings for scaling down, the only plea of the mortgagees being that the proviso to section 7, clause (*iv*) (*c*) is applicable and that the Court-fee has to be paid on half the value of immovable property. But since the question has been raised, we consider it desirable to examine the scope of the suits whether it would be really necessary for the City Civil Court to find out the exact amount due under the mortgages by the application of Agriculturists' Relief Act. In our view, to grant the reliefs prayed for, namely, the declaration that any sale of the plaint schedule properties without the intervention of Court would be wrongful, illegal and void and the permanent injunction restraining them from selling the properties, it would not be necessary to embark on an enquiry involving ascertainment of the actual amount due under the mortgages. The plaintiff's right to have an injunction would depend upon the decision as to whether they are agriculturists entitled to relief under Act IV of 1938, and if so the irresistible conclusion should be that they would not be liable to pay the sum of 8 lakhs and odd for which the mortgagees purport to bring the properties to sale. That would be sufficient in our view to grant the reliefs prayed for and there will be no need to ascertain the amount, which, however, could only be effectively dealt with in proper proceedings instituted in a Court of competent jurisdiction. This question, however, does not arise for decision in these appeals as the

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1. (1951) 2 M.L.J. 530.

objection to Court-fee and jurisdiction is based on different grounds, which we have already dealt with.

In the result, the Civil Revision Petitions are dismissed. No order as to costs.

R.M. —— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT : MR. JUSTICE GOVINDA MENON.

Chovvakkaran Pazhukkath Assankeyi .. *Appellant**

v.

Punathil Velayuthan Cheria Ummer and others .. *Respondents.*

Co-sharers—Suit for share of income of the property—Starting point of limitation—Limitation Act (IX of 1908), Article 120—Applicability.

A co-sharer's suit for his *share of the joint property* is governed by Article 120, Limitation Act and the cause of action in such cases arises when there is a denial of the co-sharer's right or hostile assertion is made ; the reason being that possession of one co-sharer is never considered adverse until there is an ouster by the other. But that principle cannot be extended to income of the property. Because it is not certainly the duty of a co-sharer to collect the income and pay their shares to the other co-sharers even if there is no demand. The mere fact that there is no ouster or assertion of hostile title would not entitle a co-sharer who has not received the income to claim it for any period more than six years. The cause of action in such case must be deemed to arise when the income accrues and not when there is a denial of the co-sharer's right. Hence mesne profits in such cases cannot be claimed for more than six years prior to the date of the suit.

Visalakshi Amma v. *Madhava Menon*, (1942) 1 M.L.J. 408, doubted.

Appeal against the decree of the Court of the Subordinate Judge, Tellicherry, in Appeal Suit No. 127 of 1948 preferred against the decree of the Court of the Additional District Munsif of Tellicherry in Original Suit No. 519 of 1946.

D. A. Krishna Variar for Appellant.

K. Kuttikrishna Menon, V. Balakrishna Eradi and *K. P. Ramakrishna Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The suit out of which this Second Appeal arises was for partition and recovery of possession of a half share in the property, the acquisition of which was admittedly under Exhibit A-1, dated 6th January, 1896, in the name of the first defendant and his two younger brothers, Kunhi Hasan Kutti and Hasan Kutti of whom the last two are dead. The second defendant is the son of Kunhi Hasan Kutti. Hasan Kutti died long ago and his widow and children do not come on the scene at all. The plaintiff is an assignee of the rights from the second defendant and on the footing that under Exhibit A-1 the three brothers acquired the property as tenants in common and when Hasan died and nobody claimed his share the surviving brothers alone were entitled to the property, the plaintiff being entitled to the half share of the second defendant claims his assignors' rights. The third defendant is a mortgagee from the first defendant on the basis that on the death of his brothers the first defendant became solely entitled to the property in question and as such could deal with it as his own property. The fourth defendant is the purchaser of the equity of redemption of the first defendant. In the trial Court the defence was set up that there was an oral partition between the first defendant and his brother, Kunhi Hasan and as such the present suit for partition is not maintainable. It was also alleged that the acquisition under Exhibit A-1 was Putravakasam property in which case Kunhi Hasan and his personal heirs had no right to it at all. There were pleas regarding limitation as also in regard to the liability to pay mesne profits.

Both the lower Courts have decreed the suit on the footing that the plaintiff is entitled to a half share in the suit property. On the question of mesne profits the lower appellate Court has held that the cause of action arises only when the right

* Second Appeal No. 524 of 1950. 24th February, 1955.

of the plaintiff is denied or from the time when there was ouster. Such being the case the plaintiff was given a decree for mesne profits as claimed in the plaint for ten years prior to the date of the suit, the amount to be decided at the time of the final decree proceedings. The third defendant is the appellant.

The main contentions raised in this Court are the same as were urged in the lower appellate Court. In the lower appellate Court it was not seriously contended that the property belonged to any Putravakasam tavazhi and therefore it is pointless to agitate the question afresh in this second appeal. Even otherwise neither the first defendant nor the third defendant has put forward the Putravakasam nature in their written statements though there was an issue raised about it. In paragraph 3 of the first defendant's written statement he admits that the plaint schedule property belonged jointly to himself and his brothers, Kunhi Hasan Kutti and Hasan Kutti. To the same effect is the averment contained in paragraph 5 of the written statement of the third defendant. Since the matter has not been seriously contended in the lower appellate Court, I shall not be justified in acceding to the contention of Mr. Krishna Variar that on a construction of Exhibit A-1 it should be deemed that the acquisition was made for and on behalf of the Putravakasam tavazhi. Exhibits A-5 to 12 do not show that the first defendant purported to act as the karnavan of the tavazhi. What is urged on behalf of the respondent is that at the time of the acquisition which admittedly was with the funds of the father of the three brothers there was their mother alive as also their sister and since the acquirer excluded the mother and the sister from the document it should be deemed that he intended the three named individuals alone to be the sole beneficiaries. To this, the appellant counters by stating that there is no clear evidence regarding the existence of the sister and the exclusion of the mother would not show that the intention of the father was not to benefit the tavazhi as such. Learned counsel relied upon the full bench decision in *Chakra Kannan* v. *Kunhi Pokker*[1], which supports the point of view urged by him. Mr. Krishna Variar contends that the absence of any serious contention regarding the Putravakasam nature of the property was due to the fact that in *Thatha Amma* v. *Thankappa*[2] it has been held that if the gift is in favour of some of the children by the father without the others being named *eo nomine* then it must be deemed that it is not for the tavazhi but only for the individuals concerned departing to a certain extent from the decision in *Chakra Kannan* v. *Kunhi Pokker*[1]. I do not think that the learned judges in *Thatha Amma* v. *Thankappa*[2] could have in any way whittled down the Full Bench decision in *Chakra Kannan* v. *Kunhi Pokker*[1]. But whatever that might be, in view of the pleadings in the case it is too late in the day to contend that the property is Putravakasam property.

The second question is as regards mesne profits. It is clear from Exhibit B-1 that the second defendant's father died on 28th October, 1933 and the mortgage in favour of the third defendant by the first defendant, Exhibit B-2 was on 13th October, 1934. The suit itself was filed on 9th October, 1946. Though it cannot be stated that from that date onwards there has been any denial of the right of the second defendant or that he had been ousted from enjoyment of the property it is urged on behalf of the appellant that at least from the date when the first defendant purported to mortgage the property as his own it should be deemed that the rights of the second defendant have been denied. But Mr. Kutti Krishna Menon for the respondent relying on the decision in *Vaiyapuri* v. *Subramania*[3] contends that the mortgage by a co-owner on the assertion that the property belongs to him absolutely cannot be taken as an indication of ouster of the other co-owner or denial of his title. I do not think that that proposition need be disputed. In the present case it is not the case of the second defendant that he was not aware of the transaction evidenced by Exhibit B-2 but what he says is that during his father's lifetime his share of the income was being received and after his death the second defendant's brothers were taking the income from the first defendant till their death. This

1. (1915) 29 M.L.J. 481 : I.L.R. 39 Mad. 317 (F.B.).
2. (1946) 2 M.L.J. 175 : I.L.R. (1947) Mad. 272.
3. A.I.R. 1929 Mad. 27.

case has not been substantiated or found to be justified by the lower appellate Court. Such being the case we have to take it that the second defendant and his brothers were aware from the date of Exhibit B-2 that their claim to the property has not been accepted by the first defendant. Though there has been no specific evidence of any denial after the death of the second defendant's father till the date of Exhibit B-2, it seems to me that at least from that date onwards the title of the second defendant and his brothers has been disputed by the first defendant. In that case the hostile assertion having taken place, under Article 120 of the Limitation Act the cause of action commences from that date. Reliance is placed on the decision of Somayya, J., in *Visalakshi Amma* v. *Madhava Menon*[1], where the learned judge held that a co-sharer's suit for his share of the income of property is governed by Article 120 of the Limitation Act and the starting point is when the right to sue accrues. It was further held that it may be that he may be entitled to an account of the share of the income for more than six years prior to the date of suit as it cannot be said that in the absence of ouster or assertion of hostile title to the knowledge of the plaintiff his right to a share in the income should be confined only to a period of six years prior to the date of suit. It is not necessary for me to express any opinion whether I agree with the reasoning of the learned Judge though the effect of that decision may be that if one co-sharer does not care to enjoy the income but allows the other to appropriate the whole of it to himself even for a period of more than 12 years, still the co-sharer who has not enjoyed his share of income will be entitled to an account for an indefinite period. I do not think that such a consequence had been envisaged. It is certainly not the duty of a co-sharer to collect the income and pay their shares to the other co-sharers even if there is no demand. The mere fact that there is no ouster or assetion of hostile title would not entitle a co-sharer who has not received the income to claim it for any period more than 6 years. The cause of action in such a case must be deemed to arise when the income accrues and not when there is a denial of the co-sharer's right. The rights and obligations *inter se* between the co-sharers are subject to well defined principles. The Privy Council in *Corea* v. *Appuhamy*[2] has laid down that possession of one co-sharer is never considered adverse until there is an ouster by the other. But that principle cannot be extended so far as to say that it is the duty of the co-sharer in possession to collect the income and pay their shares to the other co-sharers. No such sense of obligation is cast on a co-sharer. If the broad proposition of law enunciated by Somayya, J., is pushed to its logical conclusion then it will be open to one co-sharer to lie low without taking any interest in the management of the property leaving the other co-sharer to be in possession sometimes against his desire and thereafter claim a share of mesne profits for an indefinite period. It seems to me, therefore, that apart from the question of ouster the cause of action for claiming a share in the mesne profits arises as and when the profits are received. Viewed in this light the cause of action for the plaintiff for realising each year's mesne profits would arise on the date of such collection. Under these circumstances, the plaintiff will not be entitled to mesne profits for more than six years prior to the date of the suit. The decree of the lower appellate Court is modified to that extent. In other respects the second appeal is dismissed. In the circumstances of the case the parties will bear their costs in this Court. No leave.

R.M. *Decree modified.*

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1. (1942) 1 M.L.J. 408.
2. L.R. (1912) A.C. 230.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE GOVINDA MENON.

Seshan Pattar .. *Appellant**

v.

Asambi Umma and others .. *Respondents.*

Malabar Compensation for Tenants Improvements Act (I of 1900), *sections* (1)—*Applicability to non-residential buildings.*

If a vacant land is let either on *verumpattam* or *kanam* right or any other term, any tenant who puts up either a residential building or any other building, is entitled to the value of the improvements. It cannot be said that building leases mean leases for building only of dwelling houses.

Abdul Kader Rowther v. *Velu Nayar*, (1946) 1 M.L.J. 229, not followed.

Avaru v. *Asi Bai*, (1931) 61 M.L.J. 462 : I.L.R. 55 Mad. 151 and *Paredath Chori George* v. *Thithi Umma*, (1930) 60 M.L.J. 214, *relied on.*

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in A.S. No. 141 of 1947 preferred against the decree of the Court of the District Munsif of Alathur in O.S. No. 305 of 1945.

N. Sundaram Aiyar for Appellant.

V. Balakrishna Eradi for Respondents.

The Court delivered the following

JUDGMENT.—The lower appellate Court has found that the sub-lease in respect of the B Schedule, vacant site, was for the purpose of putting up a residential house thereon. It has also found that the B Schedule vacant site was leased to the defendant's predecessor, Paraman Ezhutassan by Viswanatha Pattar for the purpose of building a residential house thereon and that the defendant who is at present residing in the building put up in the B Schedule property is entitled to the value of the improvements. It is a question of fact as to whether the lease was intended for putting up a building and I cannot interfere with the finding. If that is so, the only question is whether the provisions of the Malabar Compensation for Tenants Improvements Act will be attracted.

In *Avaru* v. *Asi Bai*[1], a Bench of this Court consisting of Wallace and Madhavan Nair, JJ., after considering the entire previous case law, came to the conclusion that the Act applies not only to agricultural leases but to building leases as well, that is, leases of vacant lands for building purposes. This judgment was followed by another Bench in *Paredath Chori George* v. *Thithi Umma*[2]. It has to be mentioned in this connection that the site on which the building was put up in *Avaru* v. *Asi Bai*[1], was not a residential building site but a vacant site in the town of Cochin intended for the purpose of being used as a shop. The same was the case in *Paredath Chori George* v. *Thithi Umma*[2]. All the learned Judges who took part in these cases were of the opinion that if a vacant piece of land is let in Malabar for putting up a building, whether it be residential or otherwise, the tenant is entitled to the value of the improvements.

A somewhat different note seems to have been struck in the judgment reported in *Abdul Kader Rowther* v. *Velu Nayar*[3] where the learned Judges have interpreted *Avaru* v. *Asi Bai*[1], as laying down that building leases do not mean leases of any land for any building but only for building of dwelling houses. In my opinion there is no warrant for that proposition. It has throughout been understood in Malabar that if a vacant land is let either on *Verumpattam* or *Kanam* right or any other term any tenant who puts up either a residential building or any other building, is entitled to the value of the improvements. It is too late in the day to unsettle the law which has been understood for more than 50 years. I do not think that

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* S.A. No. 1370 of 1949. 1st February, 1955.

1. (1931) 61 M.L.J. 462 : I.L.R. 55 Mad. 151.
2. (1930) 60 M.L.J. 214.
3. (1946) 1 M.L.J. 229.

I am bound by the decision in *Abdul Kader Rowther* v. *Velu Nayar*[1], which does not correctly apply the earlier Bench decisions in *Avaru* v. *Asi Bai*[2] and *Paredath Chori George* v. *Thithi Umma*[3], especially as regards the law applied to the part of the country with which the learned Judges who decided *Abdul Kader Rowther* v. *Velu Nayar*[1] and *Paredath Chori George* v. *Thithi Umma*[3], were much more familiar than the learned Chief Justice who delivered the judgment in *Abdul Kader Rowther* v. *Velu Nayar*[1].

The second appeal fails and is dismissed with costs.

No leave.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE BALAKRISHNA AIYAR.

Pulickel Estates (1947) Ltd. .. *Petitioner** (*1st Defendant*)

v.

K.M. Joseph .. *Respondent* (*Plaintiff*).

Civil Procedure Code (V of 1908), section 16, Proviso—Jurisdiction of Court under—Scope of—Suit adding a prayer-claiming charge on certain properties—If confers jurisdiction on Court where such properties are situate.

The proviso to section 16 of the Code of Civil Procedure picks out certain categories of suits out of the categories provided in the principal section and provides that in respect of them a suit can be filed where the defendant resides. But those categories are limited to instances where the relief asked for can be entirely obtained by compelling the personal obedience of the defendant. In other words clauses (*a*) to (*f*) of section 16 of the Code take in six categories of cases. Out of these the proviso picks out cases or groups of cases in relation to which the plaintiff can be given complete relief by compelling the personal obedience of the defendant. The proviso therefore has not the effect of enlarging the scope of the principal section. It only engrafts an exception to the main clauses.

In a case in which the cause of action really arose in a particular jurisdiction, a plaintiff by merely adding a prayer for a charge on certain immovable properties situate in another jurisdiction cannot confer jurisdiction on the Court within whose jurisdiction those properties lie.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Ottapalam dated 25th September, 1953 and made in O.S. No. 88 of 1952.

O. Radhakrishnan for Petitioner.

S. Chellaswami for Respondent.

The Court delivered the following

JUDGMENT.—The first defendant is the petitioner. In 1926, the Mannarghat Moopil Nair granted a lease of a very considerable extent of land in his estate in favour of two persons, Jacob Thomas and Tommy Joseph. They, in their turn, assigned their rights to the fourth defendant a company called the Charel Rubber Company, limited. The first defendant, a private limited company called the Pullickel Estates (1947) Ltd., obtained an assignment of the leasehold from the Charel Rubber Company, Limited. On 8th September, 1952, the first defendant company entered into an agreement to convey its rights in the properties to the plaintiff for a sum of Rs. 58,000. An advance of Rs. 13,000 was paid, and it was agreed between the parties that the balance would be paid at the time the sale deed was executed. It was also agreed between the parties that

"the purchase shall be completed on or before the 4th October, 1952, at Madras, where, for the convenience of the vendor, the purchaser agrees to have the sale deed registered".

Under the Madras Preservation of Private Forests Act, the consent of the Collector of Malabar had to be obtained before the sale could take effect. With a view to obtaining the consent of its officer, the vendor gave to the vendees one letter address-

1. (1946) 1 M.L.J. 229. 151.
2. (1931) 61 M.L.J. 462 : I.L.R. 55 Mad. 3. (1930) 60 M.L.J. 214.

* R.P. No. 1922 of 1953. 18th October, 1954.

to the Collector of Malabar and another addressed to the Tahsildar of Perinthalmanna. By an order dated 29th October, 1952, the Collector refused to give his permission for the sale. Subsequently, the plaintiff filed a suit in the Court of the Subordinate Judge of Ottapalam, claiming Rs. 28,000 as damages from defendants 1 to 3. There was also a prayer for the creation of a charge in favour of the plaintiff over the leasehold properties. Defendants 1 to 3 filed written statements taking *inter alia* the point that the Court at Ottapalam had no jurisdiction in the matter. The learned Sub-Judge framed a preliminiary issue on that point and held that he had jurisdiction to proceed with the suit. The present petition has been filed to revise this order of the learned Subordinate Judge.

It will be noticed that though the property is situate in Malabar, the agreement to sell was entered into in Madras. The parties also explicitly covenanted that the sale deed was to be executed in Madras. Since the agreement to sell provides that payment was to be made at the time of the execution of the sale deed, it follows that the balance of the purchase money was also to the paid in Madras. It is clear, therefore, that the breach of contract was in Madras. Normally therefore the action should have been brought in Madras. But the learned Subordinate Judge thought that the circumstances that the plaintiff claimed a charge over the leasehold properties, which lay in his jurisdiction, brought the action within the scope of section 16 of the Civil Procedure Code and conferred jurisdiction on him in respect of the matter. This is how he stated his view :

> "Here the plaintiff has claimed a charge for the plaint claim over the immoveable propertie mentioned in the plaint schedule. Admittedly, they are situate within the jurisdiction of this Court Therefore, this is the only Court which can entertain the suit. Suppose it is filed in Madras. The plaintiff cannot expect any relief in respect of immoveable properties mentioned in the plaint. He can get only a personal decree against the defendant."

It appears to me that this is not the correct view of the matter. As I have already pointed out, the contract was entered into i Madras; its completion was to be in Madras and the breach of it was in Madras. The circumstance that the plaintiff prayed for a charge on the property and that it is situate within the jurisdiction of Ottapalam Court will not give that Court jurisdiction. If a prayer made in the plaint is to be the governing criterion, then it is easy to see that a plaintiff can bypass all the provisions of the Civil Procedure Code for determining the proper forum, and can choose his own Court. Suppose *A* were to enter into a contract with *B* for the supply of, let us say, groundnut oil, in Madras. *A* fails to deliver the oil. But he has immoveable property in Travancore, Mysore and Assam. Can *B* merely by asking for a charge on some of these properties confer jurisdiction on the Courts either in Travancore, or Mysore, or Assam? I conceive not.

Their present action is not for the recovery of immoveable property. Clause (*a*) of section 16, therefore, does not apply. It is not a suit for partition of immoveable property ; clause (*b*) does not apply either. It is not a suit for foreclosure, sale or redemption in the case of a mortgage of or charge upon immoveable property. Clause (*c*) cannot therefore apply. Though the contract relates to immoveable property, the suit cannot be properly described as one for compensation for wrong to immoveable property, there has been no wrong to immoveable property at all and clause (*e*) too cannot apply. But it was said that the case falls within the scope of clause (*d*) which runs as follows :

> "for the determination of any other right to or interest in immoveable property."

Now, at the moment he filed the suit, the plaintiff had no right, or interest in the property. In his plaint he did not ask that any right or interest of his in the property should be determined. His claim was a claim for money ; when he prayed for a charge he was anticipating the decree and execution proceedings; he was trying to ensure in advance that he would be able to realise the fruits of a decree which he hoped to obtain. Though the disputes between the parties stemmed out of immoveable property, the Court was not called upon to determine any right or interest in immoveable property. Clause (*d*) does not, therefore, apply either. Clearly therefore section 16 has no application to the case.

But it was said that the proviso applies to the case: that proviso, so far as is now material, runs as follows:

"Provided that a suit to obtain relief respecting immoveable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides............"

On this argument certain observations may be made. One is that a proviso cannot be used to enlarge the scope of the principal section. A proviso, from its very nature, only engrafts an exception or limitation to the main clauses. In the present case, what the proviso does is this: out of the categories of cases provided for in the principal section it picks out certain categories and provides that in respect of them a suit can be filed where the defendant resides. But those categories are limited to instances where the relief asked for can be entirely obtained by compelling the personal obedience of the defendant. To put the matter in another form, clauses (*a*) to (*f*) of section 16 take in six categories of cases. Out of those categories, the proviso picks out cases or groups of cases in relation to which the plaintiff can be given complete relief by compelling the personal obedience of the defendant. The proviso, therefore, has not the effect of enlarging the scope of the principal section.

Learned counsel for the respondent referred to certain decisions and these I shall now examine. Of these the earliest is reported in *Maturi Subbayya* v. *Kota Krishnayya*[1]. This does not apply at all for it related to unpaid purchase money under a contract for sale of land. The head-note makes the matter clear:

"A suit for the recovery of unpaid purchase money under a contract for the sale of land is a suit 'for the determination of any right to or interest in immoveable property' within the meaning of section 16, clause (*d*) of the Code of Civil Procedure."

See also section 55 (4) (*b*) of the Transfer of Property Act.

The next case is reported in *Sita Bai* v. *Laxmi Bai*[2]. The facts there were as follows: The plaintiff filed a suit in a Poona Court against her deceased son's daughter and her father, both of whom resided in a Native State beyond the jurisdiction of the Poona Court. She prayed for a declaration that she was entitled to a maintenance allowance and sought to make the same a charge on the immoveable property of her deceased son. This property lay within the jurisdiction of the Poona Court. The Poona Court held that it had no jurisdiction to try the suit, as the claim for maintenance was not one for the determination of any right to or interest in the immoveable property, as required by clause (*d*) of section 16, Civil Procedure Code. The plaintiff then went in appeal to the High Court of Bombay, which held that the Poona Court had jurisdiction in the matter. In so far as this decision implies, that, by merely asking for a relief in respect of immoveable property, a plaintiff can confer jurisdiction on a particular Court, one may hesitate to agree. A learned Judge of this Court in *Veeraraghavamma* v. *Sitaramayya*[3], observed:

"It was my impression at first and I still entertain a doubt that that (sub-clause in section 16) is concerned with disputes as to title or interest in property existing at the date of the suit and does not apply to interests that spring out of ancillary reliefs claimed in the suit and arising as a consequence of the decree made in the suit."

With the doubt expressed herein I am in full agreement. But the decision in *Sita* v. *Laxmi Bai*[2], if I may say so with respect, is undoubtedly right. The defendants in that case were under no personal obligation to pay any maintenance to the plaintiff. Her son died leaving certain property, that property lay within the jurisdiction of the Poona Court. Out of that property the plaintiff was entitled to maintenance. It is because the defendants were in possession of that property that they were proceeded against. The right to receive maintenance out of immoveable property may, without imposing undue strain on language, be described as an inte-

1. (1904) I.L.R. 28 Mad. 227.
2. (1915) I.L.R. 40 Bom. 337.
3. (1935) 42 L.W. 647.

rest in immoveable property. *See* section 39 of the Transfer of Property Act which runs :

"Where a third person has a right to receive maintenance......from the profits of immoveable property, and such property is transferred, the right may be enforced against the transferee, if he has notice thereof..........."

The last case I need examine is *Mt. Gauhar J. Begum* v. *Mt. Imteyaz J. Begum*[1]. The facts there were as follows: *G*, a widow, brought a suit for recovery of her dower debt and also for the administration of her deceased husband's estate in the Court within whose jurisdiction only a fractional portion of the properties was situate. The suit was treated as an administration suit, but the plaint was returned on the ground that section 20 of the Code of Civil Procedure was a bar. In appeal by the plaintiff, a Bench of the Patna High Court held that section 16 (*d*) and not section 20 of the Code of Civil Procedure was applicable and, therefore, that the Court had territorial jurisdiction over the case. At page 525, the learned Judges said :

"This mention of the word 'charge' in relief No. 2 brings the case within the purview of clause (*d*) of section 16 of the Civil Procedure Code."

Some of the observations I have made in relation to *Sita Bai* v. *Laxmi Bai*[2] apply here also. But this decision too was, on the facts, undoubtedly correct, because part of the property to be administered lay in the jurisdiction of the Court to which the plaint was presented.

One further remark is called for. It is reasonably plain in the present case, that the plaintiffs were conscious that they could not get a charge over the property, because, in paragraph 10 of the plaint, they stated that the vendor had no title to the property. The relevant passage runs :

"The plaintiff has come to know that the document dated 17th January, 1947, executed by the Charel Rubber Co., Ltd., in favour of the 1st defendant company, had been executed without obtaining the necessary permission from the Collector of Malabar under the M. P. P. F. Act and therefore void. The absence of title to the 1st defendant company in the plaint schedule property was known to the 1st defendant company and defendants 2 and 3, and was deliberately kept back from the plaintiff with the sinister purpose of getting from the plaintiff illegally large sums of money for no valid consideration."

If the defendants had no interest in the property obviously no Court would create a charge over it in respect of amounts decreed against them. As I have said before I am clear in my mind that when the cause of action really arose elsewhere a plaintiff by merely adding a prayer for a charge on certain immoveable properties cannot confer jurisdiction on the Court within whose jurisdiction those properties lie.

Learned counse for the respondent finally stated that the fifth defendant resides within the jurisdiction of the Ottapalam Court, and that therefore, that Court acquired jurisdiction by virtue of sub-clause (*b*) of section 20 of the Civil Procedure Code. Now, before the respondent can obtain the benefit of this sub-clause of section 20 one of the two requirements must be fulfilled ; either he must obtain the leave of the Court or the other defendants must acquiesce in the institution of the suit in Ottappalam. That they have not acquiesced is clear from the fact that they took objection to the jurisdiction of the lower Court in their written statements and also by their coming to this Court challenging the correctness of the decision of the learned Subordinate Judge. The consent of the Subordinate Judge has yet to be obtained. The only course that is open to the plaintiff if he wants to prosecute the suit in the Ottapalam Court is to apply for the leave of that Court. On the question whether that leave should or should not be given I express no opinion whatsoever. That will be a matter for the learned Subordinate Judge to decide in his discretion and after hearing the parties affected.

The petition is allowed with costs. Advocate's fee : Rs. 250.

R.M. ——— *Petition allowed.*

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1. (1947) I.L.R. 26 Pat. 523.
2. (1915) I.L.R. 40 Bom. 337.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE KRISHNASWAMY NAYUDU.

A.V. Sreenivasalu Naidu .. *Appellant**

v.

V. K. Nataraja Goundan and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 94—Issue of sale certificate to the representative of the purchaser—Permissibility—Attachment of property in execution—If could be abandoned by act of parties.

Order 21, rule 94 of the Code of Civil Procedure does not state the person who, at the time of the sale, is declared to be the purchaser should alone be granted the sale certificate. It can be issued to a representative of the purchaser in accordance with the provisions of section 146 of the Code. There is nothing whatever in the Code to prevent an assignee from the auction purchaser applying for the issue of the sale certificate nor to prevent the Court granting it to him.

Ganapathi v. *Subraya*, A.I.R. 1936 Bom. 137, referred to.

Makhan Lal v. *Baldeo Prasad*, A.I.R. 1938 All. 471, not approved.

Pokhpal Singh v. *Kanhaiya Lal*, I.L.R. (1946) All. 788, followed.

An attachment of property by an order of Court cannot be abandoned by mere act of parties. For the determination of an attachment an order of Court is necessary. A party cannot abandon an attachment validly imposed upon a property by the orders of the Court. But in exceptional cases due to a long lapse of time the Court can presume that the decree-holder has abandoned the execution petition itself.

Puddomonee Dassie v. *Roy Muthooranath Chowdhry*, (1873) 20 W.R. 133, *Chamiappa Tharagan* v. *Rama Iyer*, (1920) 40 M.L.J. 65: I.L.R. 44 Mad. 232; *Maharaj Bahadur Singh* v. *A. H. Forbes*, (1929) 57 M.L.J. 184 (P.C.); *Venkata Lakshminarasimham* v. *Gomaji and Company*, (1948) 2 M.L.J. 488, referred to.

Karuppan Chettiar v. *Rajangam*, (1939) 2 M.L.J. 916, applied.

Appeal against the Decree of the District Court of Coimbatore in Appeal Suit No. 162 of 1949, preferred against the Decree of the Court of the Subordinate Judge of Coimbatore in Original Suit No. 107 of 1947.

R. Gopalaswamy Aiyangar for *M. R. Narayanaswami* for Appellant.

K. S. Desikan and *K. Raman* for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—The appellant before us is the defendant in the Court of the first instance, in a suit for redemption of a mortgage on the plaint mentioned properties, which was dismissed by the trial Court but decreed in appeal by the learned District Judge. Objecting to that redemption decree the present appeal has been preferred. The plaintiff claimed to be the assignee from an auction-purchaser of the property in question under a sale certificate, Exhibit A-3, dated 12th June, 1934, issued in favour of his assignor and on the death of the plaintiff pending the appeal in the lower appellate Court his legal representatives who are the contesting respondents before us have been brought on record. The defendant claims title to the properties through his predecessor-in-title under a sale, Exhibit B-1, dated 4th December, 1929 and the sole point for consideration in this Second Appeal is as to which of the sales ought to prevail.

A few facts may be stated in order that the proposition of law may properly be understood. The plaint mentioned property originally belonged to one Ananthachar who had mortgaged the same along with other items for a sum of Rs. 30,000 on 15th October, 1910, in favour of one C.V. Narayana Rao. On 13th December, 1920, under Exhibit A-1, the mortgagor executed a usufructuary mortgage in favour of one Sri N.S. Ramaswami Iyengar for a sum of Rs. 20,000 directing him to pay the amount to the previous mortgagee. By sale of a part of the mortgaged property to the second mortgagee himself on 20th July, 1925, Rs. 14,000 were paid towards the usufructuary mortgage and for the balance of Rs. 6,000, the suit property was sold to the mortgagee. *See* Exhibit A-2, dated 20th July, 1925. The previous mortgagee, Narayana Rao executed a release deed in favour of Ramaswami Iyengar

* Second Appeal No. 1211 of 1950. 12th November, 1954.

Exhibit A-2 (*a*) 15th December, 1927. The result was that the mortgage of 15th October, 1910, ceased to be subsisting on the property and if there had been no other complication, Ramaswami Iyengar would have become the owner of the suit property. The western portion of the property of an area of 21 cents was sold by Ramaswami Iyengar on 11th July, 1928, to one Parvathi Ammal and the eastern portion was sold to the defendant's predecessor-in-title on 4th February, 1929, under Exhibit B-1. As the assignee of the rights under Exhibit B-1 the defendant claims the property.

Before the property was sold to Ramaswami Iyengar, O.S. No. 78 of 1922 on the file of the Court of the District Munsif of Coimbatore had been filed by one Nalla Karuppan Chettiar against Ananthachar and others for recovery of a sum of money and on 27th March, 1922 a decree was passed against Ananthachar and others in that suit. The decree amount with interest and costs as on 5th July, 1922, came to Rs. 561-8-0. E.P. No. 1019 of 1922, in O.S. No. 78 of 1922 was an execution application by the decree-holder for the realisation of the decree amount and the prayer was that the plaint schedule property should be attached and sold. See Exhibit B-5. On 7th July, 1922, the District Munsif ordered attachment by 19th July, 1922. It is seen from the further endorsements on that execution application that the property was attached and further steps were ordered to be taken by 14th August, 1922. See the endorsement dated 29th July, 1922. Thereafter various proceedings and steps were taken in pursuance of the attachment, such as payment of batta, affixing of sale notice, etc. On 30th October, 1922, proclamation was settled and it was ordered that the sale should take place on 8th January, 1923 and the petition was adjourned to 11th January, 1923, from which date it was again adjourned to 12th March, 1923, for sale. The hearing of the petition was also adjourned to 16th March, 1923. See the order of the District Munsif, dated 27th January, 1923. On 16th March, 1923, there is the following endorsement on the execution application : " Not sold for want of bidders. Closed " *Initialled; District Munsif, 16th March*, 1923. It is the interpretation of this endorsement that is the point in dispute. Nothing seems to have been done thereafter for more than ten years in pursuance of this attachment and on 11th November, 1933, the decree-holder filed E.P. No. 239 of 1934, praying that the decree amount may be realised by directing sale of the properties set out in the schedule to that application which were attached under Order 21, rule 64, Civil Procedure Code in E.P. No. 1019 of 1922. *Vide* Exhibit B-2. Columns 1 to 5 of this petition give various details which are usually found in an execution petition and against column 6 there is the recital of the previous applications, the first of which is to the following effect :

" (1) 5th July, 1922, E.P.R. No. 1019 of 1922, the properties were attached and brought to auction sale and as there was nobody to bid, it was rejected.'

Further details are given as regards later applications E.P. No. 172 of 1925, E.P. No. 1433 of 1925, dated 21st July, 1925, E.P. No. 153 of 1926, dated 25th January, 1926, and so on and so forth and the last of them was E.P. No. 32 of 1932, dated 20th June, 1932 and it is stated that the petition was filed and returned but was not re-presented. Excepting the first application the rest of them did not deal with the sale of immovable properties but were all either for the arrest of the judgment-debtor or for transfer of the decree to the Court of Small Causes, Madras and to the District Munsif's Court, Kallakurichi, for execution. When the execution application was returned for the purpose of complying with certain returns there is a further endorsement to the following effect :

" E.A. No. 630 of 1929 was dismissed on 25th September, 1929 and a fresh E.P. for arrest of D-2 was granted on 20th June, 1932 and returned for some mistakes being remedied. The attachments in E.P.R. No. 1019 of 1922 is still in force as that execution petition was disposed of only for statistical purposes. Hence this petition is not barred in any case. Hence this petition is granted for sale of the properties attached in E.P.R. No. 1019 of 1922."

On this execution application the plaint property was put up for sale on the assumption that the attachment in E.P. No. 1019 of 1922 was still subsisting. Exhibit B-3, dated 16th April, 1934, is a certified copy of the bidders' list prepared at the time the sale took place in pursuance of E.P. No. 239 of 1933. Item 2 related to the

sale of the suit property and it is seen that it was knocked down to one Balakrishna Iyer for a sum of Rs. 106. Exhibit A-2 is the Court sale certificate issued in pursuance of this auction to Rajammal, wife of the bidder, Balakrishna Iyer. The document recites as follows :

"This is to certify that P.S. Balakrishna Iyer, husband of Rajammal mentioned above, on her behalf, has been declared the purchaser of the property, set out at a sale by public auction held on 16th April, 1934, in execution of the decree in this Court and that the sale has been duly confirmed by this Court".

Therefore the sale certificate was issued in favour of the plaintiff's predecessor-in-title, Rajammal and how it came to be issued in her name is spoken to by P.W. 1, Balakrishna Iyer, who deposed that he bid at the auction on behalf of his wife and on his application the sale certificate was issued in her name. After the purchase and the issue of the sale certificate in her name Rajammal applied for delivery of possession but the defendant obstructed. C.M.P. No. 2445 of 1935 was filed for removal of obstruction and that was dismissed. Rajammal thereafter filed O.S. No. 772 of 1937 on the file of the District Munsif's Court, Coimbatore, for setting aside the order in C.M.P. No. 2445 of 1935. It was held in that suit that the Court auction-purchaser Rajammal had title to the properties subject to her redeeming the earlier mortgages binding on the properties but the suit for possession was dismissed. The result was that if the sale in favour of Ramaswami Iyengar was not valid, then there would be subsisting the usufructuary mortgage for Rs. 6000 on this property as well as on the 21 cents of land lying to the west of it which was purchased by Parvathi Ammal whose rights have now devolved upon Rajammal. Therefore the proportionate mortgage amount charged on the suit property would be Rs. 3,350 and it is for the redemption of the property on payment of the said sum that the present suit has been filed.

The contention of the defendant was that since the person who bid at the sale was Balakrishna Iyer, the husband of Rajammal, the sale certificate should have been issued in the name of Balakrishna Iyer but without adopting that course the sale certificate had been issued in the name of Rajammal and as such it is invalid and does not convey any title to Rajammal and *a fortiorari* to the plaintiff. It is further urged that the order in E.P. No. 1019 of 1922 to the effect that for want of bidders the property was not sold and therefore closed amounted to a dismissal of that execution petition which resulted in the raising of the attachment and such being the case at the time of filing E.P. No. 239 of 1933 there was no subsisting attachment on the suit property and therefore, the sale in pursuance of E.P. No. 239 of 1933 did not convey any title to the purchaser since the property on which no attachment had been subsisting had been sold. The third argument was that even if at the time of the closing of E.P. No. 1019 of 1922 the attachment was intended to be continued still by the fact that the decree holder took various steps during the course of the next ten years for transferring the decree to other Courts and for arrest of the judgment-debtor such action would be tantamount to the abandonment of the attachment even if it had been subsisting and therefore at the time of the filing of E.P. No. 239 of 1933 no attachment subsisted. The trial Court found that the sale certificate issued to Rajammal was without jurisdiction as it was not shown that Balakrishna Iyer bid at the auction as the agent of Rajammal and hence Rajammal did not get any right to the property under the purchase in the Court sale. It also found that the attachment effected in E.P. No. 1019 of 1922 did not subsist on the date when E.P. No. 239 of 1933 was filed. The result was that the Court sale held on 16th April, 1934, on the assumption that the attachment was subsisting did not amount to a valid sale. On these grounds the suit was dismissed. The learned District Judge took a contrary view on both the points and decreed the redemption of the property. Hence this second appeal.

Mr. R. Gopalaswamy Iyengar, learned counsel for the appellant, raised the three points set out by us while stating the contentions of the defendant. His first argument was that the sale certificate did not confer any title on Rajammal and that being the case the assignment in favour of the plaintiff was void and inoperative. From Exhibit B-3 the bidders' list it does not appear that Balakrishna

Iyer bid at the auction either in his capacity as an advocate appearing for any party or as the agent of his wife. The entry is to this effect: "Knocked down to P.S. Balakrishna Iyer, son of Sundaram Iyer, advocate, Coimbatore for Rs. 106." The evidence of Balakrishna Iyer in examination-in-chief as P.W. 1 is to the effect that he bid at the auction on behalf of his wife, Rajammal, and in cross-examination he states that he held no power of attorney from his wife and that it was only when he bid for the second time before the conclusion of the sale that he informed the Nazir that he was bidding on his wife's behalf whereupon the Nazir said that he could not do anything and asked him to represent to the Court. Thereafter an application was made to the Court for the issue of the sale certificate in the name of his wife and accordingly the sale certificate, Exhibit A-3, mentioned that the bidding was by Balakrishna Iyer on behalf of his wife. Mr. Gopalaswami Iyengar contends that since the actual bidder was Balakrishna Iyer and not his wife and since no power of attorney or vakalat had been filed by Balakrishna Iyer on behalf of his wife it should be taken that the bidder was really Balakrishna Iyer in his own capacity and not as anybody's agent. The lower appellate Court has accepted the evidence of Balakrishna Iyer that he bid at the auction on behalf of his wife and the Court which issued the sale certificate was also satisfied that the real purchaser was Rajammal. Even so, it is argued by Mr. Gopalaswami Iyengar that the sale certificate can be issued only in the name of a person who actually bids at the auction and that no kind of benami status can be recognised in such Court sales. Order 21, rule 94, relating to issue of sale certificate to a purchaser states as follows:

"Where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser."

From this, it is argued, that since the bidders' list shows Balakrishna Iyer as the person who was declared to be the purchaser at the time of the sale, no certificate could have been issued in the name of his wife, Rajammal, even if Balakrishna Iyer had bid at the auction as the agent of Rajammal. The contention is put forward that if Rajammal should get valid title to the property purchased by her at the Court-auction the bidders' list should show that Balakrishna Iyer bid at the auction on behalf of his wife and in the absence of any such entry, it must be taken that the bidding was by Balakrishna Iyer for himself. We are unable to accept this contention. The lower appellate Court has not rejected the evidence of P.W. 1, Balakrishna Iyer to the effect that when he bid for the second time he informed the Nazir that he was bidding on behalf of his wife. We are prepared to accept the evidence of P.W. 1 that at the time he bid, his function was to act as the agent of his wife despite the fact that no power of attorney or vakalat was filed by him asking for permission to bid at the auction on behalf of his wife. In the light of the evidence of P.W. 1 we are prepared to interpret the entry in the bidders' list on the footing that Balakirshna Iyer bid on behalf of his wife and that the property was knocked down to him for Rs. 106 as the agent of his wife.

Such being the case, Rajammal must be deemed to be the person who at the time of the sale was declared to be the purchaser.

Our attention was invited to a decision of the Allahabad High Court in *Makhan Lal* v. *Baldeo Prasad*[1], laying down that having regard to the provisions of rule 94 of Order 21, Civil Procedure Code, the Court should issue the sale certificate only in the name of the auction-purchaser or if he dies in the name of his legal representative. But the Court is incompetent to recognise any transfer or arrangement made by the auction-purchaser with a third person. That was a case where subsequent to the knocking down in the name of one Kunj Behari Lal, he sold the property to another and the sale certificate was sought to be issued in the name of the assignee. The view taken by Rachhpal Singh, J., was that it cannot be issued in the name of a person other than the purchaser.

1. A.I.R. 1938 All. 471.

A contrary view has been taken in the decision in *Ganapathi* v. *Subraya*[1], in which case, Broomfield, J., was of the opinion that when Order 21, rule 94, Civil Procedure Code, does not state that the persons who at the time of the sale is declared to be the purchaser should alone be granted the sale certificate, it can be issued to a representative of the purchaser in accordance with the provisions of section 146 of the Code of Civil Procedure and that, therefore, there is nothing whatever to prevent an assignee from the auction-purchaser applying for the issue of the sale certificate nor to prevent the Court granting it to him. In our opinion the more acceptable view seems to be that of Broomfield, J. That the Allahabad High Court has not accepted the view of Rachhpal Singh, J., in *Makhan Lal* v. *Baldeo Prasad*,[2], is evident from a later decision in *Pokhpal Singh* v *Kanhaiya Lal*[3], where a bench held that if the sale certificate had been issued in the name of a person who has been declared to be the purchaser even though somebody had bid at the time of the auction, it is only an irregularity which would not vitiate the whole proceedings. In that case at the time the sale took place the property was knocked down to one Banarsi Das as he was the successful bidder but he made a statement at the time of his bidding that he was doing so not on his own account but on behalf of the decree-holder. The sale certificate was, therefore, issued in the name of the person on whose behalf Banarsi Das bid and when the validity of the sale certificate was questioned Yorke, J., who delivered the judgment of the bench held that the order directing issue of a sale certificate in favour of the decree-holder might have been questioned by means of appropriate proceedings and that not having been done at the most it was an irregularity which cannot be questioned at the time when the sale certificate was sought to be executed. The Court was not prepared to accept the technical plea. The result is that the purchaser in whose name the sale certificate has been issued cannot be deprived of his right to obtain possession of the property purchased by him even though the order passed by the Sales Officer might be irregular. There is a close resemblance between the facts of the case of the Allahabad High Court and the instant one. Even in the present case, Balakrishna Iyer at the time of his bidding told the Nazir who conducted the sale that he was bidding as the agent of his wife and the sale certificate was issued by the Court on that representation in the name of his wife, Rajammal. We are inclined to agree with the observations contained in the decision in *Pokhpal Singh* v. *Kanhaiya Lal*[3], and therefore the first contention of Mr. Gopalaswami Iyengar in our opinion, is bereft of any substance.

We now come to the second contention, namely, that at the time E.P. No. 239 of 1933 was filed the attachment effected in E.P. No. 1019 of 1922 as per the order passed by the District Munsiff on 17th June, 1923, was not in existence. Learned counsel for the appellant argues that when the District Munsiff closed the petition on the ground that the properties were not sold on account of absence of bidders, he must be deemed to have finally disposed of that application in which case the attachment effected already, must also cease to have any effect. What is urged is, that we ought to read the expression 'closed' as meaning dismissed, or disposed of finally. From very early times a large crop of case-law has sprung up on the interpretation of the words such as 'closed, struck off, rejected, etc.' when dealing with execution applications. This Court has on more than one occasion held that such disposals should be deemed to be only for statistical purposes and they do not amount to any final adjudication of the points in controversy. Learned counsel for the appellant referred to the observations of Varadachariar, J., in *Somasundaram Chettiar* v. *Alamelu Achi*[4], which are to the following effect :

> "The legal result of orders importing 'rejection, striking off, closing, recording and even dismissal has to be ascertained with reference to the attendant circumstances and not merely from the form of the order."

In this connection a large body of case-law has been referred to by the learned Judge. It is unnecessary for us to discuss elaborately the long catena of cases on

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1. A.I.R. 1936 Bom. 137.
2. A.I.R. 1938 All. 471.
3. I.L.R. (1946) All. 788.
4. 1937 M.W.N. 480.

this topic as, in our opinion, it is not the expression used in the order that concludes the matter but it is the effect of the action of the Court. When on 16th March, 1923, the District Munsif passed orders closing the petition as the sale could not take place for want of bidders, are we to understand that the District Munsif had dismissed the application, disposed of the matter finally and given a quietus to the relief claimed by the decree-holder. It will be seen from the earlier orders that the sale could not take place on 8th January, 1923, as the Court was closed on account of the fact that plague was prevalent in the town. Again there was an order for sale on 12th March, 1923. Obviously the reason for the absence of bidders for the sale fixed to take place on 16th Maich, 1923, was the prevalence of plague in the town and the consequent aversion of the villagers to proceed to the town and bid at the auction. It is difficult in these circumstances to say that the Court intended that the application should be dismissed. By that time the Court should have been fully aware of the meaning attributed in the decisions of the High Court to such expressions as "closed, struck off, consigned to the records, etc.," and in most of the cases, the view taken by the High Courts that such disposal if they can be named as such, are only for statistical purposes and not with the object of putting an end to the application.

The next decision relied on by the learned counsel for the appellant is the judgment of Wadsworth, J., in *Unnamalai Ammal* v. *Baghyathammal*[1], but we do not think that there is any dictum in that judgment which can be availed of by the learned counsel for the appellant in support of his contention. Wadsworth, J., was dealing with the interpretation of an order couched in the following terms : "Decree-holder dead. Petition dismissed." The learned Judge was of the opinion that when a petition is dismissed it has the effect of raising the attachment and thereafter no further attachment subsisted. In the circumstances of that case and especially in view of the expression used, namely, "dismissed" there can be no justification for imagining that the attachment would thereafter subsist. In this connection we need only refer to a passage in the judgment of Jackson and Butler, JJ. in *Prianan Chettiar* v. *Lakshmanan Chettiar*[2], where the bench had to consider the effect of similar expressions used in passing orders on an execution petition. The facts of that case show that in an execution application after the attachment was effected there was an endorsement on the petition, 'closed'. It was argued that what the Court intended by that order was that the petition had been dismissed on account of the failure to pay batta. In refuting this argument the learned Judge, (Jackson, J.) observed as follows at page 266 :

> "By this date (1921) the distinction between 'closed' and 'dismissed' is well known and it cannot be argued that a petition which is closed has been dismissed so as to attract the mischief of Order 21, rule 57, Civil Procedure Code."

The learned Judge, therefore held that the attachment was still subsisting. It seems to us that the observations of the learned Judge aptly apply to the present case. As we have already remarked, there is no data from which it can be inferred that the Court intended to pass final orders on the petition when it used the expression "closed". Such being the case, it cannot be held that the Court intended to put an end to the attachment that had already been subsisting. The same should be deemed to be susbisting even after such an order had been passed.

Failing on these two points the learned counsel for the appellant urged that even if the attachment was subsisting after 16th March, 1923, still the conduct of the decree-holder subsequent to that order would show that he had abandoned the attachment so that it must be deemed that the attachement had been wiped off or effaced. We are not quite clear how a party by his act can abandon the attachment subsisting on a property. It is by an act of the Court resulting from an order passed that the attachment is effected and how a party by his own volition can put an end to an attachment by abandoning it has not been clearly explained. Mr. Gopalaswami Iyengar relied upon a sentence in the judgment of Satyanara-

1. 1940 M.W.N. 459. 2. (1934) 68 M.L.J. 265.

yana Rao, J., in *Venkata Rao* v. *Surya Rao*[1], where the learned Judge observed as follows :

"An attachment, it has to be mentioned, does not otherwise cease unless there was a satisfaction or adjustment of a decree or sale of the property or a decree was set aside or attachment was withdrawn or *abandoned* and in the case of attachment before judgment the suit was dismissed."

Because the learned Judge has used the expression that the atttachment does not cease unless it is put an end to in one of the ways of which abandoning is one, we are asked to say that it is possible for a party to extinguish it by means of abandoning it. The various modes under which an attachment can cease to have effect have been enumerated by the learned Judge and the antithesis between withdrawal of attachment and abandonment shows that the abandonment of an attachment cannot be by the mere act of parties. The actual decision of the case shows that for the determination of the attachment not covered by Order 21, rule 57, Civil Procedure Code, the order of the Court would be ordinarily necessary and the omission to state whether the attachment continues or ceases would probably result in the continuance of the attachment. We do not read the observations of the learned Judge as laying down that a party can abandon an attachment validly imposed upon a property by the orders of the Court. A petition can be abandoned but not an act of the Court like the attachment.

It was then urged that the first item in column 6 of E.P. No. 239 of 1933, Exhibit B-2, stated that the properties were attached and brought to auction sale and as there was nobody to bid, it (E.P. No. 1019 of 1922) was rejected and because the word "rejected" was used, the decree-holder was conscious of the non-existence of the attachment at the time, he filed E.P. No. 239 of 1933 on 11th November, 1933. Mr. Desikan, for the respondents, pointed out that though the word used in column 6 was "rejected" when dealing with the mode in which the assistance of the Court was required in column 10 there is a specific mention of the existence of the attachment in E.P. No. 1019 of 1922 for it is prayed that the properties which were attached under Order 21, rule 64, Civil Procedure Code, in E.P. No. 1019 of 1922 should be sold and the amount realised. It is also relevant to note that after the execution petition was returned there was a further endorsement that the attachment in E.P. No. 1019 of 1922 was still in force as that execution petition was disposed of only for statistical purposes. Hence it cannot successfully be contended that when the decree-holder filed E.P. No. 239 of 1933 he was conscious of the non-existence of the attachment already subsisting. On the other hand, various averments contained in Exhibit B-3 prove the contrary.

A number of cases were cited before us to show that under certain circumstances the Court is entitled to infer that the attachment has ceased to exist as a result of the inaction of the decree-holder during a course of time and that from such conduct it could be concluded that there could be no attachment in existence. A very early case reported in *Puddomonee Dossee* v. *Roy Muthooranath Choudhry*[2], was cited.

In that case the Privy Council held that the "striking off" an execution petition is an act which may admit of different interpretations according to the circumstances but when a very long time has elapsed between the original execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative unless the circumstances are otherwise explained. It is seen from that report that a very long time had elapsed between the filing of the original execution petition and the date on which it was struck off and, therefore, their Lordships presumed that the striking off was due to the inaction or negligence of the party. It means that he had abandoned the execution petition itself. Nowhere do their Lordships say that the attachment as such can be abandoned or has been abandoned. All that can be gathered from the observations of their Lordships is, that if a party is not diligent but on the other hand is dilatory and negligent in prosecuting the execution petition which after a long

1. (1949) 1 M.L.J. 320: I.L.R. (1950) Mad. 39 at p. 50.
2. (1873) 20 W.R. 133 (P.C.).

lapse of time is struck off, the inference is that the same has been abandoned by him. The facts of the case show that the attachment was effected in 1832 and the execution petition was struck off in 1844 and there is nothing to show that any proceedings were taken during the intervening period and it is also in evidence that in 1840 a fresh attachment was effected. In these circumstances there can be no doubt, whatever, that the earlier execution petition itself has been abandoned by the party. A later case in the same volume at page 418 *Mussamut Goonjessur Koonwar* v. *Luchmee Narain Singh*[1], refers to this judgment of the Judicial Committee and lays down (*sic*)

> "Where an attachment more than nine years old, made in execution of a decree more than twelve years old was pleaded as an injunction operative under the Civil Procedure Code, section 240, the Court held themselves bound to assume in the absence of other information that the attachment had been removed, and the execution proceedings had all come to an end."

Here again for nine years there was absolute inaction and from the facts of the case it was legitimate to assume that the execution proceedings had come to an end.

Sir John Wallis, Kt., Chief Justice, referred to the judgment of the Judicial Committee in *Puddomonee Dasi* v. *Roy Muthoornath Chowdhry*[2], adverted to above in *Chamiappa Tharagan* v. *Rama Iyer*[3], and held that the facts of that case before him raised a presumption that the attachment was abandoned. It is seen that the attachment was effected by the Court to which the decree had been transferred for execution and after sometime the petition was struck off and the decree was sent back to the Court which passed it. From these circumstances, the learned Chief Justice presumed that the attachment was abandoned. It is not clear how there can be an abandonment. But the actual decision had turned upon some other point. We are not able to see how this observation can help the case of the appellant. Great reliance was placed by Mr. Gopalaswami Iyengar on a decision of the Privy Council in *Maharaj Bahadur Singh* v. *Forbes*[4], where there are observations at pages 188 and 189. Because of the fact that between the first application in which the attachment was effected and the final one which came up for decision there had been a number of intervening applications for attachment which were different in nature and character from the initial one, their Lordships held that the reliefs claimed under the earliest application must be deemed to have been given up. It is clear, as their Lordships have stated, that three intervening applications essentially different in character from the first of 1908 had been filed and, therefore, they presumed that the decree-holder must be deemed to have abandoned the first application.

Here also, it is a case of an abandoment of the petition filed in the Court and not of an abstract thing as the attachment . It was further held that the combined effect of the intervening applications was that a substantial departure from the original application had been made so as to make it impossible to hold that the last application was a continuation of the initial one. The next case relied on by the learned counsel for the appellant is the judgment of Govindarajachari, J.,in *Venkata-Lakshminarasimham* v. *Gomaji & Company*[5]. Here also the learned Judge was considering the abandonment of the application by the decree-holder in that he had not taken adequate steps in regard to his prayer for attachment and sale of the immovable property. In this case reference had been made to the decision of the Privy Council in *Maharaj Bahadur Singh* v. *Forbes*[4], for concluding that where the intervening applications between the earliest and the latest execution application are essentially different in character from the earliest one it is quite open to the Court to infer an abandonment of that application and in any event the combined effect of the previous applications marks such substantial departure from the original application that it cannot be said that the later application should be treated as a continuation of earlier one. The facts of that case show that the earlier application had been abandoned.

1. (1873) 20 W.R. 418.
2. (1873) 20 W.R. 133 (P.C.).
3. (1920) 40 M.L.J. 65 : I.L.R. 44 Mad. 232 at 238.
4. (1929) 57 M.L.J. 184 (P.C.).
5. (1948) 2 M.L.J. 488.

On behalf of the respondents two decisions have been brought to our notice, namely, *Mohamadsha Khan Sahib* v. *Srinivasalu*[1], and *Karuppan Chettiar* v. *Rajangam*[2]. In the former case the decision was that where by way of caution, a decree-holder who has previously attached the property of his judgment-debtor asks for re-attachment, he does not thereby abandon or waive the original attachment especially where he refers to the prior attachment as subsisting and asks for re-attachment only if the Court should deem it necessary. In the latter case Venkataramana Rao, J., held that if owing to a mistake or ignorance of the legal rights the plaintiff obtained a fresh attachment when an earlier attachment is in force it would not terminate the attachment which was already subsisting.

In our view, the point decided in the case cited above may usefully be applied to the facts of the present case. That the decree-holder was conscious of the existence of the attachment already effected when he filed E.P. No. 239 of 1933 has already been considered by us. The only point is whether the intervening applications between E.P. No. 1019 of 1922 and E.P. No. 239 of 1933 are so different in nature and character as to compel the Court to infer that the earliest application had been abandoned. The burden of proving that the application has been abandoned is on the defendant and he has not taken any steps to discharge that burden. No certified copy of any of the intervening applications has been produced before the Court and we are not able to say whether those applications contained any reference to the existence of the attachment in E.P. No. 1019 of 1922. As Article 182 (5) of the Limitation Act then stood, the subsequent execution application can be considered as step-in-aid of execution only if it is filed within three years of the presentation of the earlier application and not as is now within three years of the passing of the final order on the earlier one. Therefore, we can safely presume that in E.P. No. 172 of 1925 and E.P. No. 1433 of 1925 reference must have been made to E.P. No. 1019 of 1922 and the orders thereon. The subsequent petitions also should make reference to the earlier ones. We are not, therefore, justified in presuming from the intervening applications that the earliest application had been abandoned by the decree-holder. If that is so, in view of our conclusion that the attachment already effected was subsisting E.P. No. 239 of 1933 is a valid one by which the properties already attached on 29th July, 1922, can be sold. Therefore, the sale in favour of the predecessor-in-title to the defendant cannot have precedence over the Court sale in favour of Rajammal. In this view the decision of the learned District Judge is correct.

In the result the second appeal fails and is dismissed with costs.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE RAJAGOPALA AYYANGAR.

The Province (State) of Madras, having its head quarters at Fort St. George, Madras and represented by the Chief Secretary .. *Appellant**

v.

I. S. & C. Machado, a registered firm of general merchants and commission agents having their head-office at Tuticorin .. *Respondents.*

Carriage of Goods by Sea Act (XXVI of 1925), section 4 and Articles 2 to 4 of Schedule—Carrier—When could invoke the exemption from liability—Act of God—What constitutes to enable carrier to claim exemption from liability to loss on account of.

Under section 4 of the Carriage of Goods by Sea Act, every Bill of Lading or similar document of title issued in India, which contains or is evidence of any contract to which the rules apply, shall

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1. (1902) 13 M.L.J. 221. 2. (1939) 2 M.L.J. 916.

* O. S. Appeal No. 96 of 1951 and Memo. of Objections. 17th December, 1954.

contain an express statement that it is to have effect subject to the provisions of the said rules as applied by the Act and it is only when a Bill of Lading is issued and this document contains an express provision that it is subject to the terms of the rules under the Act, that the rights and obligations of the parties are governed by the stipulations set out in Articles 2 to 4, including the exemptions in favour of the carrier. Both the conditions have to be satisfied before the exemption could be invoked by a carrier.

Vita Food Products Inc. v. *Unus Shipping Company*, L.R. (1939) A.C. 277 and *Canadian and Dominion Sugar Company Limited* v. *Canadian National (West Indies) Steamships Limited*, L.R. (1947) A.C. 46 referred.

The provisions of the rules embodied in the schedule to the Act do not apply *proprio vigore* to all contracts of carriage by sea but only in cases where a Bill of Lading has been issued incorporating the provisions of the Act.

If the occurrence (moderate winds during monsoon) was nothing extraordinary and one that could have been anticipated, the loss caused by it would not be attributable to an act of God. Where the carrier has not anticipated or provided against such occurrence, he cannot claim exemption from liability for the value of the cargo lost by the boat sinking in such weather.

Case-law as to what amounts to act of God reviewed.

On appeal from the Decree and Judgment of the Honourable Mr. Justice Mack, dated the 8th January, 1951 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 156 of 1947.

The Advocate-General (*V. K. Tiruvenkatachari*) and the Government Pleader (*C. A. Vaidialingam*) for Appellant.

S. Krishnamurthi for Respondents.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This is an appeal by the defendant, the State of Madras, against the Judgment of Mack, J., in C.S. No. 156 of 1947 filed by the respondents against them, and the complaint of the appellant is directed against the disallowance of a portion of the counter-claim which had been raised by them in the suit. The plaintiffs have filed a memorandum of cross-objections objecting to the decree in respect of a portion of the counter-claim in favour of the State.

The plaintiffs are a registered firm carrying on business *inter alia* as country-craft-carriers for a long time and they were employed in such capacity by the Government of Madras for transporting rice from the West Coast to Tuticorin during the years 1945-1946. The terms and conditions upon which the plaintiffs were to render this service were reduced to writing and embodied in a contract, dated 24th November, 1945, between the Governor of Madras represented by the Commissioner of Civil Supplies on the one part and the plaintiffs on the other. This sets out the conditions under which, and the remuneration payable for the transport of rice in country-crafts between Trivandrum port and Tuticorin port. A supplemental contract was entered into on 4th December, 1945, relating to the loading of the bags of rice from the pier-head at Trivandrum into country-crafts. The plaintiffs deposited with the defendant Rs. 5,000 and Rs. 1,000 as security under the two contracts above-mentioned. For arrears in the remuneration payable to them for the services rendered by them under these two contracts, the plaintiffs brought the suit C.S. No. 156 of 1947 on the Original Side of this Court for the recovery of Rs. 59,116-10-0 made up of the charges payable to them on several items as under the agreement. The Government of Madras admitted that a sum of Rs. 56,494-10-9 was due to the plaintiffs as remuneration but counter-claimed in respect of damages sustained by them in matters to be mentioned immediately. The learned Judge has granted to the plaintiffs a decree for this sum of Rs. 56,464, and there is now no dispute as regards this portion of the decree, the only items in controversy being those comprehended in the counter-claim by the defendant.

This comprises two distinct heads. The first is as regards the claim to compensation for the loss of 3,005 bags of rice entrusted to the plaintiffs for carriage from Trivandrum to Tuticorin, but which was never delivered at destination, and which were stated by the plaintiffs to have been lost by "an act of God". The value of the goods thus lost is stated to be Rs. 85,069-8-8. The entire amount

of this counter-claim has been negatived by the learned Judge. The second head relates to the short fall between the weight of the goods as handed over to the plaintiffs at Trivandrum compared with the weight as delivered by them at Tuticorin. The contract, dated 24th November, 1945, contains a tolerance clause permitting 2 lb. per bag of 164/4/7 lb. After making this agreed allowance, there was an excess shortage of 3,52,230 lb. and the defendant counter-claimed for the value of this quantity which came to Rs. 61,317-15-1. The learned Judge decreed to the defendant 2/3rd of the excess, *viz.*, Rs. 40,878 and disallowed the rest. The amount disallowed by the learned Judge is the subject-matter of the second item of the appellant's claim. The plaintiffs have filed a memo. of cross-objections against this decree for Rs. 40,878.

The first question to be considered is regarding the liability of the plaintiffs for the loss of the 3,005 bags entrusted to them. The plaintiffs anticipated the counter-claim in this regard and pleaded in paragraph 11 as follows :

"The plaintiffs state that a consignment of 3,005 bags of Tanjore boiled rice weighing about 220½ tons was sent by the defendant through the plaintiffs in December, 1945. The bags were loaded at Trivandrum on plaintiffs' country-craft on 29th December, 1945. When the country-craft reached the south limit of Port of Tuticorin it struck a submerged rock on account of adverse weather due to an act of God and sprang a leak and the goods were lost. The plaintiffs state that the defendant is wrongfully claiming from the plaintiffs a sum of Rs. 82,261-14-0 being the value of 3,005 bags of rice so lost on the ground that the plaintiffs shall make good the loss."

The defendant's version in regard to this is to be found in paragraph 8 of their written statement which runs as :

"In respect of the transport of rice done by the plaintiffs under the contract, dated 24th November, 1945, above adverted to 488,517 lb. of 3005 bags of Tanjore boiled rice were sent by the defendant through the plaintiffs in December, 1945, as alleged in paragraph 11 of the plaint. The bags were loaded at Trivandrum on the 29th December 1945. The defendant states that in and by virtue of the provisions of clause 3 of the aforesaid agreement of the 24th November, 1945, the plaintiffs are responsible for the safe transport of the said rice to the Tuticorin Port. The defendant denies the allegations in paragraph 11 of the plaint that the goods were lost on account of an act of God but states that the same were lost by the negligence of the plaintiff and his servants or agents or other people who were in charge of the boat in which the rice was loaded. The defendant therefore claims that the plaintiff is liable to re-imburse the defendant the value of the said quantity of rice. The defendant claims the value of same at the rate of Rs. 14-5-3 per maund being the cost of the rice to the defendant at Tuticorin Port. The defendant states that the total amount due by the plaintiff to the defendant under this head is Rs. 85,069-8-8."

Before dealing with the evidence relating to the sinking of the ship to ascertain whether this could be attributed, to an act of God, we might refer to the reasoning by which the learned trial Judge has rejected the claim by the State. He dealt with the evidence as regards the circumstances in which the ship was sunk, and reached the conclusion that the ship sank in what was really fine weather by striking against a coral reef and that this was not due to an act of God. On this finding if the rights and obligations of the parties were to be based wholly upon the agreement, dated 24th November, 1945, marked as Exhibit P-1, which exempted the carrier from liability for loss to the cargo while in transit by sea only if caused, by enemy action or an act of God, the counter-claim would have to be allowed. But the learned Judge negatived the counter-claim by holding that despite the contract Exhibit P-1 the plaintiffs as carriers were protected by Article IV para. 2 of the Indian Carriage of Goods by Sea Act, (XXVI of 1925) which provides that:

"Neither the carrier nor the ship shall be responsible for loss or damages arising from the (*a*) act, neglect, or default of the master, mariner, pilot or servant of the carrier in the navigation or in the management of the ship".

The reasoning of the learned Judge might as well be set out in his own words :

"This Act embodied the unanimous recommendations made at the International Conference on Maritime Law held at Brussels in October, 1922. Every boat-load of rice was accompanied by a satmi letter, described as a bill of lading by Government in their correspondence, showing the shipment made by the Government of Madras, Civil Supplies, giving the weight, freight and other details. The evidence shows that this letter was made out by the contractor's representative at Trivandrum and handed over to the tindal, and that on arrival at Tuticorin after paying harbour dues was handed over to the Reception Tahsildar at Tuticorin for taking delivery at the customs shed. All these letters show on their face that they were issued 'subject to rules in force as laid down by the

Government of India for Transport and Delivery'. Mr. Radhakrishnayya for plaintiffs contends that the rules contemplated there were the Articles of Act XXVI of 1925. The learned Advocate-General contends that this Act has no application to the suit contract at all, as under section 2 it only applies to the carriage of goods by sea in ships carrying goods from any port in British India to any other port whether in or outside British India. He argued that as Trivandrum was not then in British India the Act is not applicable. Presumably this Act was adopted by the then Travancore Government for regulating the carriage of goods by sea from its ports....However this may be, plaintiffs were residents of Tuticorin, a port in British India. The other contracting party was the Madras Government. I am unable to see much force in the learned Advocate-General's argument that these satmi letters were not bills of lading......The simple point I have to determine is whether in this very hurried contract Exhibit P. 1 entered into to provide for a pressing emergency the contracting parties at all contemplated the Indian Carriage of Goods by Sea Act and contracted themselves out of its scope. It would be manifestly inequitable to deprive a carrier by sea of the protection afforded to him under Act XXVI of 1925 in respect of accidents by sea which are not acts of God, but which arise from errors of judgment in the navigation and management of the ship by the master, mariner or the pilot....I find that the obligation under Exhibit P. 1 must be read subject to the protection afforded to the carrier and the ship under Act XXVI of 1925 by which the contracting parties are not only bound, but also specifically agreed to be bound by the acceptance of these bills of lading subject to rules in force which certainly must include the Articles appended to Act XXVI of 1925. I find in the result that the Pathimar Salim, boat No. 217, was sunk by the neglect of Rosiah Rodrigo, P.W. 3, who was in charge of the navigation of this ship in seeking to anchor it in unsuitable place. Under Article 4 of Act XXVI of 1925 plaintiffs cannot be held responsible for any damage resulting therefrom. This part of the counter-claim therefore fails."

We are of the opinion, that the entire reasoning of the learned Judge proceeds upon a misapprehension, and that the Carriage of Goods by Sea Act (XXVI of 1925) is inapplicable to govern the rights of the plaintiffs while carrying the goods now in dispute under Exhibit P. 1. In the first place, by reason of section 2 of the Act :

"the rules set out in the schedule have effect only in connection with the carriage of goods by sea in ships carrying goods *from any port in British India* to any other port whether in or outside British India."

Unless, therefore, the starting point or the port of loading is a port in British India the Act is obviously inapplicable. The learned Judge has assumed without any warrant that there must have been some legislation in Travancore on the same lines as Act XXVI of 1925. It is clear that there was no such legislation in force, in that State and the learned Judge erred in making a presumption the other way. It was only after Travancore acceded to the Indian Union that by reason of Central Act (XVIII of 1945) could the Carriage of Goods by Sea Act be made applicable to Travancore-Cochin along with other acceding States if a notification were issued therefor by the Central Government and it does not even appear that any such notification was issued. Subsequently of course by the Adaptation of Laws Order, 1950 section 2 of Act XXVI of 1925 was amended so as to cover ships carrying goods from any port in *India* to any other port in or outside India, so that it was only after 1950 that the Carriage of Goods by Sea Act became applicable to vessels starting their voyage from the port of Trivandrum.

Further, under section 4 of the Carriage of Goods by Sea Act:

"every bill of lading, or similar document of title issued in British India which contains or is evidence of any contract to which the rules apply, shall contain an express statement that it is to have effect subject to the provisions of the said rules as applied by this Act"

and it is only when a bill of lading is issued and this document contains an express provision that it is subject to the terms of the rules under the Act that the rights and obligations of the parties are governed by the stipulations set out in Articles II to IV including the exemptions in favour of the carrier. Thus two conditions have to be satisfied before the exemption could be invoked by a carrier (1) he must have issued a bill of lading and (2) this should contain a clause stating that it was subject to the provisions of the Act.

Thus in *Vita Food Products Inc.* v. *Unus Shipping Company, Limited*[1], Lord Wright laid down that the Act and the schedules were attracted only where a bill of lading

1. L.R. (1939) A.C. 277 at 288.

was issued and that there was no provision in the Act making it imperative for the carrier to issue a bill of lading, save on demand of the shipper (Article III, paragraph 3 of the Schedule). In the case before the Privy Council, a bill of lading was issued, but it did not contain a statement as required by the section corresponding to section 4 in the Indian enactment, *viz.*, that it is to have effect subject to the provisions of the said rules as applied by this Act. The question was whether the bill of lading was invalid on this account or whether it was this document alone which governed the relationship between the parties as distinct from the exemptions and immunities granted by the statute. The Privy Council held that the disobedience of the terms of a section corresponding to section 4 of the Indian Act did not render the bill of lading illegal, but that this instrument alone governed their relationship and not the provisions of the statute. A similar view was expressed in a later decision in *Canadian and Dominion Sugar Company Ltd.*, v. *Canadian National (West Indies) Steamships Limited*[1], by the Privy Council, this judgment also being by Lord Wright. Dealing with the provisions of the Carriage of Goods by Sea Act, the learned Lord said :

> "Rule 3 expressly applies only if the shipper demands a bill of lading showing the apparent order and condition of the goods. There is no evidence that the shipper here made such demand : indeed, no demand of this nature is alleged. The condition of the rule is thus not fulfilled. In *Vita Food Products Inc.* v. *Unus Shipping Co.*[2] this Board held that the rules under an Act in similar terms in force in Newfoundland did not make it imperative for the carrier to issue a bill of lading save on demand of the shipper. There is indeed no law which prevents goods being carried at sea without any bill of lading at all or makes any particular form of bill of lading obligatory."

It is, therefore, clear that the provisions of the rules embodied in the schedule do not apply *proprio vigore* to all contracts of carriage by sea, but only in cases where a bill of lading has been issued incorporating the provisions of the Act.

It is now necessary to deal with the observation by the learned trial Judge that the satmi letters issued in respect of each loading is tantamount to a bill of lading and the further point that the reference to the rules in the form renders the statute applicable to the carriage of goods in the present case. We have examined the terms of the satmi letters and we are satisfied that it is not a bill of lading at all. It was not issued to the shipper by the Master of the vessel, but is really in the nature of a manifest enabling the Master or tindal of the vessel to receive payment of freight after delivery of these goods. Further the printed clause at the top " issued subject to rules in force as laid down by Government for transport and delivery " has nothing to do with the Carriage of Goods by Sea Act, but evidently refers to the rules and regulations made under the Defence of India Act in relation to shipping and transport of goods by sea. The grounds upon which the learned Judge has disallowed the counter-claim have, therefore, to be ignored, and indeed the learned counsel for the plaintiffs-respondents did not seek to support the judgment of the learned judge on the basis upon which it was rested.

The rights and liabilities of the parties have, therefore, to be judged with reference to the terms of the agreement Exhibit P-1 in which the only exception or exemption in favour of the carrier was in the event of loss of the cargo being caused by enemy action or an act of God (*Vide* clause 11). As there is no question of enemy action in the present case, the plaintiffs would be liable for the loss, unless they were able to prove that the boat with the cargo sank by reason of an " act of God." As stated before, the learned trial Judge has negatived the plaintiffs' plea in this regard.

The learned counsel for the plaintiffs-respondents, however, challenged the finding of the learned Judge that the loss of the vessel was not due to an " act of God " and it will now be convenient to deal with the evidence in relation to it.

The 3,005 bags of rice were loaded at Trivandrum on board a Kothia vessel on 28th December, 1945, by name " Pathimar Salim " No. 217. The normal duration of the journey from Trivandrum to Tuticorin is about 4 days. The vessel which carried the goods was of 190 tons. She left Trivandrum on the morning

1. L.R. (1947) A.C. 46. 2. L.R. (1939) A.C. 277.

of the 28th December and was sunk near Tuticorin on the evening of 13th January, 1946. The distance between Trivandrum and Tuticorin is about 130 miles, Cape Comorin being situated almost mid-way between those two ports. The vessel when it left Trivandrum was in charge of a tindal by name Ibrahim Kutti who has been examined as P.W. 1. The story of the plaintiff in relation to the ill-fated voyage is shortly this. The vessel reached Cape Comorin at about 7 A.M. on 29th December, 1945. On arrival there the tindal experienced strong winds. He had with him one John who was really not a pilot, but who was supposed to know the route. These two decided that it was not safe to proceed further to Tuticorin and therefore, sailed backwards to an intermediate port by name Colachel which they reached at about 4 P.M. on the same date. P.W. 1 then wired to Trivandrum asking for a pilot to be sent and he also went himself by bus to Trivandrum and met the agent of the plaintiffs P.W. 5. and requested him to spare a pilot. In response, one Rosiah Rodrigo who is P.W. 3 and who had experience of this route, was sent and Ibrahim and Rosiah joined the boat at about 3 P.M. on 3rd January, 1946. They set sail that day and reached Comorin on 7th January, 1946. From there they started on their voyage to Tuticorin and stopped at Panjal, Pattua, Manapad and Alathurai on their way to Tuticorin, though they had admittedly no business at these places. Leaving Alathurai at 5 A.M. on 13th January, 1946, they reached the outskirts of Tuticorin at 4 P.M. on the same day. The wind is said to have increased in violence towards the evening and considering that it was not safe to proceed into Tuticorin, they dropped anchors at a place called Peimundal 6 or 7 miles from Tuticorin. Owing to the violence of the winds the anchor dragged and the boat struck a submerged rock and sprang a leak and was sunk. All the crew on board, however, escaped and reached Tuticorin where P.W. 1 the tindal made a report to the Port Officer, Mr. Smye, the next morning, *i.e.*, on the 14th. The tahsildar went with a staff to the place where the boat sank to find out if there was any possibility of salvage, but what they saw consisted merely of the mast of the ship and there was no trace of the 3,005 bags which were stated to have gone down into the sea in the holds of the ship. This, in brief outline, is the story as spoken to by the plaintiff's witnesses.

Before dealing with the evidence relating to the sinking of the ship, it is necessary to refer to one point merely to put it aside. This relates to a case which was sought to be developed by Government during the course of the evidence suggesting that the rice bags must have been taken out of the boat before it was sunk and that the rice must have been disposed of in black-market. The fact that the boat after coming up to Comorin went back to Colachel and on its subsequent journeys from there to Tuticorin halted in so many places without any apparent necessity to do so, coupled with the fact that there were no traces at all of any rice bags on the morning of the 14th when the site of the sinking was inspected by the tahsildar, and others viewed in the light of the disparity between the controlled and the black-market price of the commodity, undoubtedly create an amount of suspicion whether the rice bags were on board the vessel at the time of the sinking. But a fraud of this type has to be pleaded with particularity and cannot be rested on mere suspicion. It was on this ground that the learned trial Judge rejected the Government's case in relation to this allegation, and we do not see any reason to differ from him.

We have, therefore to proceed upon the footing that the 3,005 bags of rice were on the boat at the time when it sank on the evening of 13th January, 1946. The question to be considered is, how did this loss occur. Was it really caused by negligence on the part of the owners or the crew in charge of the vessel at the relevant date? Or, was it due to an act of God? We shall first deal with the question whether there was negligence on the part of the ship-owner or of the crew which was really the effective cause of the loss of the boat. The point may be considered under two heads: (1) was there a competent crew on board to navigate this boat? (2) did the crew on board navigate the vessel properly?

These questions have to be considered in the light of the undoubted delay that occurred in the vessel reaching Tuticorin from Trivandrum. We have already referred to the fact that though the normal duration of the journey between the two

ports is only about 3 to 4 days at the most, the time taken in the present case was from the 28th December to the evening of the 13th of January. Further, we have also this fact that though the vessel started from Comorin on the 7th of January, it has taken over 6 days to reach the environs of Tuticorin, a distance of about 60 to 70 miles. This delay is wholly unexplained, and though in the evidence it was stated that the boat called at the intermediate stations, the explanation is most unsatisfactory. The theory that this delay was due to heavy winds cannot be accepted, in view of the fact that other boats belonging to the same carriers had done the journey during this identical period taking the normal time. For instance, boat No. 56 left Trivandrum on the 25th December and reached Tuticorin on the 30th. Boat No. 51 left Trivandrum on the 31st December and reached its destination on 3rd January. Another boat No. 45 left Trivandrum on the 31st December and was able to arrive at Tuticorin on the 4th January. In fact except this one boat, during the entire period from the 28th of December till the 13th of January, 1946, all the boats which had reached Tuticorin had taken not more than 5 or 6 days at the most to make the journey and some of them have done it in 3 or 4 days. If, therefore, the weather were left out of account, the unfamiliarity of the crew who were put in charge of the vessel to pilot it, is a possible explanation for this delay. It is in this context that it becomes necessary to examine whether the story of there having been a competent pilot on board the "Pathimar Salim" is made out or not. The case of the plaintiffs in explanation of the delay was shortly this : The vessel started from Trivandrum on the 28th December, with one Ibrahim Kutti (P.W. 1) as the tindal in charge of the vessel. It was stated that he was not acquainted with the route, Trivandrum to Tuticorin. There was a pilot by name John whose knowledge was no better. That was why after reaching Comorin on the 29th, Ibrahim Kutti decided to go back in order to get a proper pilot to man the vessel. The case of the plaintiffs as spoken to by this witness is that after having reached Colachel at about 4 P.M. on the 29th of December he sent a telegram to his master and, also went himself to Trivandrum to get a good pilot into the boat. He says he went by bus to Trivandrum, met the plaintiffs' agent one John examined as P.W. 5 and with his assistance secured the services of one Rosiah Rodrigo. It is stated that this Rosiah Rodrigo joined the boat at Colachel at 3 P.M. on 3rd January, 1946. It was stated in evidence that this Rosiah was an experienced pilot who had navigated on this route continuously for several years and he was in charge of this vessel from Colachel to the environs of Tuticorin where the boat was lost. The boat after stopping at the places mentioned earlier reached a point about 7 or 8 miles from Tuticorin called Peimundal on the 13th. The case was that they found the winds heavy and decided to anchor in the open sea, not being able to sail to their destination. They sounded the depth and found it to be about 15 feet. They dragged the two anchors that were on the boat, but the anchors drifted and the vessel dashed against a submerged rock and sank. They tried to bale out the water for about 1½ hours, but did not succeed. They had a life-boat in the vessel and life-belts and with the aid of these all the crew of 16 on board reached the coast. On the 14th they returned with the tahsildar in a steam-launch, but not a single bag of rice was to be found in the place where the ship was supposed to have been sunk. From this evidence, it is clear that P.W. 1 was incompetent to man the boat, not having done the trip before and that it would be an act of gross negligence on the part of the carrier to have put this vessel in charge of this tindal, particularly in monsoon time when knowledge of expert navigation was essential. But the case, however, put forward by this witness was that Rosiah was really in charge of the vessel from Colachel onwards and that he was an expert. In the cross-examination of the several witnesses called on behalf of the plaintiffs, the defendant suggested that the story of Rosiah being on board the boat was untrue. Though the learned trial judge has not given any finding upon the point, a critical examination of the evidence has led us to the conclusion that Rosiah was not really on the vessel.

Before considering the evidence of Rosiah who has been examined as P.W. 3, it is necessary to mention a few preliminary facts. It is admitted that this individual

was in charge of boat No. 3 belonging to the same owner. He says he was contacted by P.W. 1 and P.W. 5 on 2nd January, 1946 and that he reached Colachel by the evening of 3rd January, 1946, when he took charge of the " Pathimar Salim " as a pilot. It is also admitted that boat No. 3 of which this Rosiah was in charge left Trivandrum on the 25th and reached Tuticorin on the 27th (*vide* Exhibit D-8, which is a register giving particulars of the transport of rice on Government account by the plaintiffs). The version of the witness Rosiah is that after unloading the goods at Tuticorin he reached Trivandrum in time to be there on the second and that Ibrahim Kutti met and took him to Colachel, leaving Trivandrum on the second. But it is found from Exhibit D-8 that boat No. 3 left Trivandrum on 4th January, 1946, reaching Tuticorin on the 7th and after having returned to Trivandrum started another journey, Trivandrum to Tuticorin on 12th January, 1946, reaching the latter on 15th January, 1946. The log book of boat No. 3 which would show the persons who were in charge of it in its trips dated 4th January, 1946 and 12th January, 1946, has not been produced.

Next, we have this very important circumstance that the fact of Rosiah being on board the ' Pathimar Salim ' is not to be found in any document till a very late stage and its significance cannot be missed. The first report of the accident is the entry of protest with the Port Officer by the tindal which is dated 15th January, 1946. The version set out in this document is that Ibrahim Kutti, Master and Commander of the Cotia called the ' Pathimar Salim ' and a crew of 14 set sail from Trivandrum to Tuticorin on the 29th of December, that they proceeded on their voyage encountering ordinary and moderate wind and weather and that nothing of any particular importance occurred until they reached Devil's Point (Peimundal). On 13th January, 1946, at about 4-30 P.M. the wind prevailing there was strong and the sea rough and the boat rolled heavily and shipped water fore and aft.

"As the wind was adverse to continue my voyage, I dropped my two anchors but due to nature of bottom which in many places is coral the boat dragged the anchors and dashed against a a rock and sprung a leak. I, with the assistance of my crew, baled out the water but all was in vain and in order to save the boat and the lives of the crew I have jettisoned some of the cargo and yet I was unable to pump out the water entering into the boat. Then myself and the eight crew on 14th January, 1946, early morning came in my life-boat to the shore near Devil's Point and from there to Tuticorin came by walk....Again on 14th January, 1946, at 4 P.M. I went to the spot with three lighters from shore to remove the cargo......I noticed my boat sunk."

It will be seen that there is absolutely no reference to Rosiah being the pilot of the vessel, a circumstance which would loom large in view of what happened during the journey and which necessitated the return to Colachel. In addition to this protest, the Port Officer, Mr. Smye, conducted an examination of Ibrahim Kutti under section 246 (3) of the Indian Merchant Shipping Act, 1923. In the description of the crew the name of no pilot is mentioned and there is only a statement that the crew consisted of the Master Ibrahim Kutti and 14 others. At about the same time Mr. Smye, the Port Officer of Tuticorin, before whom Ibrahim Kutti appeared on the 14th and made the statement and protest, submitted a confidential report to the Government of India regarding the loss of this vessel and its contents are very significant. In this report Exhibit D-3 he said :

"The vessel whilst on a voyage from Trivandrum to Tuticorin experienced adverse weather when nearing Tuticorin and the *tindal* apparently decided to anchor......

It would appear the tindal was endeavouring to anchor under the lee of Hare Island inside the bay known as Devil's Point, but on lowering the sails and letting go two of his anchor the vessel dragged and before further action was taken she struck a submerged rock and was holed..

This was the tindal's first voyage to Tuticorin and he was not familiar with the coastline and local conditions.

The *tindal* having decided to anchor near Devil's Point and acted accordingly it is doubtful if the accident could have been avoided after lowering sail and letting go the anchors as the nature of the sea-bed there is sand and coral and very poor holding ground but had he tackled seawards or returned to Pinnakayal he could have safely anchored and avoided the risk he took which resulted in the loss of both ship and cargo".

According to Rosiah as P.W. 3 he was also present when the tindal made the report and the protest, and it is surprising that if this were so, he omitted to mention the name Rosiah as the pilot in charge of the vessel at the relevant time. Mr. Smye

was examined as a witness on commission and no attempt was made to elicit from him that Rosiah met him on the 14th. Indeed if Rosiah was really on board and was in charge of the vessel at the time of the accident, one would have expected him to make a statement to the Port Officer and there would be some evidence of his having done so. The earliest occasion when it is definitely stated that it was the pilot Rosiah who was in charge of the vessel " Pathimar Salim " is only in March, 1946. It is also not without significance that in a letter written by P.W. 1 to the owners of the vessel from Colachel, P.W. 1 admits that he did not say anything about getting a good pilot from Trivandrum, but only that they were waiting for a favourable wind. The story, therefore, of P.W. 1 having gone over to Trivandrum to get a pilot and his getting Rosiah as a result of such endeavours must, therefore, be rejected as wholly improbable and inconsistent with the evidence.

If we proceed upon the footing that Ibrahim Kutti was in charge of this boat at the relevant time, a case of negligence on the part of the owners of the vessel is clearly established, for, it is admitted that P.W. 1 had no knowledge of the route and was most inexperienced for the job and if owing to his mismanagement the vessel was lost, the loss is attributable really to the negligence of the carrier in the employment of his staff.

Apart from this, even on the assumption that Rosiah was on board, the evidence in our opinion clearly establishes that there has been a negligence in the navigation of the vessel, in that the boat was anchored at a point where there were submerged rocks to the knowledge of Rosiah. Without going so far as to say that a case of barratry has been proved, one cannot but characterise the action of the Master and the pilot in anchoring at Devil's Point as one of near suicide. In Exhibit D-3 Mr. Smye said :

> " The tindal having decided to anchor near Devil's Point and acted accordingly it is doubtful if the accident could have been avoided after lowering sail and letting go the anchors as the nature of the sea-bed ,there is sand and coral and very poor holding ground but had he tackled seawards or returned to Pinnakayal he could have safely anchored and avoided the risk he took which resulted in the loss of both ship and cargo."

The evidence of Rosiah himself as to the circumstances which led him to anchor just at Devil's Point seems to us clearly a piece of negligent navigation, particularly when coupled with his admission that he knew the nature of the sea-bed at that point. We are, therefore, of the opinion that even if Rosiah was on board, he too was negligent in the management of the boat and in anchoring it at such an unsafe point.

On this finding, the plaintiffs would be clearly liable for the loss of these rice bags, and if the loss is proximately due to negligent navigation even if there was a heavy storm amounting to an act of God, the plaintiffs would not be protected. But even apart from any negligence, in our judgment the plaintiffs have not been able to establish that the loss was due to an act of God. The plea in regard to this is that there was a heavy wind of Force 5 blowing at the time. Force No. 5 is characterised in Exhibit P-4 the hand-book of Cyclonic Storms in the Bay of Bengal, as a fresh breeze blowing at 28 miles per hour. The log of the Tuticorin port shows that within the port limits or in the harbour the force of the wind that day was only No. 3 which is described " as a gentle breeze blowing at 18 miles per hour." Wind blowing at 40 miles an hour is termed " a moderate gale," while it has to be at 56 miles per hour to be described as " a strong gale " whereas to be called " a storm," the velocity of the wind has to be 75 miles per hour. The definition of the expression " act of God " by Cockburn, C.J., in *Nugent* v. *Smith*[1], has been followed in all the subsequent cases and might now be taken as established law. The learned Chief Justice said :

> "The definition which is given by Mr. Justice Brett, of what is termed in our law the 'act of God' is, that it must be such a direct, and violent, and sudden, and irresistible act of Nature as could not by any amount of ability have been foreseen, or if foreseen, could not by any amount of human care and skill have been resisted."

1. (1876) L.R. 1 C.P.D. 423, 434, 444.

The Judgment then proceeds :

"We cannot say, notwithstanding the inability of the jury to agree to an answer to the fifth question left to them, that the defendant has in this case satisfied the burden of proof cast upon him so as to bring himself clearly within the definition. It seems to me impossible to say that no human ability could foresee the reasonable probability of the happening of rough weather on the voyage, and that a horse at sea might be frightened by it, or that no human ability could prevent injury to a frightened horse in such weather as occurred."

The exposition here given appears to me too wide as regards the degree of care required of the shipowner, and as exacting more than can properly be expected of him. It is somewhat remarkable that previously to the present case no judicial exposition has occurred of the meaning of the term "act of God" as regards the degree of care to be applied by the carrier in order to entitle himself to the benefit of its protection. We must endeavour to lay down an intelligible rule.

That a storm at sea is included in the term "act of God" can admit of no doubt whatever. Storm and tempest have always been mentioned in dealing with this subject as among the instances of *vis major* coming under the denomination of "act of God." But it is equally true, as has already been pointed out, that it is not under all circumstances that inevitable accident arising from the so-called act of God will, any more than inevitable accident in general by the Roman and Continental law, afford immunity to the carrier. This must depend on his ability to avert the effects of the *vis major*, and the degree of diligence which he is bound to apply to that end. It must be admitted that it is not because an accident is occasioned by the agency of nature, and therefore by what may be termed the 'act of God' that it necessarily follows that the carrier is entitled to immunity. The rain which fertilises the earth and the wind which enables the ship to navigate the ocean are as much within the term 'act of God' as the rainfall which causes a river to burst its banks and carry destruction over a whole district, or the cyclone that drives a ship against a rock or sends it to the bottom. Yet the carrier who by the rule is entitled to protection in the latter case, would clearly not be able to claim it in case of damage occurring in the former. For here another principle comes into play. The carrier is bound to do his utmost to protect goods committed to his charge from loss or damage, and if he fails herein he becomes liable from the nature of his contract. In the one case he can protect the goods by proper care, in the other it is beyond his power to do so. If by his default in omitting to take the necessary care, loss or damage ensues, he remains responsible, though the so-called act of God may have been the immediate cause of the mischief. If the ship is unseaworthy and hence perishes from the storm which it otherwise would have weathered ; if the carrier by undue deviation or delay exposes himself to the danger which he otherwise would have avoided ; or if by his rashness he unnecessarily encounters it, as by putting to sea in a raging storm, the loss cannot be said to be due to the act of God alone, and the carrier cannot have the benefit of the exception.

James, L.J., observed in the same case :

"The expression 'act of God' is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him."

Coleridge, C.J., expressed himself in similar terms in the *Queen* v. *Commissioners of Sewers for Essex*[1] and stated this of the expression 'act of God.'

"The expression itself, being confined to events which cannot be foreseen, or which if they can be foreseen cannot be guarded against, points to events which are *prima facie* likely to be of very unusual occurrence."

Reference may also be made to Paton on 'Bailment', p. 423, where *Oakley* v. *The Portsmouth & Ryde Steam Packet Co.*[2] is cited. In that case a towed boat was driven

1. (1885) L.R. 14 Q.B.D. 561, 574. 2. (1856) 2 Ex. 618 at p. 623.

by the force of the waves against the rudder of a steamboat which was towing it and then forced to stop in order to get beside a pier. There was no negligence. Barons Alderson, Martin and Platt held that this was not " an act of God." " The act of God " means something overwhelming, and not merely an accidental circumstance. The learned author also refers to the fact that in recent cases a stricter view has been adopted, and attention is invited to the statement of Lord Shaw accepting Lord Westbury's definition of the term as ' circumstances which no human foresight can provide against and of which human prudence is not bound to recognize the possibility.' To a similar effect is a passage in Charlesworth on 'Negligence', at page 244. He defines an " act of God " as equivalent to *damnum fatale* in Scottish law, which was defined by Lord Westbury in *Tenent* v. *Earl of Glasgow*[1], in the passage already extracted and concludes that, to be " an act of God " the occurrence in question must be due to natural causes exclusively, of an extraordinary nature, and such that it could not be anticipated or provided against. Dealing with high winds, he refers to *Cushing* v. *Peter Walker and Son*[2] and says :

"Before wind can amount to an act of God....the wind must not merely be exceptionally strong but must be of such exceptional srength that no one could be reasonably expected to anticipate, or provide against it."

If therefore, the occurrence was nothing extraordinary and was one that could have been anticipated, the loss caused by it would not be attributable to an " act of God ". In the present case, there is clear evidence that during the monsoon, winds are fairly high and this was no extraordinary wind at all. The day was clear and there was no storm. The wind was moderate and was one that ought to have been anticipated and provided against by those undertaking navigation on this coast. The exemption based upon, the loss being attributable to an act of God, must therefore be rejected. In addition we have the circumstance that on that very day 13th January, 1946, other boats numbered 56, 35 and 75 have reached Tuticorin and Boat Number 78 reached Tuticorin on 14th January, 1946. In our judgment, the defendants are entitled to the value of of 3,005 bags which was lost on board the ' Pathimar Salim.' The plaintiffs-respondents do not dispute the quantum of the amount claimed by the Government as the value of these 3,005 bags, which they put at Rs. 85,069-8-8.

The next head of claim by the Government is in relation to shortage in weight. Clauses 2, 3, 4, 5 and 12 of Exhibit P-1, the agreement, dated 24th November, 1945 and clauses 2, 4 and 5 of Exhibit P-2 the supplemental contract entered into to cover the transport from the pier-head at Trivandrum to the craft, are relevant to the present question and are set out below :

Exhibit P-1 dated 24th November, 1945.

"2. The Special Tahsildar will intimate the contractor in advance the dates on which the consignments will be ready, and on such intimation the contractor will check the quantity at the time of loading by employing his own agent. The Special Tahsildar will also be present at the time of loading to satisfy himself about the quality and weight : the certificate of the said Special Tahsildar shall be the conclusive proof between the parties to this agreement regarding the quality and also the fit condition of the rice *i.e.* not being damp.

3. After the contractor takes delivery of the rice from the Special Tahsildar ex-craft he shall hold himself responsible for the safe transport of rice down to the Tuticorin Port.

4. For every bag of 164 4/7 lb. (excluding the weight of gunny,) a maximum shortage up to 2 lb. shall be allowed : any loss not exceeding this limit shall be ignored and any loss in excess of it shall be made good by the contractor.

5. The contractor shall engage an agent or agents at Tuticorin who shall satisfy the Reception Tahsildar, Tuticorin, regarding the correctness of the weight and the condition of the consignments.

12. The contractor shall be responsible for all losses exceeding 2 lb. per bag of 164 4/7 lb. (excluding the weight of gunny)."

Exhibit P-2, dated 4th December, 1945 :

"2. The contractor will guarantee the weight of each bag recorded by the staff of the Additional Deputy Commissioner of Civil supplies in the presence of the contractor's representative in the godown

1. (1864) L.R. 2 H.L. 22.
2. (1941) 2 All E.R. 693, 695.

at the time when the contractor delivers the bags at Tuticorin port, subject to the limit of precentage for wastage and dryage allowed in the argeement executed by him before the Commissioner of Civil Supplies, Madras, on the 24th November, 1945.

4. The entire liability for damages, pilferages, etc., subject to the limit of percentage specified in the agreement executed before the Commissioner of Civil Supplies, Madras, from the time the contractor takes delivery of the stocks at the pier-head at Trivandrum till they are delivered at Tuticorin port is undertaken by the contractor.

5. If any gunny is found unfit, it is to be replaced by a durable gunny before stocks are handed over to the contractor at the pier-head. If any gunny happens to develop holes after delivery to the contractor the stitching and other repairs will be undertaken by him at his own cost."

But it is, however, admitted that no certificates as provided for by clause 2 of Exhibit P-1 were issued and no weight certificate was required from the Special Tahsildar. The case of the plaintiffs in respect of this matter and their defence to the claim of Government was based upon (1) that all the bags were not weighed, but only certain sample bags, that having regard to the number of bags that have to be transported, the weighment of individual bags was practically impossible and that on this ground, there is no certainty in the weight of the rice handed over to them for transport : (2) that the rice were put into gunny bags which were old and which consequently burst, that notwithstanding several complaints, the old gunnies were not replaced by fresh ones and that the condition of the bags led to their bursting when the bags were stored ceiling high one over the other—the gunnies lower down being unable to bear the weight bursting and thus causing wastage. In proof of this, reliance was placed upon the fact that 377 bags of sweepings were delivered at Tuticorin which would show that their case about the bursting of the bags had a substantial foundation : (3) that there was no evidence of pilferage or loss in any other manner attributable to the negligence or misconduct of the servants of the carrier. Though under the contract a tolerance of 2 lb. per bag only was provided for, it is clear that in the circumstances disclosed by the evidence this was wholly insufficient, and that the entirety of the excess over 2 lb. could not justly be claimed by the Government. We have been taken through the evidence relating to the procedure adopted for delivery of these goods to the carrier in the Government godowns at Trivandrum and the checking at Tuticorin. But we are not satisfied that the learned Judge has erred in his appreciation of the testimony of the witnesses or the documents produced. The learned Judge has allowed to the Government damages for two-thirds of the deficiency and has disallowed one-third. We agree that this is merely a rough and ready method of calculating the loss, properly attributable to the carriers. But in the absence of any better evidence, we do not think that the claim of the Government for the balance is made out. Nor are we satisfied that the conclusion of the learned Judge awarding two-thirds of the excess deficiency is unfair to the carrier, particularly in view of the terms of the contract. In the view we take of this matter and our agreement with the learned Judge in his conclusion on this part of the case, we do not find it necessary to traverse through the entire evidence, which the learned Judge has fully discussed, except to say that having considered the matter ourselves, we endorse all that has been said by him in relation to this portion of the counter-claim.

The result is that the appeal succeeds to the extent of Rs. 85,069-8-8, being the value of 3,005 bags lost in transit while on board the 'Pathimar Salim' but is dismissed in respect of the claim regarding shortage in weight. The parties will pay and receive proportionate costs in the appeal and in the trial Court.

The memorandum of cross-objections by the carriers plaintiffs is dismissed with costs.

R.M. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

William Jacks and Company, Ltd., Madras .. *Petitioner**

v.

The State of Madras, represented by the Deputy Commercial Tax Officer, Harbour Division, Madras .. .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), *as amended by Act (VI of* 1951), *section* 3 (2) (viii)—*Electrical goods—What are—Test to determine the nature of.*

The Madras General Sales Tax Act does not define what 'electrical goods' are. Neither the Act nor the rules framed thereunder prescribe any test which should be satisfied before any given article could be brought within the scope of section 3 (2) (*viii*), *viz.*, electrical goods. It is neither possible nor desirable to prepare an exhaustive list of such materials nor is it possible to devise a formula of universal application. The correct and only practical test is to consider all such articles, the use of which cannot be had except with the application of electrical energy, as electrical goods. The goods concerned must be taken as a unit in considering its nature and it cannot be split up into parts to discover whether it is electrical goods or not.

[The test under Administrative Instruction, G.O. No. 56, dated 5th January, 1952, not approved.]

It will be too narrow an interpretation to hold that only those goods that are needed in generation, storage and distribution of electricity that could fall within the scope of 'electrical goods'. The words that follow the expression 'electrical goods' in section 3 (2) (*viii*) is only illustrative and not exhaustive in their scope.

Petition under section 12-B (1) of the Madras General Sales Tax Act as amended by Act VI of 1951 praying that the High Court will be pleased to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 29th July, 1953 and made in T.A. No. 398 of 1952.

V. Ramakrishna Sastri for *Messrs. King* and *Partridge* for Petitioner.

S. Ramanujam for the Assistant Government Pleader (*K. Veerasami*) for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The question for determination in these proceedings in revision is whether the articles specified in lists 1 (*a*), 1 (*b*) and 1 (*c*) were electrical goods within the meaning of section 3 (2) (*viii*) of the General Sales Tax Act and on the goods specified in section 3 (2) (*viii*) an additional tax of three pies in the rupee can be imposed. The Tribunal was unanimous in its findings that item 9 of list 1 (*a*), the electrical pump sets enumerated in list 1 (*b*) and all the items in list 1 (*c*) other than item 2 were electrical goods. Item 2 in list 1 (*c*) should really have been included in list 1 (*a*); item 4 of list 1 (*a*) was 26 inches circular saw-benches, and item 2 of list 1 (*c*) was a machine of the same type but of 20 inches variety. With reference to items other than item 9 of list 1 (*a*) and item 2 of list 1 (*c*) the learned Chairman of the Tribunal was of the view that they were not electrical goods. The view of the majority of the Tribunal which prevailed was that the component electrical motors of these items were electrical goods, and that on the turnover computed on the sale price of these electrical motors the assessee was liable to pay the additional tax of three pies for which section 3 (2) (*viii*) of the Act provided.

Section 3 (2) (*viii*) which before the amendment of the Act was section 3 (2) (*v*) runs:—

"All electrical goods, instruments, apparatus and appliances, including fans and lighting bulbs, electrical earthenware and porcelain and all other accessories."

The Act did not define what "electrical goods" were. Neither the Act nor the rules framed thereunder prescribed any test which should be satisfied before

*Tax Revision Case No. 367 of 1953. 16th March, 1955.

any given article was brought within the scope of section 3 (2) (*viii*). Administrative instructions were issued by the Government to the departmental authorities in G.O. No. 56, dated 5th January, 1952 which ran:

> "a machinery should be treated as an indivisible unit, where the electrical component forms an integral part of it and the entire machinery would be subject to the additional tax under section 3 (2) (v) of the Madras General Sales tax Act. Where the electrical component is not an integral part and can be detached from the machinery the value of the electrial component would alone be subjected to the additional Tax."

As the learned Chairman rightly pointed out that did not conclude a judicial determination of the question at issue even before the Tribunal.

It is neither possible nor desirable for this Court to embark on a preparation of an exhaustive list of what constitutes "electrical goods" within the meaning of section 3 (2) (*viii*) of the Act nor even is it possible to devise a formula of universal application. With reference to the items which the Tribunal had to consider in this case the test formulated by the learned Chairman was in our opinion the correct one—the only practicable test. He recorded:

> " I hold that only such articles the use of which cannot be had except with the application o electric energy, can be termed electrical goods or appliances."

The learned Chairman stated further:—

> " I am accordingly of the view that barring a case where a machine cannot be used except with the application of electrical energy, the machine has to be regarded as non-electrical. Both in the section and the description of the goods the expression used is "turnover relating to such goods." The goods sold has to be taken as a unit in determining if it comes within the description and cannot be split up in the manner indicated in the Government order."

We entirely approve of this test.

The learned counsel for the assessee reiterated the plea rejected, and in our opinion rightly rejected by the Tribunal that it was only whatever was needed for generating, storing and distributing electricity that could fall within the scope of "electrical goods" in section 3 (2) (*viii*) of the Act. That would be to place an unduly narrow interpretation of the expression "electrical goods." The argument of the learned counsel was based virtually on the words "including fans and bulbs" as it occurred in section 3 (2) (*viii*). The learned counsel contended that fans and bulbs would not have been taxable as electrical goods but for their inclusion. We are unable to accept this contention. The words that follow the expression, "electrical goods" in section 3 (2) (*viii*) appear to be illustrative and not exhaustive in their scope.

Judged by the practicable common-sense test mentioned above item 9 was rightly held to fall within the scope of section 3 (2) (*viii*). As the learned Chairman pointed out:

> "Item 9 in the list is a double ended grinding machine. This is nothing more than an electrical motor, at either end of the shaft of which, grinding wheels are fitted for sharpening tools. The machine is nothing more than an electric motor and the grinding wheels form part of the shaft of the motor; it cannot be worked except with the use of electricity. This machine must be regarded as electrical goods."

So did the items in list 1 (*c*) other than item 2 fall within the scope of section 3 (2) (*viii*).

With reference to the pump-sets mentioned in list 1 (*b*) the learned Chairman, who set out the unanimous view of the Tribunal on the question, found that the pump section was attached to an electric motor. The further finding was that in the case of these pumps there was no provision to drive them by any alternative power supply. On these findings, we are of opinion that the pump-sets were rightly classed as electrical goods.

The only question that remains is whether the majority view of the Tribunal was correct, that the turnover of the computed value of the component electrical motors of item 2 of list 1 (*c*) and of the items other than item 9 of list 1 (*a*) was liable to be taxed under section 3 (2) (*viii*). These motors were not in fact

sold or even valued separately when the goods were sold by the assessee. In our opinion, the view taken by the learned Chairman was the correct one, that for purposes of taxation the unity of the goods sold should not be impaired and that if the machine taken as a whole did not fall within the category of "electrical goods", a component part thereof, which was not sold as an independent item of goods could not be treated as the goods sold. Such a fictional sale could not furnish any basis for a computation of the taxable turnover.

The order of the Tribunal will therefore be varied to this extent. The turnover of the sales of item 2 of list 1 (c) and of all items other than item 9 of list 1 (a) inclusive of the value of the component electrical motors is liable to be taxed only under section 3 (1) (b) of the Act on the basis that they are not electrical goods. There will be no order as to costs.

R. M. — *Order varied.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDA MENON, MR. JUSTICE BASHEER AHMED SAYEED AND MR. JUSTICE RAMASWAMI.

The Karur Jai Hind Pictures represented by its partner Periasami Goundar .. *Petitioner**

v.

A. M. Shahul Hameed .. *Respondent.*

Civil Procedure Code (V of 1908), *section* 24—*Suit of small cause nature transferred to another Court not having small cause jurisdiction and tried with a connected original suit—Nature of—If loses its small cause character—Whether appeal or revision lies.*

Sub-section (4) of section 24 of the Civil Procedure Code lays down that a Court trying any suit transferred or withdrawn under the provisions of the earlier clauses in the section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes. When a small cause suit is transferred to a Court which does not have jurisdiction to try it as a small cause, even if the trial is proceeded with along with an original suit still the Court which tries it shall be deemed to be a Court of Small Causes for the purpose of the transferred suit alone. The decree passed in such a suit cannot be a decree in a original suit, and a revision lies to the High Court from such a decree under section 25 of the Provincial Small Cause Courts Act.

Kandaswami Mudaliar, In re, (1950) 2 M.L.J. 495 held wrongly decided.

Sankararama v. *Padmanabha,* (1912) 23 M.L.J. 373 : I.L.R. 38 Mad. 25 followed.

Chockalingam v. *Palaniappa,* (1932) 63 M.L.J. 689 : I.L.R. 55 Mad. 960 explained.

Murugesa Mudaliar v. *Venkatakesavalu Chetti,* (1929) 56 M.L.J. 649 overruled.

Bhagawati Pande v. *Badri Pande,* (1931) I.L.R. 54 All. 171 referred.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Tiruchirapalli, dated 26th August, 1954 and passed in S.C.S. No. 2737 of 1953.

N. S. Raghavan for Petitioner.

A. Sundaram Aiyar for Respondent.

The Court made the following order of Reference†:

Mack, J.—The petitioner in this revision petition was the defendant in a Small Cause Suit No. 2737 of 1953 in Sub Court, Tiruchirapalli, filed by the respondent for recovery of Rs. 825-9-9, the balance of a deposit of Rs. 1,000 under an alleged contract for screening a picture. The petitioner filed a suit, O. S. No. 411 of 1952, in the District Munsif's Court, Tiruchirapalli, claiming substantial damages on the same contract. The District Judge, under section 24,

* C.R.P. No. 1477 of 1954 and C.M.P. No. 10321 of 1954. — 15th April, 1955.

† 16th December, 1954.

Civil Procedure Code, transferred the small cause suit to be tried along with the original suit by the District Munsif, who gave the respondent a decree in the small cause suit, but dismissed the original suit filed by the petitioner. The petitioner has filed A. S. No. 356 of 1954 against that dismissal in the Additional Sub-Court, Tiruchirapalli, and in C.M.P. No. 10321 of 1954 asks for a transfer of that appeal to this Court to be heard along with C. R. P. No. 1477 of 1954, which he has filed against the decree against him in the suit originally filed as a small cause suit.

As regards the procedure to be adopted in these cases, there is a difference of judicial opinion. In *Kandasami Mudaliar*, In re[1], I took the view that a small cause suit loses its character as such when withdrawn to the original side and tried along with a original suit in a common trial in which a common issue or issues arise for determination. The learned advocates in that case both agreeing, a direction was given to the District Court to admit three C. R. P's. arising out of three small cause suits, on being properly stamped with *ad valorem* court-fee and to give them a disposal along with the main regular appeal in the original suit pending on its file.

A different view was taken by Raghava Rao, J., in *Gopala Rao* v. *Seetharamiah*[2], in which, following a Bench decision in *Sankararama* v. *Padmanabha*[3], he held that in such a case only a revision petition and not an appeal would lie from the decree passed in a suit originally filed as a small cause suit. That was a case in which a small cause suit filed in the District Munsif's Court at Eluru was transferred by the High Court to the Subordinate Judge's Court at Eluru for disposal along with two other original suits.

In *Sankararama* v. *Padmanabha*[3], Sundara Ayyar and Sadasiva Ayyar, JJ., considered a case in which a suit which was instituted as a small cause suit in a subordinate Court was transferred by the District Court to the District Munsif's Court for trial as an original suit and was again transferred to another District Munsif's Court for trial and disposal. It was held that the decree passed by the latter District Munsif's Court was a decree of a Court of Small Causes and that no appeal lay against such a decree. Section 24, clause (4) does create a difficulty of interpretation and application in cases of this kind. It lays down that:

> "The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes."

In *Murugesa Mudaliar* v. *Kesavalu Chetty*[4], Ananthakrishna Ayyar, J., explained and distinguished this Bench decision in holding that an order of transfer passed under section 24 (4) of the Civil Procedure Code cannot invest a Court not having small cause jurisdiction with it, and that such an order did not enable a judge having small cause jurisdiction up to a particular limit to try as a small cause suit a suit exceeding that limit, and, therefore, the High Court had no power to transfer a small cause suit pending on the file of a Subordinate Judge to the Court of a District Munsif where the small cause jurisdiction of the District Munsif is less than the value of the small cause suit.

In the case before me, the District Munsif clearly had no small cause jurisdiction to try this suit instituted as a small cause suit in the Sub-Court. What then is the procedure to be adopted when there are two suits pending in two different Courts, one a small cause suit and the other an original suit, both raising common issues on the same evidence between the same parties?

1. (1950) 2 M.L.J. 495.
2. (1953) 1 M.L.J. 250.
3. (1912) 23 M.L.J. 373: I.L.R. 38 Mad. 25.
4. (1929) 56 M.L.J. 649.

The view, that I took in *Kandasami, In re*[1] was that in such cases, the small cause suit loses its small cause character when transferred for disposal along with the original suit on this ground, and that section 24 (4) had no application to this type of case. In view of the conflict between my decision in *Kandasami, In re*[1] and that of Raghava Rao, J. in *Gopala Rao* v. *Seetharamiah*[2] and the difficulty of reconciling the decision of Ananthakrishna Ayyar, J., in *Murugesa Mudaliar* v. *Kesavalu Chetty*,[3] with this type of case, I think the difficulty should be resolved by a reference to a Full Bench so that the correct procedure to be adopted in such cases which are not of infrequent occurrence may be indicated. When once two suits like these have been tried and decrees passed on the footing of a single judgment, it seems to be necessary that appeals and revision petitions arising out of the common judgment should be heard by one and the same Court, the alternatives learned advocates stressed before me being either that the appeal should be withdrawn to be heard along with the C.R.P. or that the C.R.P. be sent down for disposal as a first appeal along with the connected appeal.

These petitions were then placed before the Full Bench.

N. S. Raghavan for Petitioner.

A. Sundaram Iyer for Respondent.

The Order of the Court was pronounced by

Govinda Menon, J.—In the view of Mack, J., a small cause suit transferred to another Court not having power to try that suit as a Court of Small Causes, when tried along with a connected original suit loses its character as a small cause suit and the decree passed in such a suit is appealable under section 96 of the Code of Civil Procedure and no revision lies to the High Court under section 25 of the Provincial Small Cause Courts Act. This is the view expressed by him in *Kandaswami Mudaliar, In re.*[1] The view of Raghava Rao, J., in *Gopala Rao* v. *Seetharamiah*,[2] is to the contrary, and we have now to decide which of the two views is correct. The judgment in *Kandaswami Mudaliar, In re*,[1] was delivered at the admission stage of three Civil Revision Petitions which arose out of three small cause suits filed originally in a Court of Small Causes but withdrawn to be tried along with an original suit in the District Munsif's Court of Vellore where the District Munsif tried all the four suits together on common evidence and gave a decree jointly in favour of the plaintiffs and some of the defendants against some other defendants. An appeal was filed against the decree in the original suit before the District Court, Vellore and revision petitions under section 25 of the Provincial Small Cause Courts Act were filed before the High Court against the decrees in the small cause suits. When these revision petitions came up for admission the learned Judge directed the papers to be returned to the advocate so that the same may be re-presented after affixing proper Court-fee as appeals before the Disrict Judge, for in the opinion of Mack, J., before whom these revision petitions came up for admission a small cause suit loses its character as such immediately it is withdrawn to the original side and tried along with an original suit. He also rested his decision on common-sense and practical view. With due and profound respect to the learned Judge we are unable to agree with the view taken by him. Sub-section (4) of section 24 of the Code of Civil Procedure lays down:

> "that a Court trying any suit transferred or withdrawn under the provisions of the earlier clauses in the section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

No reference has been made to this statutory provision in the judgment of Mack, J., for apparently it was not brought to his notice. We find it impossible to agree with the learned Judge

1. (1950) 2 M.L.J. 495.
2. (1953) 1 M.L.J. 250.
3. (1929) 56 M.L.J. 649.

in the opinion expressed by him in view of sub-section (4) of section 24, Civil Procedure Code. When a small cause suit is transferred to a Court which, as in the present case, does not have jurisdiction to try it as a small cause, even if the trial is proceeded with along with an original suit, still the Court which tries it shall be deemed to be a Court of Small Causes for the purpose of the transferred suit alone. That being so if it is a Court of Small Causes then the decree passed by it cannot be a decree in an original suit. If we compare section 24, Civil Procedure Code, with section 35 of the Provincial Small Cause Courts Act the difference becomes clear and explicit. Under section 24 (4), Civil Procedure Code, if a case is transferred from the existing Court of Small Causes to another ordinary civil Court such a suit has to be dealt with as a small cause suit and the Court of transfer must be deemed to be a Court of Small Causes. But under section 35 of the Provincial Small Cause Courts Act where a Court of Small Causes has ceased to exist or ceases to exercise such powers, in such a case without any order of transfer the suit goes to the Court which would have jurisdiction to try it if the suit had been filed after the cessation of the Small Cause Court. Therefore the decision by the Court to which the small cause suit is transferred is not open to appeal but the decision of the Court to which the case gets transferred under section 35 of the Provincial Small Cause Courts Act is appealable. The view taken by Mack, J., is opposed to the trend of authorities in this regard.

In *Sankararama* v. *Padmanabha*[1], the matter has been elaborately discussed by Sundara Ayyar and Sadasiva Ayyar, JJ., and it has been held that where a suit which was instituted as a small cause suit in a Subordinate Judge's Court was transferred by the District Court to a District Munsif's Court for trial as an original suit and was again transferred to another District Munsif's Court for trial and disposal it was held that the decree passed by the latter District Munsif's Court was a decree of a Court of Small Causes and no appeal lay to the District Court against such a decree. The learned Judges observed that by the operation of section 24 (4), Civil Procedure Code, the Court to which a small cause suit is transferred becomes a Court of Small Causes for the purposes of the suit even if it is not a Small Cause Court. As Sundara Ayyar, J., pointed out at page 30:

> "The Legislature has thought it proper to give finality to the decisions not only of Small Cause Courts and Courts invested with small cause jurisdiction but to decisions of a third class of Courts, namely, of Courts to which a suit of small cause nature is transferred."

It was further observed that a District Court in transferring a small cause suit to a Court not having small cause jurisdiction of the requisite amount had no power to direct that the suit should be tried as an original suit. There is nothing wrong in trying an original suit and a small cause suit together where the evidence is the same and the question for decision is also identical but each of the suits retains its character as when instituted which cannot be put an end to by transfer to another Court. We are in entire concurrence with this decision, which has not been seriously assailed for nearly forty years though there is an *obiter dictum* of Krishnan Pandalai, J., in *Chockalingam* v. *Palaniappa*,[2] where the learned Judge observes thus:

> "Therefore where a suit is transferred to a Small Cause Court there is nothing in the sub-section which requires that suits of higher value when transferred shoul be tried as a small cause suit or that there shall be no appeal therefrom. This point, however, does not arise in the present petition which only raises the question of the power of transfer to a Court which has small cause jurisdiction of a suit of higher value than such jurisdiction."

The learned Judge has not dissented in so many words from the observation in *Sankararama* v. *Padmanabha*[1], though Jackson, J., who was the other Judge of the bench referred to that decision in another connection and approved of it.

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1. (1912) 23 M.L.J. 373: I.L.R. 38 Mad. 25.
2. (1932) 63 M.L.J. 689 at 693 : I.L.R. 55 Mad. 960 at page 965.

Mr. Justice Ananthakrishna Iyer in *Murugesa Mudaliar* v. *Venkata Kesavalu Chetti*,[1] takes the view that an order of transfer passed under sub-clause (4) of section 24 of the Code of Civil Procedure cannot invest a Court not having small cause jurisdiction with one; nor can such an order enable a Judge having small cause jurisdiction up to a particular limit to try as a small cause suit, a suit exceeding that limit. Therefore the High Court has no power to transfer a small cause suit pending on the file of the Court of a Subordinate Judge to the Court of a District Munsif where the small cause jurisdiction of the District Munsif is less than the value of the small cause suit. The learned Judge distinguished the case *Sankararama* v. *Padmanabha*,[2] on the ground that in that case the order of transfer itself directed the suit to be tried as an original suit. It is somewhat difficult to appreciate the distinction made by Ananthakrishna Iyer, J. Sub-section (4) of section 24, Civil Procedure Code, pre-supposes want of small cause jurisdiction in the Court to which the small cause suit is transferred. That is why the words "be deemed to be a Court of Small Causes" are used. If in fact the Court is actually one of small causes there is no necessity for the words "deemed to be." In these circumstances when a small cause suit is transferred to a Court not having small cause jurisdiction for the purpose of the trial of that suit the Court shall be deemed to be a Court of Small Causes. That is, whatever is done in the trial of that suit by the Court would be considered as done by a Court of Small Causes. It is as if for the trial of that particular suit, the Court is invested with small cause powers of the requisite pecuniary limit. This is what follows from the decision in *Sankararama* v. *Padmanabha*.[2] In *Chockalingam* v. *Palaniappa*[3], both the learned Judges agreed that the suit which was within the small cause jurisdiction of the Subordinate Judge and beyond the small cause jurisdiction of the District Munsif can be transferred by the District Judge to the file of the District Munsif as the District Munsif was competent to try the suit within the meaning of section 24 (1) of the Civil Procedure Code. Though Jackson, J., has referred to the decision in *Murugesa Mudaliar* v. *Venkata Kesavalu Chetti*[1], he has not expressly dissented from the view taken by Ananthakrishna Ayyar, J. In *Kamalathammal* v. *Harihara*,[4] Patanjali Sastri, J., relies upon *Chockalingam* v. *Palaniappa*[3], for concluding that the District Court may transfer any proceeding from a Court of Small Causes to a Court not having adequate small cause powers to deal with it as a Court of Small Causes. Nevertheless the latter Court shall be deemed to be a Court of Small Causes for the purposes of the suit transferred. The learned Judge has not referred to the decision of Ananthakrishna Ayyar, J., in *Murugesa Mudaliar* v. *Venkata Kesavalu Chetti*.[1] In the case before Krishnan Pandalai, J., in *Chockalingam* v. *Palaniappa*[3], on account of the abolition of the Subordinate Judge's Court which alone had jurisdiction to try the suit as a small cause suit on account of the pecuniary value of the suit, the suit was transferred to the Court of the District Munsif by the District Judge and such a transfer was held to be valid. A Full Bench of the Allahabad High Court in *Bhagwati Pande* v. *Badri Pande*,[5] considered the effect of section 35 of the Provincial Small Cause Courts Act and section 24 (4) of the Civil Procedure Code and Sulaiman, A.C.J., at page 180, states that the Court to which the suit has been transferred under section 24, Civil Procedure Code, would dispose of the suit as a Court of Small Causes and no appeal would lie from its decree even if it has no jurisdiction to try other small cause suits of equal value. The view expressed by Ananthakrishna Ayyar, J., that a District Judge has no jurisdiction to transfer a small cause suit from the Court of the Subordinate Judge to the Court of the District Munsif not having adequate pecuniary jurisdiction as a small cause suit is op-

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1. (1929) 56 M.L.J. 649.
2. (1912) 23 M.L.J. 373: I.L.R. 38 Mad. 25.
3. (1932) 63 M.L.J. 689: I.L.R. 55 Mad. 960.
4. (1940) 2 M.L.J. 700: A.I.R. 1941 Mad. 103.
5. (1931) I.L.R. 54 All. 171 (F.B.).

posed to the current of decisions not only of this Court but of other High Courts as well. If the learned Judge's view is correct in our opinion there is no necessity for sub-section (4) of section 24, Civil Procedure Code, at all. The reason is that if the Court to which the small cause suit is transferred has jurisdiction to try it as a small cause suit then sub-section (4) of section 24, Civil Procedure Code, becomes redundant. The enactment of sub-section (4) itself pre-supposes the non-existence of small cause jurisdiction of the requisite limit.

We, therefore, think that in the present case a Civil Revision Petition has been properly filed in this Court. What then is the procedure to be followed? In our view instead of transferring the appeal that is pending before the lower appellate Court in the connected suit it would be better to direct the Additional Subordinate Judge, Tiruchirapalli, to dispose of A.S. No. 356 of 1954 as expeditiously as possible so that the result of it might operate as *res judicata* if no second appeal is filed against the appellant. On the other hand if a second appeal is filed then the same can be heard along with C.R.P. No. 1477 of 1954. Till then C.R.P. No. 1477 of 1954 will be adjourned. Therefore the order which we propose to make in C.M.P. No. 10321 of 1954 is that the Additional Subordinate Judge of Tiruchirappalli will be directed to dispose of Appeal No. 356 of 1954 before the 30th of July, 1955.

R.M. *Order accordingly.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDA MENON, MR. JUSTICE BASHEER AHMED SAYEED AND MR. JUSTICE RAMASWAMI.

Subramania Chettiar and others .. *Appellants**

v.

Narayanan and others .. *Respondents.*

Limitation Act (IX of 1908), Article 182 (5)—'Final Order'—Execution petition validly presented into Court and returned for compliance with directions—Directions not complied with in time—Execution petition unnumbered and dismissed—If a 'Final Order' for purposes of saving limitation.

An execution petition which was in conformity with law was presented into Court and was returned by the office for certain amendments and it was eventually found that notwithstanding the return the requirements of Order 21, rules 11 to 14 of the Code have been complied with. The petition was re-presented after the expiry of the time granted for such re-presentation, with an application to excuse the delay and both the unnumbered execution petition and the application to excuse the delay were dismissed.

Held: Such dismissal of the execution petition would still amount to a 'Final Order' within the meaning of Article 182 (5) of the Limitation Act.

Held further: The correct and more acceptable view is not to treat the numbering and admitting of the execution petition as a necessary *sine qua non* for any order passed upon it to become final, if as a matter of fact the initial presentation complied with the provisions of the Code. The finality of the order does not depend upon the addition of the petition to the numbers of the execution petitions pending before the Court, but what has to be considered is the essence of the disposal. If after an order is passed it is not possible for the Court to do anything further with the paper that is rejected, then the order would be a final one; but if something more has to be done even after the passing of the order in which case the Court will be enabled to take into consideration other matters arising out of the same petition, then it is difficult to say that it is a final order. The view that unless a petition is numbered it has no legal existence in the eye of the law is not correct.

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*A.A.A.O. No. 140 of 1951. 15th April, 1955.

Syed Ghulam Sahib v. *Viswanatha Ayyar*, (1942) 2 M.L.J. 768, overruled.

Muthu Venkatasubba Reddiar v. *Thangavel Chetti*, (1948) 1 M.L.J. 327; *Sabapathi Mudaliar* v. *Mahalinga Padayachi*, (1950) 2 M.L.J. 539; *Ramabhadra Reddiar* v. *Ramachandra Reddiar*, (1952) 2 M.L.J. 73 and *Syed Ghulam Sahib* v. *Viswanatha Ayyar*, (1942) 2 M.L.J. 768, referred.

Gopalaswami Mudaliar v. *Executive Officer, Tiruvarur Devasthanam*, (1945) 1 M.L.J. 428, *Juluri Venkataratnam* v. *Kollipara Rama Kotayya*, (1945) 2 M.L.J. 152 ; *Nataraja Pillai* v. *Narayanaswami Ayyar*, (1947) 1 M.L.J. 393; *Parankusa Naidu* v. *Ayyanna Naidu*, (1943) 1 M.L.J. 445 and *Seetharama Chettiar* v. *Muthukrishna Chettiar*, (1947) 2 M.L.J. 553, approved and followed.

Chidambaram Chettiar v. *Murugesam Pillai*, (1939) 2 M.L.J. 671; *Official Receiver, Ramnad* v. *Narayanaswami Thevar*, (1941) 2 M.L.J. 1018 and *Kuppuswami Nainar* v. *Rangaswami Goundan*, (1948) 2 M.L.J. 374, referred and dissented from.

Appeal against the Appellate Order of the Court of the Subordinate Judge of Pudukottai, dated 28th June, 1950, and made in A.S. No. 17 of 1950, preferred against the order of the Court of the District Munsif of Pudukottai, made in E.P. No. 57 of 1949 in O.S. No. 941 of 1935.

K. Raman, V. Srinivasan and *T. R. Ramachandran* for Appellants.

Respondents not represented.

Order of Reference was made by

Krishnaswami Nayudu, J.—The question for determination in this appeal is whether the execution petition is in time. The first execution petition was presented on 18th April, 1948, within three years of the passing of the decree. The second one was presented on 7th March, 1946, and was signed and verified not by the decree-holder but by one Natesa Pillai describing himself as the power of attorney agent of the decree-holder. It was returned on 11th March, 1946, calling upon the petitioner to produce the power of attorney, copy of the final decree, the encumbrance certificate and the sale papers, and two months' time was fixed for complying with the requisitions. Ten months thereafter, the petition was re-presented on 12th January, 1947, beyond the time granted for compliance. Along with the petition, an application for excusing the delay was also presented. The power of attorney required was not produced and an endorsement was made on the execution petition that the power having been cancelled and the petition having been presented by an agent without such a power of attorney the execution petition might be dismissed. On the application for excusing the delay the Court passed an order dismissing it on 20th January, 1947. The execution petition itself was taken up on 27th January, 1947 and was dismissed. The order of dismissal was in the following terms:

"As per order in E.A. No. 108 of 1947, dated 20th January, 1947, delay excuse petition having been dismissed, this E.P. is dismissed."

The third execution petition out of which the present appeal arises was presented on 7th September, 1947. The question is as to whether it could be held that the order, dated 27th January, 1947, was a final order passed on an application made in accordance with law to the proper Court for execution in which case the third execution petition would be in time. The trial Court held that it was such an order, while in appeal the learned Subordinate Judge of Pudukottai took a different view and dismissed the petition as out of time. Respondent in the present appeal is not represented.

It was urged in the lower appellate Court that the second execution petition having been signed and verified by a person who had no valid authority, was not a valid petition at all, and in any event, the petition to excuse the delay having been dismissed on 20th January, 1947, the order rejecting the execution petition itself on 27th January, 1947, cannot be taken to be a final order within the meaning of Article 182 (5) of the Limitation Act. As regards the first of the contentions, the lower appellate Court found that since under Order 21, rule 11, Civil Procedure Code, the execution petition need not be signed and verified by

the decree-holder himself, but might be signed and verified either by the applicant or by some one proved to the satisfaction of the Court to be acquainted with the facts of the case, and since Natesa Pillai who was an ex-agent, stated in the petition that he was acquainted with the facts of the case, that would be sufficient compliance with order 21, rule 11, Civil Procedure Code. The presentation of the execution petition was by the vakil who was found to have had authority. The lower appellate Court rightly found that the second execution petition was validly presented into Court. But on the second contention as to whether the order of 27th January, 1947, would amount to a final order within the meaning of Article 182 (5) of the Limitation Act, the learned Judge placed reliance on two Bench decisions of this Court in *Syed Ghulam Khadir Sahib* v. *Viswnathayyar*[1] and *Kuppuswami Nainar* v. *Rangaswami Goundan*[2] and took the view that as the application excusing the delay was dismissed and since as a consequence the unnumbered second execution petition was dismissed on 27th January, 1947, the order of dismissal would not amount to a final order.

In *Syed Ghulam Khadir Sahib* v. *Viswanathayyar*[1], the execution petition was returned on the ground that the sale papers were not filed and the decree-holder was required to re-present it within three weeks after remedying the defects. The requisition was not complied with and it was re-presented nearly three years after without an application to excuse the delay. Subsequently, the decree-holder presented an application for excusing the delay in the re-presentation of the unnumbered execution petition and the delay was not excused. It was held that the unnumbered petition was one in conformity with law, the requirements of Order 21, rules 11 to 14, Civil Procedure Code, having been complied with and the mere non-production of the sale papers and the encumbrance certificates could not be held to be an omission which justified the order of return. It was furher held that when a petition is returned for the purpose of the petitioner doing something to enable the Court to proceed further with it, the Court really defers its consideration until it is brought back with the defects remedied, that it is only then that the Court is placed in a position to consider it judicially and make what can be regarded as a final order on it, and that an execution petition returned for amendment but not re-presented has no legal existence till it is re-presented, and if it is re-presented after the time limited, it does not acquire the status of a petition calling for an order unless the delay is excused. In that case, the application for excusing the delay was rejected and the consequence was that there was no valid petition before the Court to be ordered or rejected. It was urged there, as in the present case, that the petition was found to be in accordance with law and was wrongly returned and therefore it could not be contended that the petition when presented or re-presented had no legal existence. With reference to this contention, the learned Judges observed at page 773 as follows:—

> "But surely an order of return, right or wrong, if made by a competent Court is not a mere nullity and cannot be ignored by the party affected. Nor is it open to take back the petition and choose his own time for re-presenting it......He must re-present it within the time limited by the order, and if he does not, he must move the Court for an extension of time, or for excusing the delay. If the Court excuses the delay, the re-presented petition will date back to its original presentation. If the Court, however, refuses to do so, the position must be the same as if it had never been re-presented and consequently it never emerged into legal existence."

The facts of the present case warrant the application of the principle laid down in that decision.

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1. (1942) 2 M.L.J. 768. 2. (1948) 2 M.L.J. 374.

But reliance is placed on the judgment of Somayya, J., in *Gopalaswami Mudaliar* v. *Executive Officer, Tiruvarur Devasthanam*[1]. In that case the execution petition was returned for amendment and was re-presented with an application for excusing the delay in re-presentation. The application for excusing the delay was dismissed. Still the learned Judge held that when there was no defect in the previous execution petition and the same was returned for compliance with certain particulars and the petition was re-presented without undue delay, the order of the executing Court refusing to excuse the delay and dismissing the Petition was "final" within the meaning of Article 182 of the Limitation Act and saved limitation. Somayya, J., preferred to accept the view of King, J. in *Ramachandra Naidu* v. *Muthu Chettiar*[2], that, when there was no defect in the previous execution petition and the same was returned and there was no undue delay in the re-presentation, the order of the executing Court refusing to excuse the delay and dismissing the execution petition must be taken to be a "final order". In *Syed Ghulam Khadir Sahib* v. *Viswanathayyar*[3], the delay in re-presentation was nearly three years and Somayya, J., observed that he was in agreement with the view of King., J., in *Ramachandra Naidu* v. *Muthu Chettiar*[2], that the decision in *Syed Ghulam Khadir Sahib* v. *Viswanathayyar*[3], does not apply to a case where there was no undue delay in the re-presentation of the prior execution petition.

I feel I am bound by the decision of the Bench in *Syed Ghulam Khadir Sahib* v. *Viswanathayyar*[3], and the present appeal has therefore to be dismissed. Somayya, J., and King, J., have taken a contrary view that they were not inclined to follow the view taken by the Bench in *Syed Ghulam Khadir Sahib* v. *Viswanathayyar*[3]. The view taken by Somayya, J., and King, J., appears to be quite reasonable as if in fact an execution petition, which is in conformity with law, is presented and if the office returns the petition for amendment and it is eventually found that notwithstanding the return the requirements of Order 21, rules 11 to 14 have been complied with, the mere fact that an application to excuse the delay is dismissed and the execution petition is also dismissed would not have the effect of holding that the dismissal of the execution petition could not amount to a "final order."

As there is a conflict between the decision of the Bench in *Syed Ghulam Khadir Sahib* v. *Viswanathayyar*[3], and the view taken by the learned Judges in the two other cases, and as this question frequently arises it is desirable that there is an authoritative decision on the matter. I am of the opinion that the question may be considered by a Bench, preferably, a Full Bench.

Place the papers before the Honourable the Chief Justice for orders.

When this Appeal came on for orders† before *Rajamannar, C.J.*, and *Rajagopala Ayyangar, J.*, the Court passed the following

ORDER:—It is ordered that this appeal be posted before a Full Bench.

In pursuance of the above order, the Appeal came on for hearing before a Full Bench. (*Govinda Menon, Basheer Ahmed Sayeed* and *Ramaswami, JJ.*)

K. Raman, V. Srinivasan and *T. R. Ramachandran* for Appellants.

Respondents not represented.

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1. (1945) 1 M.L.J. 428.
2. (1943) 1 M.L.J. 236.
3. (1942) 2 M.L.J. 768.

† 18th January, 1955.

The Judgment of the Court was delivered by

Govinda Menon, J.—As the order of reference sets out the facts with sufficient elaborateness it bcomes unnecessary for us to restate the same. On the finding that a second execution petition filed in Court on 7th March, 1946, was validly presented, what has to be considered is whether its dismissal at a later stage without being numbered on account of the fact that certain requisitions directed to be complied with by the Court were not fulfilled would amount to a 'final order' or not. It is undisputed that if the requirements had been complied with within the time allowed and thereafter for some reason or other the petition was dismissed then that dismissal would amount to a final order within the meaning of the term in Article 182 (5) of the Indian Limitation Act. In the present case the application that was properly presented was returned for curing defects, which were not done within the prescribed time and the request for excusing delay in re-presenting the application was rejected with the result that the application which was unnumbered was dismissed on 27th January, 1947. Divergent views on the aspect as to whether such an order is a final one can be gathered from the line of cases either way and we have to choose that which lays down the correct principle.

In *Syed Ghulam Khadir Saheb* v. *Viswanathayyar*,[1] Krishnaswami Iyengar and Kunhi Raman, JJ., came to the conclusion that when an execution petition is returned for the purpose of the Petitioner doing something to enable the Court to proceed further with it then the Court really defers its consideration until it is brought back with the defects remedied and it is only then that the Court is placed in a position to consider it judicially and make an order which can be regarded as a final order on it. It was further held that the question whether an order is final order within the meaning of Article 182 (5) of the Limitation Act is not to be judged by reference to what the Court passing the order thought at the time nor by the language employed by it. It is for the Court before which the nature of the order is questioned at a later stage to decide the matter. Therefore an execution petition which is returned for amendment but not re-presented within the time specified and the delay in re-presentation subsequently was not excused is not a petition calling for a final order. According to the learned Judges, therefore even if the initial presentation was in accordance with law but some defect in the petition has to be remedied, until that is done within the prescribed time the petition as such cannot be deemed to exist as a pending cause and subsequently if that is rejected by the Court it would not be a final order. Some support to this point of view can be gathered from the earlier decisions. In *Chidambaram Chettiar* v. *Murugesam Pillai*,[2] it was held that an application which does not conform to the requirements of order 21, rules 11 to 14 of the Code of Civil Procedure and which for thatreason has to be kept in abeyance to permit the defect to be remedied is not an application made in accordance with the law and therefore even if the direction allowing time to remedy the defect is regarded as an order of the Court it would not be an order passed on an application made in accordance with the law, and hence cannot be called a final order.

In the *Official Receiver, Ramnad* v. *Narayanaswami Thevar*[3], the learned Judges held that the rejection of an unnumbered petition cannot be deemed to be a final order as wrong compliance of the requirements to remedy the defect which prevented the numbering of the petition was due to the act or default of the decree-holder and in the circumstances the unregistered petition cannot be deemed to be pending or revived later on by a fresh application. The princi-

1. (1942) 2 M.L.J. 768.
2. (1939) 2 M.L.J. 671.
3. (1941) 2 M.L.J. 1018.

ple which the learned Judges followed is that it is only where an execution petition after compliance with the necessary formalities is numbered and thereafter it is disposed of by an order that the adjudication can be deemed to be a final order. A similar view was taken in *Kuppuswami Nainar* v. *Rangaswami Goundan*[1], where Satyanarayana Rao, J., followed the Bench decision in *Syed Ghulam Khadir* v. *Viswanathayyar*[2], and held that when an unnumbered petition was returned for compliance with certain requisitions and the same was not returned within the time prescribed and later on an application to excuse delay in re-presentation was dismissed, then in the eye of the law the unnumbered petition did not exist with the result that the order rejecting the petition or refusing to excuse delay would not be called a final order. The principle deducible from these decisions is that even if the initial re-presentation did conform to the requirements of the law but still until the petition is numbered it could not be considered to be in existence though it might remain in the archives of the Court and on the rejection of such a petition the Court is not deemed to have passed an order on an existing cause pending before it. The decision in *Syed Ghulam Khadir Sahib* v. *Viswanathayyar*[2], did not meet with approval at the hands of King, J., in *Ramachandra Naidu* v. *Muthu Chettiar*[3], where the learned Judge held that an application, which was in accordance with the law and which was returned for the production of sale papers and extension of time for which was refused by the Court and later on dismissed without being admitted and numbered, was nonetheless an application pending in Court and that its dismissal amounted to a final order within the meaning of Article 182 (5) of the Limitation Act. The learned Judge was further of the opinion that it is not always essential that the application should be admitted and numbered before the order passed on it can be called a final order. The learned Judge took a similar view in *Parankusa Naidu* v. *Ayyanna Naidu*[4]. If there is no procedural defect or non-compliance with the imperative provisions of Order 21, rule 11, Civil Procedure Code, in the presentation of an execution petition but the same is returned for compliance with certain particulars but that is not re-presented within the time allowed and the delay in re-presentation is not excused, still any order passed on such an application would be a final order. This is the purport of the judgment of Somayya, J., in *Gopalaswami Mudaliar* v. *Executive Officer, Tiruvarur Devasthanam*[5]. It is evident from this that the act of numbering the petition and adding it on to the pending causes is not an essential one for the order passed on it to be termed a final order. A similar view was taken by the learned Judge in *Juluri Venkataratnam* v. *Kollipara Rama Kotayya.*[6] Wadsworh, J., in *Nataraja Pillai* v. *Narayanaswami Iyer*[7] was of the view that where an execution petition is ordered to be returned for supplying certain information within the time given but the decree-holder does not in fact take return of the petition from the Court and the Court thereupon rejects the petition on a subsequent date the order of rejection would amount to a final order on a subsisting petition for the purposes of saving limitation. The learned Judge followed the decision of King, J., in *Parankusa Naidu* v. *Ayyanna Naidu,*[4] and distinguished *Syed Gulam Khadir Saheb* v. *Viswanathayyar.*[2]

Gentle, C.J., and Tyagarajan, J., in *Seetharama Chettiar* v. *Muthukrishna Chettiar*[8], considered a case where an execution petition was rejected by a Court without numbering it because the party did not take it back to comply with certain particulars within a particular time when ordered by Court and the learned Judges were of the opinion that such a rejection was a final disposal of the petition and therefore the order passed was a final order. The decision of King, J., in

1. (1948) 2 M.L.J. 374.
2. (1942) 2 M.L.J. 768.
3. (1943) 1 M.L.J. 236.
4. (1943) 1 M.L.J. 445.
5. (1945) 1 M.L.J. 428.
6. (1945) 2 M.L.J. 152.
7. (1947) 1 M.L.J. 393.
8. (1947) 2 M.L.J. 5[?]3.

Parankusa Naidu v. *Ayyanna Naidu*[1] and of Wadsworth, J., in *Nataraja Pillai* v. *Narayanaswami Iyer*[2], was followed. It is clear from the reasoning of the learned Chief Justice Gentle that in order to make an order a final one the numbering of the petition and adding it on to the file of pending cases are not essential necessities. The learned Chief Justice enunciated a similar principle in *Muthu Venkatasubba Reddiar* v. *Thangavel Chetti*[3], sitting with Satyanarayana Rao, J., distinguishing the case in *Syed Ghulam Khadir* v. *Viswanathayyar*[4]. Two of us, Govinda Menon and Basheer Ahmed Sayeed, JJ., in *Sabapathi Mudaliar* v. *Mahalinga Padayachi*[5], considered most of the cases noted above and we are of the opinion that if there is a valid presentation in the first instance an order rejecting such a petition for non-compliance with certain requirements would be a final order. It was stated in the course of discussion that it was impliedly understood that if there had been an initial proper presentation of an execution petition, any intermediate order or subsequent irregularities such as not taking back the return or not numbering would not take away from the effect of the initial valid presentation so as to detract from the final nature of the order which ultimately rejected the petition. In L.P.A. No. 7 of 1949 Satyanarayana Rao and Raghava Rao, JJ., followed the decision in *Muthu Venkatasubba Reddiar* v. *Thangavel Chetti*,[3] and distinguished the case in *Syed Ghulam Khadir Saheb* v. *Viswanathayyar*[4]. They also approved of the decisions in *Veerabhadriah* v. *Seshiah*[6] and *Sadapathi Mudaliar* v. *Mahalinga Padayachi*[5]. Lastly we may refer to the decision of one of us Basheer Ahmed Sayeed, J., in *Ramabhadra Reddiar* v. *Ramachandra Reddiar*,[7] in which the previous case-law either way came in for discussion. It was decided there that where an unnumbered execution petition returned for filling up certain particulars was re-presented after a delay of eighteen months without the requirements having been complied without an application for or an express order excusing delay but there was an endorsement that the decree-holder was not pressing the petition and that it might be rejected, the Court passed an order 'not pressed, rejected' such an order would be a final order within the meaning of Article 182 (5) of the Limitation Act. Reliance was mainly placed upon the decision in *Muthu Venkatasubba Reddiar* v. *Thangavel Chetti*.[3]

We have now stated the conflicting views which necessitated the placing of this C.M.S.A. before a Full Bench. After a consideration of the various authorities it seems to us that the correct and more acceptable view is not to treat the numbering and admitting of the execution petition as a necessary *sine qua non* for any order passed upon it to become final, if as a matter of fact the initial presentation complied with the provisions of the Civil Procedure Code. The finality of the order does not depend upon the addition of the petition to the numbers of execution petitions pending before the Court but what has to be considered is the essence of the disposal. If after the order is passed, it is not possible for the Court to do anything further with the paper that is rejected, then the order would be a final one but if something more has to be done even after the passing of the order in which case the Court will be enabled to take into consideration other matters arising out of the same petition, then it is difficult to say that it is a final order. We are of the opinion, therefore, that the view taken in *Syed Ghulam Khadir Sahib* v. *Viswantahayyar*[2], that unless a petition is unnumbered, it has no legal existence in the eye of the law is not correct and we are unable to follow the same. The opinion of King, J., Somayya, J. and Wadsworth, J., approved of in later cases is the correct one. In the result the order of the Subordinate Judge is set aside and that of the District Munsiff restored with costs here and in the Court below. There was no appear-

1. (1943) 1 M.L.J. 445.
2. (1947) 1 M.L.J. 393.
3. (1948) 1 M.L.J. 327.
4. (1942) 2 M.L.J. 768.
5. (1950) 2 M.L.J. 539.
6. (1948) 2 M.L.J. 369.
7. (1952) 2 M.L.J. 73.

ance of counsel on behalf of the respondent but Mr. K. Raman for the appellant has placed before us all the relevant decisions for and against the contention and we are grateful to him for the assistance rendered.

R. M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALA AYYANGAR.

K. R. Kumaraswami Chettiar .. *Petitioner**

v.

Krishnaswami Chetti .. *Respondent.*

Limitation Act (IX of 1908), section 10—Extended period of limitation under—If would apply to cases of ordinary bailment.

The whole scheme of the Indian Limitation Act proceeds upon a sharp distinction between a bailment as such and an express trust for a specific purpose covered by section 10. The provision of section 10 of the Act cannot be extended to the case of ordinary bailments.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the Decree of the Court of the District Munsif, Tiruppur, made in S.C.S. No. 806 of 1951.

T. R. Thyagarajan for Petitioner.

R. Santhanam for Respondent.

The Court delivered the following

JUDGMENT.—The only question raised by the petitioner in this revision petition is whether the suit filed by him which was dismissed by the learned District Munsiff of Tiruppur is barred by limitation as held by the Court below.

The transactions out of which this suit arose came about this way. The plaintiff used to entrust certain metal sheets to the defendant who is a metal worker for fabricating vessels. This practice went on for a considerable time. But the last dealing had between the parties was in 1944-45. The present suit has been filed in 1951 for the recovery of Rs. 268-5-0 claimed to be the balance due to the plaintiff on account of these transactions resulting from non-delivery to him either of the fabricated vessels or the return of the sheets supplied by him. The learned District Munsiff has dismissed the suit on the ground that it was barred by limitation. The contention raised on behalf of the plaintiff was that the case was governed by section 10 of the Indian Limitation Act the allegation being that there was an express trust for a specific purpose created by the entrustment of the metal sheets to the defendant. The learned District Munsiff held that it was an ordinary case of bailment to which section 10 did not apply and applying any other Article of the Limitation Act the suit was clearly barred. The contention which was repelled by the Court below has been urged here by learned counsel for the petitioner. He has drawn my attention to the decision in *Kishtappa Chetty* v. *Lakshmi Ammal*.[1] But the facts of that case have nothing to do with the case here. The whole scheme of the Indian Limitation Act proceeds upon a sharp distinction between bailment as such and an express trust for a specific purpose covered by section 10. Articles 31, 32, 48, 48-A and 49 of the Limitation Act would make this point clear. In all these cases, there is a bailment. Specific property belonging to the plaintiff gets into the hands of the defendant and the defendant is under an obligation to return that property but either by negligence or by misconduct there is a loss caused to the property belonging to the plaintiff. All these cases are governed by the Articles

*C.R.P. No. 260 of 1953. 3rd May, 1955.

1. (1923) 44 M.L.J. 431.

which I have set out and not by section 10. To extend the provisions of section 10 to the cases of ordinary bailments would revolutionise the entire law relating to limitation. Learned counsel for the petitioner is not able to place before me any case in which to a case of ordinary bailment, as we have here, the provisions of section 10 have been applied. I am not surprised at it. The judgment of the Court below is correct. The Civil Revision Petition fails and is dismissed with costs.

R. M. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Swarnalingam Chettiar .. *Petitioner**

v.

Assistant Labour Inspector, Karaikudi .. *Respondent*

Constitution of India (1950), *Article* 20 (3)—*Scope—Summons under section* 94, *Criminal Procedure Code* (*V of* 1898) *directing accused to produce certain documents in his possession—Production can be resisted on the ground that accused cannot be compelled to be a witness against himself.*

The accused was charged with the offence of contravening the provisions of the Madras Shops and Establishments Act. The prosecution alleged that certain accounts maintained by the accused in the usual course of business were necessary for the purpose of the trial and the Sub-Magistrate directed summons under section 94, Criminal Procedure Code, to issue to the accused for the production of those documents. On revision

Held: The objection of the accused to produce the documents must be upheld. The guarantee under Article 20 (3) of the Constitution would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against the accused.

M. P. Sharma v. *Satish Chandra*, (1954) 1 M.L.J. 680 : 1954 S.C.J. 428 (S.C.) relied on.
Satya Kinkar v. *Nikhal Chandra*, A.I.R. 1951 Cal. 101 referred to.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Magistrate of Karaikudi, dated 20th July, 1954 and made in C. C. No. 1380 of 1954.

N. Arunachalam and *S. Swamikannu* for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) with Srimathi *Padmini Raghavan* for the Public Prosecutor (*V. T. Rangaswami Aiyangar*) for Respondent.

The Order of Court was pronounced by

Rajamannar, C.J.—This is an application by the 1st accused in C.C. No. 1380 of 1954 on the file of the Court of the Sub-Magistrate, Karaikudi, to revise the order of the Sub-Magistrate, directing summons under section 94, Criminal Procedure Code, to issue to the accused for the production of certain documents in his possession. The accused was charged with the offence of contravening the provisions of the Shops and Establishments Act, and it was alleged by the prosecution that the documents necessary for the purpose of the trial of the case were with the accused as they were accounts being maintained by the accused in the usual course of his business. On behalf of the accused, obection was taken to the production of the documents based on Art. 20 (3) of the Constitution which provides that no person accused of any offence shall be compelled to be a witness against himself. The Magistrate overruled the objection and directed summons to issue for the production of the documents. In view of the observations of the Supreme Court in their recent decision in *M. P. Sharma* v. *Satish Chandra*[1], this petition must be allowed. Their Lordships therein observed that the guarantee under Article 20 (3) would extend to any compulsory

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*Crl. R. C. No. 677 of 1954. 21st September, 1954.
(Crl. R. P. No. 635 of 1954).

1. (1954) S.C.J. 428 : (1954) 1 M.L.J. 680 (S.C.).

process for production of evidentiary documents which are reasonably likely to support a prosecution against the accused. Having regard to these observations reliance cannot be placed on the decision of the Calcutta High Court in *Satya Kinkar* v. *Nikhal Chandra*.[1] The objection of the accused to the production of the documents in question must, therefore, be upheld.

The Criminal Revision Case is allowed and the Order of the Sub-Magistrate set aside.

K. S. ——— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMASUNDARAM.

Swarnaligam Chettiar (1) .. *Petitioner**

v.

Assistant Inspector of Labour, Karaikudi .. *Respondent.*

Constitution of India (1950), *Article* 20 (3)—*Scope—Notice to show cause why the accused's premises should not be searched to get at certain documents to be used in the prosecution—If amounts to testimonial compulsion.*

A notice to an accused to show cause why his premises should not be searched (for getting a document in the possession of the accused for use in the trial against the accused) practically amounts to stating that he either produces the documents, or else the premises will be searched. To avoid the search the accused will be likely to come forward with the production of the documents himself. The notice, therefore, will amount to a testimonial compulsion and will stand on the same footing as the summons to produce the same documents. The notice must therefore be quashed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to quash the order of the Court of the Sub-Magistrate (J.) of Karaikudi, dated 1st November, 1954 and passed in the proceedings relating to the Memo. dated 1st November, 1954, for the issue of a search warrant in C. C. No. 1380 of 1954.

N. Arunachalam for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for Respondent.

The Court made the following

ORDER.—This is a revision against issue of notice to the petitioner to show cause why a general search warrant as asked for by the Sub-Inspector of Karaikudi should not be issued. The warrant is to make a search of the premises of Karaikudi Railway Out Agency and obtain the documents mentioned in the list attached to the petition filed by the Sub-Inspector. Before this application was filed by the Sub-Inspector, the accused himself was asked to produce certain documents. On that he came up in Crl. R.C. No. 677 of 1954 asking for quashing of that order on the ground that it offends Article 20 (3) of the Constitution. A Bench of this Court following a decision of the Supreme Court in *M. P. Sharma* v. *Satish Chandra*[1], held that the petition must be allowed.[2] In allowing the petition My Lord the Chief Justice and Rajagopala Ayyangar, J., observed that the guarantee under Art. 20 (3) would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against the accused. They therefore quashed the order asking the accused to produce the documents. After that, the petition by the Sub-Inspector was filed in the lower Court asking for a search warrant, so that the premises in question may be searched and the documents mentioned in the list may be seized and produced before Court. On this petition the lower Court has ordered notice to the petitioner to show cause why the premises in question should not be searched. It is against this order that this petition has been filed.

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1. A.I.R. 1951 Cal. 151.

*Crl. R. C. No. 995 of 1954. 3rd December, 1954.
Cr.R.P. No. 938 of 1954.

1. (1954) S.C.J. 428 : (1954) 1 M.L.J. 680 (S.C.).
2. Since reported (1955) 2 M.L.J. 267.

The notice to the petitioner to show cause why his premises should not be searched practically amounts to stating that either he produces the documents, or else the premises will be searched. To avoid the search the petitioner is likely to come forward with the production of the documents himself. Instead of directly compelling him to produce by means of a summons, this notice to show cause will practically have the same effect in an indirect manner. This notice, therefore, will amount to a testimonial compulsion and will stand on the same footing as the summons to produce the same documents. The notice therefore issued to the petitioner to show cause why his premises should not be searched is unsustainable and is hereby quashed.

K. S. ——— *Notice quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BALAKRISHNA AYYAR.

Swarnalingam Chettiar and another (2) .. *Petitioners**

Constitution of India (1950), *Article* 20 (3)—*Scope—Order issuing search warrant under section* 96 (1) *para.* 3 *of the Criminal Procedure Code* (*V of* 1898)—*If illegal as amounting to testimonial compulsion.*

Though by reason of Article 20 (3) of the Constitution a Court is precluded from issuing summons to an accused person to produce any document or thing in his custody, no article of the Constitution prohibits either a search under section 165 of the Code of Criminal Procedure by the police of premises involved in a cognizable offence or the issue of a search warrant by a magistrate whether the offence involved is cognizable or non-cognizable.

Accordingly an order issuing a search warrant under section 96 (1) para. 3 of the Code of Criminal Procedure is not illegal.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sub-Magistrate of Karaikudi, dated 14th March, 1955 and made in C.C. No. 1380 of 1954.

C. N. Chary and *R. Srinivasan* for the Petitioners.

The Court made the following

ORDER.—The petitioner was charged by the Assistant Inspector of Labour, Karaikudi, before the Sub-Magistrate of Karaikudi with having contravened certain provisions of the Madras Shops and Establishments Act. The complainant also filed an application for the issue of summons to the accused for the production of certain documents in his custody. That application was granted by the Sub-Magistrate. The accused then came to this Court in Revision and a Bench of this Court, following the decision of the Supreme Court in *M. P. Sharma* v. *Satish Chandra*[1], set aside the order of the magistrate.[2] They took the view that to require an accused person to produce a document in his custody by issuing a summons to him would amount to testimonial compulsion and therefore be repugnant to Article 20 (3) of the Constitution. Subsequently, the complainant filed an application on 1st November, 1954, for the issue of a search warrant and on that the Sub-Magistrate issued notice to the accused. Thereupon, the accused came to this Court a second time complaining that the Sub-Magistrate ought not to have entertained the memo. for the issue of a general search warrant. Somasundaram, J., who heard that revision petition allowed it and quashed the notice.[3] He expressed himself thus:

"The notice to the petitioner to show cause why his premises should not be searched practically amounts to stating that either he produces the documents or else the premises will be searched. To avoid the search the petitioner is likely to come forward with the production of the documents himself.

*Cr.R.C. No. 206 of 1955.
Cr.R.P. No. 199 of 1955. 22nd March, 1955.

1. (1954) S.C.J. 428 : (1954) 1 M.L.J. 680 (S.C.).
2. Since reported (1955) 2 M.L.J. 267.
3. Since reported (1955) 2 M.L.J. 268.

Instead of directly compelling him to produce by means of a summons, this notice to show cause will practically have the same effect in an indirect manner. This notice, therefore, will amount to a testimonial compulsion and will stand on the same footing as the summons to produce the same documents."

In other words, the learned Judge quashed the notice on the ground that it was only an indirect or oblique form of the original summons.

Thereafter the Assistant Public Prosecutor applied to the Sub-Magistrate for the issue of a search warrant under section 96 (1) paragraph 3, Criminal Procedure Code and the learned magistrate granted the prayer. The petitioner has now come to this Court a third time to have the order quashed.

Now, though by reason of Article 20 (3) of the Constitution a Court is precluded from issuing summons to an accused person to produce any document or thing in his custody, no article of the Constitution prohibits either a search under section 165 of the Code of Criminal Procedure by the police of premises involved in a cognizable offence or the issue of a search warrant by a magistrate whether the offence involved is cognizable or non-cognizable. It is easy to see where a different view would lead us. A person may commit a murder and bury the body in the backyard of his house and he may commit burglary and keep the loot in an almirah inside his house. Or he may commit cheating and keep the proceeds thereof in a drawer of his writing desk, and they would all be as safe as if they had been lodged in the Bank of England. The Constitution is not intended to be a charter for the lawless and there is nothing in Article 20 of the Constitution or in any of its other articles to prohibit the police from searching either the person of the accused or the premises in the manner laid down by the Criminal Procedure Code. Nor have the powers of the Magistrate to issue a search warrant in the circumstances set out in the Code been abrogated by the Constitution. It is therefore impossible to say that the order of the learned Sub-Magistrate contravenes any article of the Constitution.

But, Mr. Chari strongly argued that in the circumstances of this particular case no order should have been made for the issue of a warrant. According to him, the action of the magistrate in issuing the warrant really amounts to circumventing, if not flouting, the order of Somasundaram, J. I am unable to agree. Somasundaram, J., did not say one word about the merits of the case in his order; he did not express the view that, in the circumstances of the case it would be an improper thing to issue a search warrant. What he decided was that the issue of a notice would be an indirect form of summons and, therefore, a contravention of Article 20 (3) of the Constitution.

Mr. Chari, the learned advocate for the petitioner, enquired whether if a warrant cannot be issued after notice, would it not be more improper to issue a warrant *ex parte?* Put that way the argument would appear to have force, but then I am not quite sure that the view expressed by Somasundaram, J., is an unassailable one. Besides the compromise between the security of the public and the liberty of the individual involved in prohibiting the issue to an accused person of summonses while at the same time permitting the issue of a search warrant in respect of property in his possession and the consequences that flow from such compromise might as a matter of abstract theory appear illogical. Constitutions, however, are built on compromises and not on abstract logic.

In my opinion there is no illegality about the order complained of. This revision petition is therefore dismissed.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALAN.

Annamalai Mudaliar and Bros., by managing Partner A. Mariappa Mudaliar ..*Petitioner**

v.

Regional Provident Fund Commissioner and others .. *Respondents.*

Employees' Provident Fund Act (XIX of 1952), *section* 2 (*f*)—*Employees—Who are—Scope and applicability of the Act—Powers of the Commissioner to decide the applicability of the Act—Employment—What constitutes.*

The Employees' Provident Act does not vest any power in the Commissioner to adjudge a dispute, should one arise, whether a factory is one to which the Act applied, that is, whether it is a factory within the scope of section 1 (3) of the Act. Section 19-A of the Act specifically provides for the machinery for determination of such disputes. If that machinery is not resorted to, the High Court will not interfere under Article 226 of the Constitution and go into the disputed question of fact and give a decision thereon.

Quaere: What is the scope of the statutory finality accorded by section 19-A of the Act to the decision of the Central Government in proceedings under Article 226 of the Constitution ?

A demand on an employer for contributions issued under the Act cannot be enforced 'till the question whether the factory of the employer is one in which 50 or more persons are employed and if so whether it comes within the scope of section 1 (3) of the Act is decided. Such a dispute is one which has to be decided under section 19-A of the Act.

It is with reference to the definition of an employee that the scope of the expression 'fifty or more persons are employed' in section 1 (3) of the Act has to be construed.

Before a person can be held to be an employee under section 2 (*f*) of the Act there must be proof (1) that he is employed, (2) that he is employed for wages, (3) that he is employed in work, manual or otherwise, (4) the work is in or in connection with the work of a factory and (5) he gets his wages directly or indirectly from the employer. In construing the word 'employed' in section 1 (3) of the Act it is only employment for wages that would appear to have been contemplated. The common Law concept of master and servant is not applicable to the cases of statutory definition of employee under the Act.

The term 'wages' is not defined in the Act. Other statutory definition of 'wages' is not useful in construing the expression 'employed for wages' in this Act. Wages may be interpreted to mean compensation paid to a hired person for his service. It may be determined by the basis of work done or on the basis of time spent in service.

The expression 'employed' in section 1 (3) taken in the context of the Act as a whole would imply, subject to the statutory definition in section 2 (*f*), the existence of the relationship of master and servant between an employer and the worker and between a contractor and the worker. It would exclude a contractor from the scope of the definition of an employee in section 2 (*f*).

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a *writ* of *mandamus* directing the respondents to forbear from enforcing the provisions of the Employees Provident Fund Act, 1952 (Central Act XIX of 1952) on the Employees Provident Fund Scheme, 1952, passed in pursuance thereof or from collecting any amounts by way of contribution as arrears of land revenue as due from the petitioner under the said scheme or the provisions of the said Act and grant costs of the petition.

M. K. Nambiar for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) on behalf of Respondents.

The Court made the following

ORDER.—The petitioner is the managing partner of a firm which owns a factory at Karur where bedsheets and towels are manufactured on handlooms. The real question that arises for determination in this application, filed under Article 226 of the Constitution for the issue of an appropriate writ to the respondents, to restrain them from enforcing the provisions of the Employees Provident Fund Act (XIX of 1952) and the scheme framed thereunder against the

*W.P.No. 445 of 1954. 20th January, 1955.

petitioner firm, was whether it "employed" 50 persons or more in the factory within the meaning of section 1 (3) of that Act.

The position was to some extent clarified after the first respondent filed a supplementary counter affidavit. The seven persons enumerated in paragraph 2 of that affidavits belonged to the office staff of the petitioner's factory, and they were paid wages on a monthly rate. It was only with reference to these seven persons that contributions were claimed by the first respondent under the provisions of the scheme framed under Act XIX of 1952. But even that claim could be justified only if the Act applied to the petitioner's factory, that is, only if it could be found that 50 or more persons were "employed" in that factory.

The conditions under which the labourers worked on the handlooms in the petitioner's factory on its manufacturing side were set out in paragraph 3 of the affidavit filed by the petitioner.

"Weavers from the neighbourhood undertake to weave bedsheets and towels by the yarn supplied by us within our premises and payment is made not as wages for work done for any particular time but only according to the stipulated rates for the particular fabric that are woven and turned out by each individual weaver. The weavers who are so engaged on a contract basis do not turn up or leave the premises at any stipulated time but work in the premises at any time convenient to them in order to suit their agricultural operations during the same period or to attend to similar work that they usually undertake with similar establishments situated in Karur. There are no fixed employees for the business of weaving bedsheets and towels in the firm. No weaver is permanently attached to a particular weaving firm. They are only casual workers who come and go at such times and days as are convenient to them and paid according to the piece work turned out by them "

These facts were not controverted in either of the affidavits filed by the first respondent. The number of labourers exceeded 50 was not denied by the petitioner at any time.

The main contention of the petitioner was that these workers were not employees as defined in section 2 (*f*) of the Act and what was payable to them for the work done by them was not wages. That was what was urged also in paragraph 15 (*a*) of the petitioner's affidavit.

The question in the form in which it was finally raised before me was not decided by the first respondent at any time. Despite the correspondence between the petitioner and the first respondent, in which this aspect of the conditions of labour was adverted to by the petitioner, adjudication of the issue on the narrowed basis now represented to me was apparently not sought by the petitioner. In any case, there was no decision beyond that implied in the claim by the first respondent that the provisions of the Act applied, which was the basis for the demand notices he issued to the petitioner to pay up the contributions claimed to be due, and also the further steps taken by the first respondent and the second respondent to recover the sums demanded as arrears of land revenue under the provisions of section 8 of the Act.

It should, however, be noted that neither the Act nor the scheme vests any power in the first respondent to adjudge a dispute should one arise, whether the factory is one to which the Act applied, that is, whether it is a factory within the scope of section 1 (3) of the Act. Section 19-A specifically provides:

"If any difficulty arises in giving effect to the provisions of this Act and in particular if any doubt arises as......

(ii) whether fifty or more persons are employed in a factory....the Central Government may by order, make such provision or give such direction, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for the removal of the doubt or difficulty ; and the order of the Central Government, in such cases, shall be final."

Such an order of the Central Government does not appear to have been sought in this case either by the first respondent or by the petitioner.

If there had been an adjudication of the question in dispute in the manner provided for by section 19-A of the Act, what this Court could do in the exercise of the jurisdiction under Article 226 of the Constitution is best explained by the

principles laid down by the House of Lords in *Smith* v. *General Motor Cab Co., Ltd.*[1] The point in controversy in that case was what was the true nature of the relation between the respondents and the appellant. Was it that of master and servant or bailor and bailee of the taxi cab of the respondents of which the appellant was a driver? The decision of the County Court Judge, sitting as an arbitrator under the provisions of the Workmen's Compensation Act of 1906, was that the appellant was not a servant but only a bailee of the cab. Lord Atkinson pointed out that the finding of the County Court Judge, that the appellant was a bailee, was a finding on conflicting evidence of an issue of fact. Their Lordships held that the findings of fact by the County Court Judge sitting as arbitrator could not be set aside if there was evidence to support the findings. Act XIX of 1952 having provided for a specific machinery in section 19-A for the determination of a dispute like the one before me now, and that machinery not having been resorted to, I do not think I would be justified in constituting myself as a tribunal of first instance to go into the disputed question of fact and give a decision thereon.

It is not necessary for me either to decide at this stage the scope of the statutory finality accorded by section 19-A of the Act to the decision of the Central Government in proceedings under Article 226 of the Constitution.

What the petitioner firm really seeks in this case is that demands for contributions issued to it by the first respondent should not be enforced till the question, whether the petitioner's is a factory in which 50 or more persons are employed and if so it comes within the scope of section 1 (3) of the Act, is decided. That relief, I think, he is entitled to get on the short ground, that there is a dispute and that dispute has yet to be decided under section 19-A of the Act.

Though what I have stated is enough to dispose of the petition, I shall also set out some of the features of the dispute urged during the arguments before me.

The relevant portion of section 1 (3) runs:

"........it applies in the first instance to all factories engaged in any industry specified in schedule I in which fifty or more persons are employed."

It is not disputed that the petitioner's is a factory as defined by section 2 (*g*) of the Act; and textile industry is one of the industries listed in schedule I of the Act. The further requirement therefore is that 50 or more persons must have been "employed" in the factory. "Employed" itself has not been defined by the Act. The expression "employer" has been defined by section 2 (*e*). Section 2 (*f*) defines employee":

"Employee" means any persons who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of a factory and who gets his wages directly or indirectly from the employer and includes any person employed by or through a contractor in or in connection with the work of the factory."

It is with reference to the definition of an employee that the scope of the expression fifty or more persons "employed" in section 1 (3) of the Act has to be construed.

Before a person can be held to be an employee as defined by section 2 (*f*) of the Act, there must be proof (1) that he is employed, (2) that he is employed for wages, (3) that he is employed in work, manual or otherwise, (4) the work is in or in connection with the work of a factory and (5) he gets his wages directly or indirectly from the employer. I am leaving out of account the further provision in section 2 (*f*) of the Act, that it "includes" any person employed by or through a contractor in or in connection, with the work of a factory". It is not the case of either party to this petition that any of the workers in the factory was a person employed by or through a contractor.

1. L.R. (1911) A.C. 188.

The learned counsel for the petitioner contended that on the facts averred by the petitioner, the relationship between the petitioner firm and those who worked in the factory in the manufacture of bedsheets and towels was not that of a master and servant, and that each piece work contract between the individual worker and the firm was a contract for services.

In Salmond's Law of Torts, eleventh edition, at pages 98 and 99 the distinction between a contract of service and contract for services is summarised:

"What then, is the test of this distinction between a servant and an independent contractor. The test is the existence of a right of control over the agent in respect of the manner in which his work is to be done. A servant is an agent who works under the supervision and direction of his employer; an independent contractor is one who is his own master. A servant is a person engaged to obey his employer's orders from time to time; an independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it—he is bound by his contract, but not by his employer's orders."

"This may be put in another way by drawing a distinction between one employed under a contract of service (a servant) and one employed under contract for services (an independent contractor). "The distinction between a contract for services and a contract of service can be summarised in this way. In the one case the master can order or require what is to be done, while in the other case he can not only order or require what is to be done but how itself it shall be done." Other marks of a contract of service are: (1) the master's power of selection of his servant; (ii) the payment of wages or other remuneration; (iii) the master's right of suspension or dismissal"

In *Collins* v. *Hertfordshire County Council*,[1] Hilbery, J., discussed this question at pages 614 to 616. At page 616 is the observation:

"The proper test is whether or not the hirer had authority to control the manner of execution of the Act in question"

In *Smith* v. *General Motor Cab Co., Ltd.*,[2] to which I have already referred Lord Shaw expressed his opinion:

"In my opinion quoad the cab, the contract was an ordinary contract *locatio rei*. Quoad the public, the relation of the cab-driver to the cab owner was, in my opinion, one of agency."

"Quoad the employer himself, the question whether the relation of master and servant existed between the employer and the driver is one of fact. The fact has been found in this case, that no such relation did exist. . . . . . . I think that there was in this case ample evidence to confirm the finding . . . . ."

What would be the position if these principles were applied to the facts in isssue in this case? The owner of the factory had really no control over the time taken by the worker to complete the work the latter had undertaken to do for the remuneration specified. The worker was under no obligation to attend on any particular day or at any particular hour. It is no doubt true that the worker had to do his work within the precincts of the factory, and I presume the hours of work in the factory would be regulated under the Factories Act. But even during those hours no compulsion could be brought to bear upon the worker to do the work. Further as in *Smith's case*[3] the owner of the factory was under no obligation to provide work for any given worker on any given day, that is, the owner was under no obligation to provide for a reasonable continuity of service or the work. These features would appear to militate against the existence of a jural relationhip of master and servant.

The result might be the same if we approach the question from a different angle. In this case the contract between a worker and the owner of the factory was that with the yarn supplied by the owner, the worker should weave the fabric on the handlooms provided by the owner and within the precincts of that factory of the owner. When the work was completed, the remuneration contracted for was paid. Suppose the contract had been that the worker could take the yarn away, weave the fabric anywhere he liked and bring back the finished goods before he claimed the remuneration payable; quite obviously the owner could exercise no control over the time taken by the worker or the mode in which he worked, and the position of the worker could only be that of a

1. L.R. (1947) 1 K.B. 598.
2. L.R. 1911 A.C. 188.
3. L.R. (1911) A.C. 188 at pages 192 and 193.

contractor. The mere fact, that the terms of the contract provided that the work should be done within the precincts of tha factory, gave the owner no more control over the time of the worker; the worker still continued to control the time factor; that is the time spent on the work was not at the disposal of or under the orders of the owner of the factory. Judged by that test it would be difficult to hold that the relationship between the worker and the owner of the factory was that of servant and master; the worker could only be an independent contractor with reference to each contract of work.

Therefore, if the question at issue were, did the relationship between labourers or workers and the owner of the factory conform to the common law concept of servant and master, Mr. Nambiar for the petitioner would have been well founded in his contention that such a relationship did not exist. The question, however, which I postulated was were those labourers, employees as defined by section 2 (*f*) of Act XIX of 1952? The inclusion, for instance, in the statutory definition of an employee of a factory, the employee of a contractor in or in connection with the work of that factory is certainly not based on any common law concept of master and servant. The "employee" of a contractor may or may not be a servant of the contractor. But even if he is a servant of the contractor, he would certainly not in common law be the servant of the owner of the factory. Similarly the statutory definition of an employer in section 2 (*c*) of the Act does not conform to the common law concept of a master in relation to those who were employed in the factory. The question at issue has, therefore, to be decided with reference to statutory definition of an employee in section 2 (*f*).

I have already referred to the elements to be proved before the requirements of section 2 (*f*) are satisfied. Two of those elements are, that the person must be "employed" and the employment must be for "wages". Neither the expression "employed" nor the expression "wages" has been defined by Act XIX of 1952. Though there is a definition of "basic wages" in section 2 (*b*) of the Act, that does not really help. "Basic wages" have in substance been defined to mean "all emoluments which are earned by an employee." So in construing whether a given payment constitutes basic wages, one has to find out whether it had been earned by an employee. We are therefore thrown back upon the definition of an employee. Stripped of the other elements under the definition an "employee" is a person employed for wages. It should be clear that what the Act really intended to provide for was a provident fund for the employees for wages. In construing the word "employed" in section 1 (3) of the Act, it is only employment for wages that would appear to have been contemplated.

As I said, the expression wages has not been defined by the Act. It may not be possible to import into this Act the definition of wages in other Acts, for example, section 2 (22) of the Employees State Insurance Act XXXIV of 1948. Section 59 of the Factories Act (Act LXIII of 1948) provides for computation of wages for payment for overtime where the worker is paid on a piece-work basis. But it is not really with reference to these definitions that the term wages as it appears in section 2 (*f*) of Act XIX of 1952 can be construed.

Wages may be interpreted to mean compensation paid to a hired person for his service. Compensation to the labourer may be a specified sum for a given time of service or a fixed sum for a specified work, that is, payment made by the job. The word wages by itself does not imply that the compensation is to be determined solely upon the basis of time spent in service; it may be determined by the work done. It means compensation estimated in either way.

Section 2 (*f*) itself refers to three classes of persons, the employer, the contractor and the employee. The statutory definition of an employee takes in as the employee of an employer, also the employee of the contractor. But it should be clear that the contractor himself would not be an "employee".

It is not the case that the workers in the factory were employees of a contractor. If the contentions of the petitioner were true, each worker would be in the position of a contractor, and he could not be his own employee.

If the position of the worker or labourer was that of a contractor, what would be payable to him under the contract could not be wages, and the contract itself could only be a contract for services and not a contract of service. Though I am fully alive to the fact, that the definition in any other enactment may not decide the true content of the statutory definition in section 2 (*f*) of Act XIX of 1952, the definition of a worker in the Factories Act is significant:

"Worker means a person employed . . . . . whether for wages or not, in any manufacturing process, etc."

Section 2 (*f*) of Act XIX of 1952 however requires the payment of wages to a person before that person could be brought within the scope of that definition of an "employee".

If we take the scope of the Act and the scheme framed thereunder, it should be clear that it was intended to provide for employees with continuous service. One year's continuous service has been prescribed by the rules in the scheme before an employee is entitled to join the fund and before the liability to contribute to the fund with reference to that employee arises. If there is really no obligation on the part of the employer, and the owner of a factory is certainly an employer, to find work for those who work at their will within the precincts of the factory, it may be difficult to hold that such persons could satisfy the statutory requirements of the definition of "employee" in section 2 (*f*). In my opinion, the expression "employed" in section 1 (3) taken in the context of the Act as a whole would imply, subject to the statutory definition in section 2 (*f*), the existence of the relationship of master and servant between an employer and the worker, and between a contractor and the worker. It would certainly appear to exclude a contractor from the scope of the definition of an employee in section 2 (*f*). If the contentions of the petitioner were well-founded, each of the workers would be in the position of a contractor and not of a servant or an employee as defined by section 2 (*f*) of the Act.

This petition is allowed. The respondents should forbear from enforcing the demands already issued to the petitioner before the question whether the petitioner's is a factory within the meaning of section 1 (3) of the Act, is decided under section 19-A of the Act. In the circumstances of this case there will be no order as to costs.

R. M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

T. G. Sundaraiyer .. *Petitioner**

v.

K. N. Balusami Iyer and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 73—Rateable distribution—'Same Judgment-debtor'—Meaning of—Decrees against partner of a firm as partner and as individual—Decrees if against 'same judgment-debtor'.

The necessary condition for the application of section 73 of the Code of Civil Procedure is that the decrees should have been passed against the 'same judgment-debtor'. That means the decrees should be against the defendant or defendants in the same capacity.

Section 73 of the Code (which provides for the distribution of assets when the assets are realised in execution of one decree and when other decree-holders against the 'same judgment-debtor' put in their decrees in execution before the assets are realised), should be read together with Order 21, rules 49 and 50 which deal with the mode of execution. Section 49 of the Partnership Act also recognises for a limited purpose that the separate debts of a partner and his partnership firm debts are distinct and payable from different assets.

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*C.R.P. Nos. 1168 and 1163 of 1952. 12th January, 1954.

A decree against a firm's partners and a decree against the partners in their individual capacity are not decrees against the same judgment-debtor.

Balmer Lawrie & Co. v. *Jadhunath Banerjee*, (1914) I.L.R. 42 Cal. 1; *Sadhu Ram* v. *Firm Dhanpat Rai*, I.L.R. (1937) Lah. 637 : A.I.R. 1937 Lah. 937 and *Pacific Bank* v. *Thakur Singh*, I.L.R. (1945) 1 Cal. 153 : A.I.R. 1949 Cal. 396, followed.

But in the instant case all the decrees were found to be against the same judgment-debtor (personal decrees against the members and not against the firm).

Petition under section 115 of Act V of 1908, and Article 227 of Constitution of India, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Salem, dated 30th June, 1952 and made in R.E.A. Nos. 1114 and 1152 of 1951 respectively in R.E.P. No. 237 of 1951, in O.S. No. 17 of 1946.

D. Ramaswami Aiyangar for Petitioner.

M. S. Venkatarama Ayyar for Respondents.

The Court delivered the following

JUDGMENT.—These two revision petitions arise out of two applications, R.E.A. Nos. 1152 of 1951 and 1114 of 1951, two applications filed under section 73 of the Civil Procedure Code on the file of the Court of the Subordinate Judge, Salem, for rateable distribution. The facts found by the learned Subordinate Judge may be briefly stated. The petitioner in R.E.A. No. 1152 of 1951 is the decree-holder in O.S. No. 110 of 1945 on the file of the Court of the Subordinate Judge, Salem. He obtained a decree against the sons and widow of one Srinivasa Ayyar. The respondents in that application are the decree-holders in O.S. No. 17 of 1946 and O.S. No. 27 of 1944 on the file of the same Court. The first respondent in R.E.A. No. 1152 of 1951 filed O.S. No. 17 of 1946 against Venkatarama Ayyar and Srinivasa Ayyar who were the erstwhile partners of the firm, and their sons and obtained a decree for Rs. 6,250 against Venkatarama Ayyar and Srinivasa Ayyar personally and their sons from out of their family properties. The second respondent filed O.S. No. 27 of 1944 and obtained a decree for Rs. 6,138-12-0 as against the widow and sons of Srinivasa Ayyar. Srinivasa Ayyar before his death became an insolvent and his estate vested in the Official Receiver. His widow, fifth defendant in O.S. No. 110 of 1945 was allotted the amounts now in dispute representing his estate. The decree-holder in O.S. No. 110 of 1945 filed R.E.A. No. 1152 of 1951 claiming the entire amount so allotted on the ground that his decree was obtained against Srinivasa Ayyar and his heirs personally, whereas the other decrees were against the firm. The decree-holder in O.S. No. 27 of 1944 brought the properties of the deceased to sale and the sale proceeds were deposited to the credit of O.S. No. 27 of 1944. That amount was attached by the decree-holder in O.S. No. 17 of 1946. The decree-holder in O.S. No. 110 of 1945 also attached the same. The decree-holder in O.S. No. 27 of 1944 filed E.A. No. 1114 of 1951 claiming rateable distribution out of the amounts deposited in Court. On these facts the learned Subordinate Judge held that the three decrees were against the same judgment-debtor and on that finding dismissed E.A. No. 1152 of 1951 and ordered E.A. No. 1114 of 1951. The decree-holder in O.S. No. 110 of 1945 preferred the two revisions against the said orders.

Learned counsel appearing for the petitioner raised before me two points :—

(1) The learned Subordinate Judge was wrong in holding that the decrees in O.S. Nos. 27 of 1944 and 17 of 1946 were against members of Srinivasa Ayyar's family personally. He contended that on a true construction of the decrees it will be clear that the said decrees were really against the firm.

(2) If the petitioner's decree was against the legal representatives of Srinivasa Ayyar personally and if the other two decrees were against the firm, the decrees would not be against the "same judgment-debtor", within the meaning of section 73 of the Civil Procedure Code.

The first question turns upon the construction of the decrees. Except the certified copies of the decrees, no other relevant papers such as the pleadings

are placed before me. The question therefore falls to be considered on the recitals in the decrees themselves. The decree in O.S. No. 17 of 1946 shows five defendants. They are (1) Venkatarama Ayyar, (2) Srinivasa Ayyar, (3) Soundararajan, (4) Seshadri and (5) Minor Balakrishnan. Defendants 3 and 4 are the sons of the second defendant Srinivasa Ayyar, and the fifth defendant is the son of Venkatarama Ayyar, the first defendant. Pending the suit, the second defendant died. In the summary of the plaint given in the decree it is stated that defendants 1 and 2 were carrying on partnership trade under the name and style of "Paramathi N. Venkatarama Ayyar, L.N. Srinivasa Ayyar, Salem"; that defendants 3 and 4 were the undivided sons of the second defendant and that the fifth defendant was the undivided son of the first defendant. The claim was for damages for breach of contract in respect of goods sold to the defendants. Though the liability was that of the firm, the plaintiffs did not implead the defendants 1 and 2 as partners of the firm, personally because the partnership business was closed and the plaintiffs intended to recover the amounts from the family assets of the partners. The defendants remained *ex parte* and the plaintiffs obtained a decree for recovery of the sum claimed against defendants 1 to 4 personally and defendants 1 to 5 from and out of the joint family properties. The decree is therefore clearly one against defendants 1 to 5 personally. I entirely agree with the learned Subordinate Judge that the decree cannot be construed to be one made against the firm.

Coming to O.S. No. 27 of 1944 it was a suit filed by the plaintiff therein for recovery of a sum of Rs. 6,138-12-0 as damages for breach of contract from defendants 1 to 4 personally and from out of the joint family properties of defendants 1 and 5. The operative portion of the decree reads as follows :

"This Court doth order and decree, that defendants 1 to 4 personally and defendants 1 and 5 from out of the joint family properties, do pay plaintiff a sum of Rs. 6,138-12-0 as damages for breach of contract, with subsequent interest at the rate of 6 1/4 per cent. per annum from 30th June, 1943, till date of decree and thereafter at six per cent. per annum till date of payment subject to the condition mentioned in paragraph 2 below.

2. This Court doth further order and direct that the plaintiff do proceed, for realising the decree amount, in the first instance against defendants 1 to 4 and the properties of the 1st defendant and then against the shares of the joint family properties of the fifth defendant, if he is not able to realise the entire decree amount from defendants 1 to 4".

It will be seen from the aforesaid recitals that no decree was made against the firm or the defendants as partners of a firm. The decree is a pure and simple personal decree against defendants 1 to 4 and against the shares of the joint family property of the fifth defendant. I therefore agree with the finding of the lower Court on the construction of the decree in O.S. No. 27 of 1944 also.

In this view no other question arises. But as the learned counsel argued at some length on the applicability of the provisions of section 73 to a case where one of the decrees is against the firm and the other against the partners personally, I shall proceed to express my view on the said question.

The provision of law that governs the question of rateable distribution is section 73 of the Civil Procedure Code which reads :

"73. (1) where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decree for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons."

The necessary condition for the application of the section is that the two decrees should have been passed against the "same judgment-debtor". The applicability of the section therefore turns upon the connotation of the words "same judgment-debtor" in the section. The meaning of those words is sought to be ascertained by reference to other provisions of law. The relevant provisions may now be read.

"*Section* 49, *Indian Partnership Act :* Where there are joint debts due from the firm and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any

partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm".

"*Order* 21, *rule* 49, *Civil Procedure Code:* Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree and may by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partners, or as the circumstances of the case may require."

Order 21, *rule* 50 : Where a decree has been passed against a firm, execution may be granted—

(*a*) against any property of the partnership ;

(*b*) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner ;

(*c*) against any person who has been individually served as a partner with a summons and has failed to appear.

The said provisions were subject to judicial scrutiny which lead to divergent views on the subject. Before I express my view on the question raised, it will be convenient and profitable to consider some of these cases. In *Balmer Lawrie & Co.* v. *Jadhunath Banerjee*[1], a Divisional Bench of the Calcutta High Court explained the meaning of the words ' the same judgment-debtor' in section 73. There the petitioner obtained a decree for money against D. Mukherjee & Co., whereas, the respondent obtained a decree for money against his judgment-debtor, Dasarathi Mukherjee. At the instance of the respondent decree-holder certain sums payable to Mukherjee by the Corporation of Calcutta were realised. The question was whether the petitioner who obtained a decree against Mukerjee & Co., was entitled to rateable distribution. In negativing the claim, the learned Judges observed as follows at page 9 :

"It is essential for the application of the section that the decrees should have been passed against the same judgment-debtor. This has been made clear beyond possibility of dispute by the introduction of the word "passed" which did not find a place in section 295 of the Code of 1882. But as already stated the decree held by the opposite party, in execution of which the properties have been brought into Court, was passed against Dasarathi Mukerjee, while the decree held by the petitioner was obtained against the firm of which Dasarathi Mukerjee was a partner, and is not shown to be capable of execution against him individually. Consequently, the two decrees cannot be deemed to have been passed against the same judgment-debtor. "

The same view was expressed by the Divisional Bench of the Lahore High Court in *Sadhu Ram* v. *Firm Dhanpat Rai*[2]. There also the conflict was between a person who obtained a decree against a person in his individual capacity and another who obtained another decree against the same defendant as a partner of a firm. The learned Judges following the decision in *Balmer Lawrie & Co.* v. *Jadhunath Banerjee*[1], negatived the claim of the petitioner on the ground that a decree against a firm and a decree against a partner in his individual capacity are not decrees against the "same judgment-debtor". In *Kritanta Kumar* v. *Pullin Krishna*[3], the facts were : The appellants obtained a decree for a large amount against a firm known as Ram Krishna Bejoy Krishna Pal. The respondent obtained a decree against Pullin Behari Pal and Anil Krishna Pal and three other persons and put his decree into execution. The appellants applied for rateable distribution of the money which would be brought into Court in execution of the respondent's decree. The learned Judges allowed the application for rateable distribution. In coming to that conclusion they applied the following principle laid down in *Ex parte Handford*[4].

"It is settled law that the effect of the provisions with regard to suing partners in their firm name is merely to give a compendious mode of describing in the writ the partners who compose the firm

1. (1914) I.L.R. 42 Cal. 1.
2. I.L.R. (1937) Lah. 637 : A.I.R. 1937 Lah. 937.
3. A.I.R. 1938 Cal. 316.
4. L.R. (1899) 1 Q.B. 566.

and that the plaintiff who sues partners in the name of their firm in truth sues them individually, just as such as if he had set out all their names."

Following the said principle they held when a suit is brought against a firm and judgment obtained against it, the action is really against the persons who constituted the firm and the judgment is really a judgment against the individuals. In that view they saw no difficulty in holding that the decrees were against the same judgment-debtors. It is true that this Judgment is in conflict with the earlier views expressed by the Calcutta High Court. But the learned Judges have not considered the effect of the principle embodied in section 49 of the Partnership Act and the combined effect of Order 21, rule 49 and section 73 of the Civil Procedure Code. The Bombay High Court in *Pannaji Devi Chand* v. *Lakkaji Dolaji*[1], considered the applicability of section 73 to a case where one of the decrees was made against a partner under Order 30, rule 6, Civil Procedure Code and another made against him individually. At page 157 the learned Judges stated thus :

"Now, applying these provisions to the facts of the present case, the petitioners impleaded the firm of Kapurji by its proprietor and Vahivatdar Sogaji and the summons was served on Sogaji as a partner. Sogaji appeared in the suit and defended it. Thereafter the decree was passed against the firm by its partner Sogaji. Now Order 21, rule 50, provides that where a decree has been passed against a firm execution may be granted against any property of the partnership, and against any person who has appeared in his own name under rule 6 or rule 7 of Order 30 or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner. In the present case Sogaji appeared in his own name under rule 6. The result therefore, was that, under the combined operation of Order 30, rule 6 and Order 21, rule 50, the decree was executable against the person of Sogaji. That being so, the capacity of Sogaji as a judgment-debtor in the petitioner's darkhast would be the same as that of Sogaji as a judgment-debtor in the opponents' darkhast, and the petitioners, therefore, would be entitled to rateable distribution."

It will be seen from the aforesaid observations that the learned Judges accepted the principle that for the application of the provisions of section 73, Civil Procedure Code, the two decrees should have been made against the judgment-debtor in the same capacity ; but having regard to the provisions of Order 21, rule 50 and Order 30, rule 6, the learned Judges held that the two decrees were against the defendant in the same capacity. An exhaustive, and if I may say so, instructive discussion on the question raised is found in *Pacific Bank* v. *Thakur Singh*[2]. There the first decree was against the defendants' partners and the second decree was against them in their individual capacity. The decree-holder against the firm applied for rateable distribution in regard to the fund representing the separate property of the defendants. He would be entitled to rateable distribution if the decrees were against the same judgment-debtor. The learned Judge after considering the relevant provisions cited before him expressed the following view in regard to the meaning of the words "same judgment-debtor":

"These words indicate not only an identity of the individual but also an identity of the interest or character or capacity of the individual. The individual may be the same but if he has different interests or characters or capacities in different decrees, then the decree is not against the same judgment-debtor."

As the decrees were made against the defendants in different capacities, one as partners, and another as individuals, the learned Judge held that the decree-holder against the partners cannot apply for rateable distribution against the assets realised by the sale of the separate property of the defendants.

I shall now proceed to state my view having regard to the aforesaid provisions and the case-law bearing on those provisions. The wording of section 73 is clear and unambiguous. Rateable distribution could be allowed only in a case where the decree is against the same judgment-debtor. The question, namely, whether a decree against a firm and a decree against the partner of a firm in his individual capacity are against the same judgment-debtor can be decided only by posing and answering the question whether the said decrees are against the defendants in the same capacity. Section 49 of the Indian Partnership Act affords a clue. It is

1. I.L.R. (1943) Bom. 306 : A.I.R. 1943 Bom. 156.

2. I.L.R. (1945) 1 Cal. 153 : A.I.R. 1949 Cal. 396.

true that section 49 of the Partnership Act finds its place in Chapter 6 which regulates the procedure in the case of dissolution of a firm either voluntary or by operation of law or through the intervention of Court. The section in terms, therefore, cannot apply to resolve the conflict between decree-holders in execution. But the principles laid down in the section cannot be ignored. Section 49 clearly and expressly states that the property of the firm shall be applied in the first instance in payment of the debts of the firm and that the separate property of any partner shall be applied first in the payment of his separate debts. If there is a balance of assets after the discharge of the firm debts or separate debts as the case may be the debts of the other category can be paid. This section therefore recognises for a limited purpose that the two classes of debts are distinct and payable from different assets. The principle underlying the section is also applied in execution. Order 21, rule 49, lays down that the property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners of the firm as such. By reason of this provision a decree-holder who obtained a decree against a defendant personally cannot proceed against the assets of the firm of which that defendant is a partner. This section therefore also treats the firm and the members of the firm in their individual capacity as different persons. Order 21, rule 49 (2) prescribes the mode of execution in the case of a decree against a partner, whereas Order 21, rule 50, regulates the procedure in the case of a decree against a firm. Section 73, Civil Procedure Code, provides for the distribution of assets when the assets are realised in execution of one decree, and when other decree-holders against the same judgment-debtor put in their decrees in execution before the assets are realised. Both Order 21, rules 49 and 50 and section 73 deal with the mode of execution. It is therefore unreasonable to read section 73 independently without reference to Order 21, rule 49. They must be read together. By reason of Order 21, rule 49, when the judgment-debtor is a firm or the partners of a firm, the property of the firm cannot be proceeded against for a decree obtained against the partners in their individual capacity. This could only be because they are deemed to hold separate capacities. If they hold separate capacities, it is illogical to hold that in a converse case when a decree-holder against the firm proceeds to execute his decree against the separate assets of the partners of the firm, the partners and the individuals are holding the same capacity, as they hold separate capacity in either case. Order 21, rule 50 (*b*) specifically enacts an exception in a case where the conditions laid down therein are complied with. I would therefore hold that a decree against a firm's partners and a decree against the partners in their individual capacity are not decrees against "the same judgment-debtor". This view is consistent with the decisions reported in *Balmer Lawrie & Co.* v. *Jadunath Banerjee*[1], *Sadhu Ram* v. *Firm Dhanpat Rai*[2], and *Pacific Bank* v. *Thakur Singh*[3]. I respectfully agree with the views expressed therein.

But as I hold, agreeing with the Court below that all the three decrees were against the same judgment-debtors, it follows that the respondents are entitled to rateable distribution. The Civil Revision Petitions therefore fail and are dismissed with costs in C.R.P. No. 1168 of 1952.

R.M. *Petitions dismissed.*

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1. (1918) I.L.R. 42 Cal. 1.
2. I.L.R. (1937) Lah. 637: A.I.R. 1937 Lah. 937.
3. I.L.R. (1945) Cal. 153: A.I.R. 1949 Cal. 396.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE RAJAGOPALA AYYANGAR.

The Tata Iron and Steel Co, Ltd., with its office at Jamshedpur, Calcutta. .. *Petitioner**

v.

S. Kader Ibrahim Rowther .. *Respondent.*

Civil Procedure Code (V of 1908), Order 26, rule 15—Commission to examine witnesses—Powers of Court as regards expenses—"Expenses of the commission"—If includes expenses of opposite party for appearing before the Commissioner.

The expression 'expenses of the commission' in Order 26, rule 15 of the Code of Civil Procedure, could not include the opponents pleaders' fees or the costs which the opponent might have to incur to go to the place where the commissioner was going to examine the witnesses. The expression denotes only fees to be paid to the commissioner and other expenses directly incidental to the issue and execution of the commission.

Kanji Karsondas v. *Nathubai Kimji*, I.L.R. (1953) Bom. 935, followed.

The Court has no inherent power under section 151, Civil Procedure Code, to travel outside the provisions of Order 26, rule 15, Civil Procedure Code and impose conditions not warranted by that or any other specific statutory powers in that regard.

Saboora Bivi Ammal v. *Julaika Bivi Ammal*, (1949) 2 M.L.J. 524 and Judgment in C.R.P. No. 303 of 1954, followed.

Abdur Rahman v. *Muhammad Kasam*, (1948) 2 M.L.J. 652 and *Srinivasalu Naicker*, In re, (1954) 68 L.W. 61, held wrongly decided.

It is certainly within the jurisdiction of a Court to order that the costs of a commission is to be borne in any event by the party applying for the issue of commission.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of the 1st Additional Subordinate Judge, Tiruchirapalli, dated 28th August, 1954 and made in I.A. No. 372 of 1954 in S.C.S. No. 539 of 1953.

M. R. Narayanaswami and *R. T. Gopalakrishnan* for Petitioner.

S. Tyagaraja Aiyar for Respondent.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This is a Civil Revision Petition against the order of the Subordinate Judge of Tiruchirapalli imposing certain terms to be fulfilled by an applicant who prayed for the issue of a commission to examine certain witnesses in Calcutta. The case has been directed to be posted before a Bench by reason of certain conflicting decisions of this Court on the powers of the Court under Order 26, rule 15, Civil Procedure Code.

The first defendant is the petitioner in this Court. The plaintiff-respondent filed a suit for the recovery of about Rs. 300 alleged to be due for shortage of goods supplied by the 1st defendant-company. The defence was that there was no default on the part of the 1st defendant and that all the goods for which the plaintiff had paid were loaded in the wagons of the Railway Company. To prove that they had fulfilled their obligations under the contract, the 1st defendant-company filed an application for the examination of four persons on commission at Calcutta, through the Court of Small Causes, Calcutta. As the witnesses were residents of Calcutta and as Calcutta was admittedly more than 200 miles from Tiruchirapalli, the 1st defendant had a *prima facie* right to have an order made for such examination. This application was opposed by the plaintiff on the ground that the witnesses being officers of the 1st defendant could have been brought over to Tiruchirapalli for examination. The respondent also prayed that as the expenses to be incurred on commission were disproportionate to the amount of his claim, it was a proper case in which the applicant praying for the issue of a commission should bear the costs of the commission in any event.

*C.R.P. No. 1430 of 1954. 21st February, 1955.

The learned Subordinate Judge considered that "as the witnesses reside beyond 200 miles the petitioner is entitled to ask for a commission to examine them". He further directed the 1st defendant (the applicant) to "deposit a sum of Rs. 450, *i.e.*, Rs. 300 being the second class fare to and fro and daily allowance at Rs. 15 per day for the commissioner's journey and stay at Calcutta plus Rs. 150 being his commission fee" and a further sum of Rs. 100 being "a portion of the expenses that the plaintiff may have to incur to go to Calcutta with his advocate to cross-examine the petitioner's witnesses". The order also directed that the entire commission expenses of Rs. 550 would be borne by the 1st defendant irrespective of the result of the suit.

Two points have been raised by learned counsel for the petitioner in this Civil Revision Petition. The first is that the Court below had no jurisdiction under Order 26, rule 15 of the Code of Civil Procedure to direct the petitioner to deposit Rs. 100 for the expenses of the plaintiff and the second, that the Court below unnecessarily mounted up costs by asking the commisioner to proceed from Tiruchirapalli to Calcutta whereas the purpose would have been served much more cheaply by the appointment of a practitioner at Calcutta as commissioner through the Court of Small Causes at Calcutta.

On the first point there is a conflict of authority which has necessitated this petition being heard by a Bench. The relevant statutory provisions on this point are these : Section 75 Civil Procedure Code empowers a Court "subject to such conditions and limitations as may be prescribed" to issue a commission "(*a*) to examine any person". Order 26, Civil Procedure Code, prescribes the conditions and limitations referred to in this section. Order 26, rules 1 to 4 deal with the circumstances in which such commission might be issued for examination of witnesses and rule 15 prescribes the conditions which might be imposed upon a party applying for a commission. This runs in these terms :

"15. Before issuing any commission under this Order the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued."

The Court, therefore, has power under this provision to order "such sum as it thinks reasonable *for the expenses of the commission*" to be paid. The question is what is meant by the expression "expenses of the commission" and whether it includes the expenses which might be incurred by the opposite party for appearing before the commissioner. The earliest decision of this Court in which this was considered, was by Mack, J., in *Abdur Rahiman* v. *Muhammad Kasam*[1]. The defendant in that case had taken out an application for the examination of witnesses on commission. The plaintiff insisted that this should be ordered only on terms on the defendant paying him a sum of Rs. 1000 to meet the expenses to be incurred by him in connection with the examination of these witnesses. The Subordinate Judge declined to accede to this request on the ground that it was not a fit case in which such deposit should be ordered. The plaintiff came up in revision to this Court his complaint being that the Subordinate Judge ought to have imposed such a condition and required such a deposit from the defendant before directing the commission to issue. Mack, J., dismissed the pettition but went on to say :

"The Subordinate Judge was doubtful whether he could order such costs under Order 26, rule 15 of the Civil Procedure Code. The 'expenses of the commission' can be made to include expenses of the other parties to the litigation and can in suitable cases be ordered to be deposited by the party at whose instance the commission was taken out."

It will be seen that this opinion was purely *obiter* and does not adduce any reasons for the conclusion reached.

The decision of Mack, J., was considered by Govinda Menon, J., in *Saboora Bivi Ammal* v. *Julaika Bivi Ammal*[2], where the point had to be considered directly. The Subordinate Judge of Kumbakonam, understanding the expression "the expenses of the commission" in Order 26, rule 15 of the Code to include the expenses to be defrayed by the opposite parties made an order directing the applicant for the

1. (1948) 2 M.L.J. 652. 2. 1949) 2 M.L.J. 524.

commission, to deposit into Court not merely what in strictness would be the expenses of the commission but also the expenses of the opposite party. The matter was brought up in revision to this Court and Govinda Menon, J., allowed the petition observing :—

"There is no direct authority on the point except the observations of my learned brother, Mack, J., in *Abdur Rahim Settu* v. *Muhammad Kasam Settu*[1], where the learned Judge observes that 'the expenses of the commission' can be made to include expenses of the other parties to the litigation and can in suitable cases be ordered to be deposited by the party at whose instance the commission was taken out. It seems to me that this proposition has been very widely stated. The phrase 'expenses of the commission' in ordinary parlance would mean only what the commissioner has to spend for summoning witnesses and for other incidental expenses relating to the examination of the witnesses before him. No authority has been placed before me where the words have been construed in such wide terms. Moreover the Civil Rules ofPractice (Rule 82) does not comtemplate any such thing....If one of the parties desires to travel luxuriously by air or in the first class on board a ship, it cannot be said that such a thing can be included as expenses of the commission, in the absence of any direct authority. I am not inclined to hold that the word 'expenses' would mean that."

These are the only reported decisious of this Court. But there are two unreported decisions. One is by Balakrishna Ayyar, J., in C.R.P. No. 303 of 1954, where the learned Judge expressed his agreement with the view taken by Govinda Menon, J. The decisions of other High Courts to which reference will be made presently were all placed before the learned Judge and he expressed his concurrence with the decision of a Bench of the Bombay High Court in *Kanji Karsondas* v. *Nathubai Kimji*[2], in which the same view as that taken by Govinda Menon, J., was adopted. On this reasoning, the learned Judge set aside the order of the lower Court which had directed the deposit of Rs. 250 as a condition for the issue of a commission this sum including the expenses of the opposite party. The other decision is by Ramaswami, J., in C.R.P. No. 1078 of 1954 (since reported in *Srinivasalu Naicker*[3], where the learned Judge held that on grounds of justice, equity and goods conscience a Court should be deemed to have power to direct such payment under section 151, Civil Procedure Code, in order to equalise the position of rich and poor parties in litigations. So far as the other High Courts are concerned the position stands thus. In *Sarat* v. *Ram*[4], an order for the issue of a commission was refused by the lower Court but was allowed by the learned Judges of the Calcutta High Court on condition of the applicant depositing Rs. 1000 to meet the expenses of the opposite party. There is no discussion of the terms of Order 26, rule 15 and the decision was based on the ground that the applicant for the commission had no right to it but was granted a special indulgence on certain terms. The next case to be referred to is the decision also of the Calcutta High Court in *Nripendra Bhusan* v. *Raja Pramatha Bhusan*[5]. It arose out of an application for the issue of a commission for local investigation and the order which the High Court had to consider was the one by the Subordinate Judge which directed that if the defendant wanted a local enquiry he must deposit the amount of the claim, that is the claim in the suit, and the 1st plaintiff would be able to withdraw three-fourth of it before decree. The order was taken in revision but the revision was dismissed on the gromnd that Order 26, rule 15, was not exhaustive and that it did not stand in the way of the Court making any terms that it chose to impose as a condition precedent to the granting of the prayer for local investigation. This case therefore does not help us in construing the expression "expenses of the commission" in Order 26, rule 15. The next decision to be noticed is of the Patna High Court in *Ghanshyam Das* v. *Kisturibala Debi*[6]. The order of the Court below directed the defendant to pay to the plaintiff Rs. 200 as costs in attending to the commission and this was sustained on the ground that in an earlier unreported decision an order in similar terms was held not to be illegal. The matter has been considered fully in a recent judgment of the Bombay High Court in *Kanji Karsondas* v. *Nathubai Kimji*[2], where after discussing all the earlier decisions of the several High Courts it was held that the expression the "expenses of the commission" could not include an

1. (1948) 2 M.L.J. 652.
2. I.L.R. (1953) Bom. 935.
3. (1954) 68 L.W. 61.
4. (1921) 35 Cal. L.J. 78.
5. A.I.R. 1927 Cal. 907.
6. A.I.R. 1936 Pat. 33.

opponent's pleader's fees or the costs which the opponent might have to incur to go to the place where the commissioner was going to examine the witnesses and that the expression denoted only fees to be paid to the commissioner and other expenses directly incidental to the issue and execution of the commission. Having considered the matter ourselves we respectfully concur in the opinion of the learned Judges of the Bombay High Court. We consider that the views taken by Mack, J., and Ramaswami, J., in the cases referred to above are incorrect and that Govinda Menon, J., and Balakrishna Ayyar, J., were right in their construction of Order 26, rule 15 and the powers of the Courts under that provision.

We have only to add that it is settled law that where there is an express provision in the Code setting out the conditions that might be imposed it would not be open to any Court to resort to its inherent powers in order to enlarge its powers or get over the statutory limitations. We are therefore clearly of the opinion (*a*) that the expression "expenses of the commission" in Order 26, rule 15, Civil Procedure Code, does not include expenses of the opposite party and (*b*) that the Court has no inherent power to travel outside Order 26, rule 15, Civil Procedure Code, and impose conditions not warranted by that or any other specific statutory provisions in that regard. To pass an order in the terms as the Court below has done would really be tantamount to passing an interim decree for costs which cannot be sustained under any provision of the Code. In this view the order of the Court below directing the petitioner to deposit Rs. 100 for defraying the Respondent's expenses of the commission is without jurisdiction and is set aside.

The question that remains is as regards the necessity for an advocate-commissioner going all the way from Tiruchirapalli to Calcutta in order to record the evidence of four witnesses. We consider this as absolutely unnecessary and a waste of money. The same purpose could be achieved by a letter of request to the Small Causes Court at Calcutta to appoint an advocate of Calcutta as commissioner and have the witnesses examined. The Subordinate Judge will in the light of these considerations determine the reasonable expenses of the commission and pass orders accordingly.

Only one thing more remains to be mentioned and that is that no objection could be taken to the order of the Court below directing the costs of the commission to be borne by the petitioner in any event. That was certainly within the jurisdiction of the Court and it is not open to objection.

The Civil Revision Petition is accordingly allowed and the Court below will dispose of the application for the issue of a commission in the light of our observations contained above. There will be no order as to costs in the Civil Revision Petition.

R.M. —————— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Hussain Bee and others .. *Petitioners**

Madras Prohibition Act (X of 1937), sections 13 and 14 and rules 6 and 10—Rule 6 of the rules framed by G.O. Ms. No. 5452, dated 19th December, 1952—Validity—If opposed to Article 19 (1) (g) of the Constitution of India—Rule imposing a restriction on possession of the maximum quantity of French polish—If void—Contravention of the provisions of a rule under—If could be deemed to be a contravention of the Act itself—If could attract the punishment prescribed under the Act.

The mere fact that preparations used for medicinal, toilet or industrial purposes containing alcohol are liable to be misused is not a sufficient ground for banning them completely under the Madras Prohibition Act. But the Legislature or the rule-making authority is entitled to take steps to regulate their manufacture, possession or sale provided the regulation does not impose any unreasonable restraint or amounts virtually to a prohibition of their possession or use. On this basis there

*Crl.R.C. Nos. 816 to 818 of 1954. 7th April, 1955.
Cr.R.Ps. Nos. 771 to 773 of 1954.

is nothing in rule 6 of the Madras Prohibition Rules which enacts any prohibition or which exceeds the limits of a reasonable restriction which the State may impose under Article 19 (5) of the Constitution. Rule 6 of the rules issued under G.O. Ms. No. 5452, dated 19th December, 1952, imposing a restriction on the possession of 'French polish' beyond a certain quantity is valid.

Where there has been an infringement of the provisions of a rule which specifically provides for a particular punishment, the same cannot be treated as an offence under the Act also so as to enable a Court to impose upon the accused the punishments provided for offences against the Act as distinguished from those provided for the offences against the rules.

Though the general principle is that a valid rule made under an enactment has the same force as a provision in a statute and a breach of the rule might in a sense be considered as a contravention of the enactment itself, in any given case it would depend on the language of the particular statute.

The Madras Prohibition Act has drawn a clear distinction between the offences in regard to liquor and intoxicating drugs pure and simple in respect of which a prohibition is being enforced and those preparations containing alcohol used for medicinal and toilet or industrial purposes in regard to which a restriction only is being enacted.

In view of the specific provisions in sections 13 and 14 of Madras Prohibition Act relating to confiscation of the goods and materials in respect of which or by means of which an offence has been committed, it is not open to a Court to invoke the powers of confiscation under section 517 of the Criminal Procedure Code in regard to an offence under this Act.

On a proper construction of the provisions of the Madras Prohibition Act the expression 'offence committed against the Act' in sections 13 and 14 cannot comprehend the contravention of a notification issued under section 16. The breach of a rule is not an offence against the Act itself within the meaning of sections 13 and 14 of the Prohibition Act. For a contravention of a rule, which does not provide for confiscation of the goods, the power of confiscation provided in the Act for contravention of a section cannot be invoked.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the Judgment of the Court of Sessions, Chingleput, dated 5th March, 1954 and passed in Criminal Appeals Nos. 2, 1 and 4 of 1954, respectively preferred against the order of the Court of the Sub-Divisional Magistrate of Chingleput passed in C.C. Nos. 131, 129 and 130 of 1953.

S. Mohan Kumaramangalam and *A. Jagannatha Rao* for Petitioners.

The Advocate-General (*V. K. Tiruvenkatachari*), the Special Government Pleader (*V. V. Raghavan*) and the Public Prosecutor (*V. T. Rangaswami Ayyangar*) for the State.

The Court made the following

ORDER.—*Cr. R. C. Nos.* 816 *to* 818 *of* 1954 : These three revision petitions are by the accused who have been convicted under section 4 (1) (*a*) of the Madras Prohibition Act read with rules 6 and 10 of the Notification G.O. Mis. No. 5452, Development dated 19th December, 1952; framed under sections 4, 16, 18, 18-A, 21 and 54 of the Madras Prohibition Act, whereby the possession of varnish without a licence in excess of 3 quarts is made punishable with imprisonment which may extend to 6 months or fine which may extend to Rs. 1000 or both.

The petitioners in these cases were found in possession of a large number of four-gallon tins of varnish or French polish. The common defence put forward on the merits by the several accused was that the goods were not found in their premises but had been seized by the police while they were lying on the road-side and the accused had been falsely implicated. Their case was that these goods belonged to one Annamalai Mudaliar, a merchant of Bangalore, who was examined in the cases as D.W. 4, that he was transporting this quantity of French polish in 47 barrels from Bangalore to Madras in July, 1952, before the notification of Government referred to earlier, that these goods were seized by the police for non-payment of duty but were subsequently released after the collection of gallonage fees by the Government. It was stated, that, subsequently after the release, the varnish was transferred from 47 barrels to 247 four-gallon tins as the barrels which originally contained them were in a damaged condition, that as the goods in these tins were being brought back to Madras, the lorry broke down with the result that the goods had to be kept by the road-side, that while they were there, they were seized by the police and that the accused were falsely implicated as having been

in possession of these goods. On the other hand, the evidence adduced on the side of the prosecution was that these tins were found in the premises belonging to the accused in the respective cases and that the police seized then from these premises. The prosecution story was accepted by the Sub-Divisional Magistrate who rejected the defence version as wholly improbable. The Sessions Judge on appeal confirmed these findings of the Sub-Divisional Magistrate.

The petitioner in Criminal Revision Case No. 816 of 1954, was found in possession of 42 four-gallon tins. The Sub-Divisional Magistrate who found her guilty of the offence sentenced her to a fine of Rs. 300 and in default to imprisonment for 6 weeks. On appeal the Sessions Judge upheld the conviction but reduced the fine to Rs. 150 and the imprisonment in default to simple imprisonment for 10 days. In Criminal Revision Case No. 817 of 1954, the quantity found in the possession of the accused was 183 four-gallon tins. The sentence passed by the Sub-Divisional Magistrate was rigorous imprisonment for six months and a fine of Rs. 100 and in default to rigorous imprisonment for six weeks. The Sessions Judge on appeal reduced the sentence to a fine of Rs. 250 and in default to rigorous imprisonment for six weeks. In the last of the revision cases Criminal Revision Case No. 818 of 1954, there were three accused who were found jointly in possession of 220 gallons in 55 four-gallon tins. The Sub-Divisional Magistrate found them guilty and sentenced each of them to a fine of Rs. 200 and in default to rigorous imprisonment for a period of six weeks. The Sessions Judge reduced the sentence to a fine of Rs. 100 on each of the accused. In all these three cases the tins of French polish which were seized from the respective accused were ordered to be confiscated to the Government. D.W. 4, Annamalai Mudaliar, who claimed the varnish as his, made applications, to the Magistrate under section 517, Criminal Procedure Code, for the delivery of the goods to him on the footing that he was the owner. These applications were dismissed as the main defence of the accused was disbelieved. The claimant filed an application under section 520, Criminal Procedure Code, to the Court of Sessions to set aside this order. The learned Sessions Judge refused to interfere with this order declining to return the goods to the applicant and pointed out that it was open to him to establish his claim, if so advised, in a civil Court. It is from these orders of conviction and sentence that these three criminal revision cases arise. A subsidiary point is also raised in these cases that on a proper construction of the relevant provisions of the Madras Prohibition Act the order of confiscation passed by the Magistrate and confirmed by the Sessions Judge is illegal. Against the order of refusal to return the goods to the applicant, the claimant has filed Criminal Miscellaneous Petition No. 1318 of 1954 and Criminal Miscellaneous Petitions Nos. 6 and 7 of 1955, before this Court seeking the same relief.

Regard being had to the concurrent findings of fact that the several accused, were in possession of this quantity of French polish without a licence therefor, that the accused contravened rule 6 of the notification is not open to challenge before us ; but these cases have been placed before a Bench for the consideration of the plea raised by the accused in their respective cases attacking the validity of the notification G.O. Mis. 5452 Development, dated 19th December, 1952, referred to earlier on the ground that it was in contravention of Article 19 (1) (*f*) of the Constitution. This argument was put forward before the learned Sessions Judge and it was rejected by him.

Before setting out the contentions regarding the invalidity of this notification it would be necessary to state briefly the scheme of the Madras Prohibition Act. The Preamble to the Act recites :

"Whereas it is expedient as early as possible to bring about the prohibition except for medicinal, scientific, industrial or such like purposes, of the production, manufacture, possession, export, import, transport, purchase, sale and consumption of intoxicating liquors and drugs in the State of Madras".

Liquor is defined under section 3 (9) thus :

" 'liquor' includes toddy, spirits of wine, methylated spirits, spirits, wine, beer and all liquid consisting of or containing alcohol".

At this stage it may be convenient to refer to the composition of the French polish which is the subject-matter of these proceedings. This is made out of shellac or resin being dissolved in denatured spirit—that is spirit denatured with half a gallon of light caoutchoucine and half a gallon of pyridine to 99 gallons of spirit at a maximum strength of 50 O.P.

Section 4 enacts the prohibition in respect of possession, manufacture, sale or consumption etc., of liquor and runs thus :

"4. (1) whoever

(*a*) imports, exports, transports, or possesses liquor or any intoxicating drug ; or

(*b*) manufactures liquor or any intoxicating drug ; or

(*c*) except in accordance with the rules made by the State Government in that behalf cultivates the hemp plant ; or collects any portion of such plant from which an intoxicant drug can be manufactured or

(*d*) taps any toddy-producing tree or permits or suffers to be tapped any toddy-producing tree belonging to him or in his possession ; or

(*e*) draws toddy from any tree or permits or suffers toddy to be drawn from any tree belonging to him or in his possession ; or

(*f*) constructs or works any distillery or brewery ; or

(*g*) uses, keeps or has in his possession any materials, still, utensil, implement or apparatus whatsoever for the tapping of toddy or the manufacture of liquor or any intoxicating drug ; or

(*h*) bottles any liquor for purposes of sale ; or

(*i*) sells liquor or any intoxicating drug ; or

(*j*) consumes or buys liquor or any intoxicating drug ; or

(*k*) allows any of the acts aforesaid upon premises in his immediate possession shall be punished

(i) in the case of an offence falling under clause (*b*) clause (*f*), clause (*g*), clause (*h*) or clause (*i*) or an offence falling under clause (*k*) in so far as it relates to an act specified in any of the clauses aforesaid with imprisonment which may extend to two years or with fine which may extend to five thousand rupees or with both.

(ii) In any other case with imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both."

In order to carry out the purpose set out in the Preamble that the general prohibition would not apply to the use of liquor as defined under the Act for medicinal, scientific and industrial or such like purposes, section 16 enables the local Government by notification to exempt specified liquors or articles containing liquor from all or any of the provisions of the Act on the ground that such liquor is required for medicinal, scientific or industrial or such like purpose. Section 18 enables the Government to grant licences for possession, etc., of these preparations.

Section 16 runs thus :

" 16. (1) The State Government may, by notification and subject to such conditions as they think fit exempt any specified liquor or intoxicating drug or article containing such liquor or drug from the observance of all or any of the provisions of this Act on the ground that such liquor, drug, or article is required for a medicinal, scientific industrial or such like purpose.

(2) When issuing a notification under sub-section (1) the State Government shall have power to provide that a breach of any of the conditions subject to which the exemption is notified shall be punished with imprisonment which may extend to six months or with fine which may extend to one thousand rupees or both."

Section 18 runs thus :

" 18. The State Government or subject to the control of the State Government, the Collector may issue licences to any person or in respect of any institution, whether under the management of Government or not, for the manufacture, export, import, transport, sale or possession of any liquor, intoxicating drug or article containing such liquor or drug, on the ground that such liquor, drug or article is required by such person or in respect of such institution for a *bona fide* medicinal, scientific, industrial or such like purpose."

The other provisions of the Act are not very relevant for the consideration of the question arising in these petitions except section 54 which gives the Government the power to make rules for the purpose of carrying into effect the provisions of the Act.

In exercise of the powers conferred *inter alia* by sections 16 and 18, the Government of Madras published a notification on 2nd June, 1950, whereby the preparation known as French varnish containing denatured spirit was exempted from all the provisions of the Act subject to the following conditions :

(1) When the preparation was imported into the State by any person or firm it shall be imported under a permit granted by the Board of Revenue on prepayment of a licence fee at 12 annas per imported gallon on its denatured spirit contents.

(2) That no attempt shall be made to render the preparation fit for human consumption. A penalty was also imposed for breach of the conditions of this notification. This notification was repealed by G.O. Mis. No. 5452, Development, dated 19th December, 1952 and under its terms the Government introduced a stricter control over the manufacture, importation, possession and sale of French polish. It is the validity of this notification that is challenged in the present revision petitions. The scheme of the notification was this. No person could manufacture varnish except under a licence granted by the Collector of the District on payment of an annual fee of Rs. 50 and in accordance with the conditions and restrictions imposed therein. Under rule 3 no person can import varnish except under a permit granted by the Board of Revenue, rule 4 laid an embargo on sales of varnish except under a licence granted by the Collector. Rule 5 enacted that (*i*) varnish may be sold by a manufacturer or dealer to persons or firms requiring it for *bona fide* use, (*ii*) it shall not be sold to any person whom the manufacturer or dealer has reason to believe is likely to misuse it as a substitute for alcohol and (*iii*) every manufacturer or dealer in varnish and every licensee thereof was directed to maintain a register in a form specified. Rule 6 for contravention of which the accused in these cases were convicted is in these terms :

" Possession of varnish for domestic purposes by private persons without a licence shall not exceed 3 quarts at any one time."

Rule 9 makes it an offence for any person to render or attempt to render varnish fit for human consumption and finally rule 10 enacts punishment in these terms :

" A breach of all or any of these rules shall be punishable with imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both."

The argument advanced against the validity of the notification is this: Article 19 (1) (*f*) of the Constitution guarantees to every citizen ' the right to acquire, hold and dispose of property.' Property in this context would comprehend movable property including in this category " liquor." Under Article 19 (5) the State can undoubtedly impose restrictions on the exercise of this right provided they are in the interests of the general public. While no exception could be taken to any embargo or prohibition laid on intoxicating liquors or beverages and their manufacture, import, possession, sale, use or consumption, liquids containing alcohol including medicinal or toilet preparations or preparations intended for industrial uses can only be the subject of regulation and not of prohibition. Up to this stage we do not see any room for controversy.

It was however contended that the effect of the decision of the Supreme Court in the Bombay Prohibition case, *State of Bombay* v. *Balsara*[1], was to restrict this control to guarding against their misuser for human consumption as alcoholic drinks either as they were or after processing and that restrictions for achieving any other purpose were invalid. Judged by these tests it was urged that only rules 5 and 9 could be in order and that all the other rules including rule 6 contravened the Constitution. It was also urged as following from this decision of the Supreme Court that the enactment must first exempt this type of liquors from the operation of the Act and then impose restrictions on their manufacture, possession, sale, etc , but that as the Madras Prohibition Act started with imposing a total ban on them by including them within

1. (1951) 2 M.L.J. 141 : 1951 S.C.J. 478 (S.C.).

the definition of liquor and then sought to enact restrictive regulations by rules under section 16, the restrictions imposed by the rules were *ultra vires.*

We do not agree with the above deductions sought to be derived from the decision of the Supreme Court. Fazl Ali, J., with whose judgment the other learned Judges agreed formulated the position thus at page 495:

"The question boils down to ascertaining whether the restrictions imposed by the provisions to which reference has been made are reasonable..........That the restrictions imposed by the sections on the right of a citizen to possess or sell or buy or consume or use spirits of wine, methylated spirits, wine, beer, toddy are in view of the aforesaid directive principles of State policy (referring to Article 47 of the Constitution) quite reasonable, has not been disputed before us. The controversy has centred round the words 'and all liquids consisting of or containing alcohol.' It is said that these words include all liquid, toilet or medicinal preparations containing alcohol, and the restrictions imposed upon the ordinary use of such toilet or medicinal preparations are unreasonable and therefore void."

The learned Judge then set out an extract from the judgment of the Bombay High Court wherein the conclusion was reached that the Bombay Act in so far as it prevented the possession, use and consumption of non-beverages for legitimate purposes was void as offending against Article 19 (1)(*f*) of the Constitution. His Lordship. then scrutinised the orders and rules made by the Provincial Government under section 139 of the Bombay Act under which the latter could exempt any intoxicants from all or any of the provisions of the Act. But they were such a medley of notifications which in the words of the learned Judge

" An ordinary citizen may find it a perplexing task to attempt to extract information out of the long series of complicated regulations, as to the true nature and extent of the right which the law confers upon him."

His Lordship was unable to deduce therefrom any intelligible restrictions which he could characterise as reasonable and so said

" Having given my careful consideration to the matter, I am of the opinion that the restrictions imposed by the Act even when read with the above Notifications are not reasonable, and I would affirm the conclusion arrived at by the High Court."

There is however no doubt that in his Lordships' opinion these " liquids containing alcohol " could have been subjected to reasonable restriction in respect of their manufacture, possession or sale.

The Madras Prohibition Act is modelled on a basis different from that of the Bombay Act. The intention of the statute to exclude medicinal, toilet and industrial preparations from the general operation of the Act is made clear in the Preamble which we have extracted earlier and this purpose is achieved by the enactment of sections 16 and 18. This Court has held in *Nageswara Rao* v. *State of Madras*[1], that section 16 (1) is mandatory and that it lays a duty on Government to frame rules to regulate this species of " liquor " and it is by virtue of these powers that the present rules are framed. After discussing in detail the judgment of the Supreme Court Venkatarama Ayyar, J., concluded at page 732 of the report :

" Having examined the judgment (of the Supreme Court in the *Balsara case*[2] carefully we are unable to see anything in it which compels us to hold that section 18 of the Act and the licences issued thereunder should be held to be void because of the inclusion of Medicinal preparations in the definition of ' liquor ' under section 3 (9) of the Act, even though such licences are reasonable."

and

" Such a regulation cannot be attacked as an encroachment on the right of a citizen to acquire, hold and dispose of property because its object is not to interfere with those rights but to prevent the evasion of prohibition laws under cover of those rights."

There is nothing in the subsequent case of *Pesikaka* v. *State of Bombay*[3] to qualify the principle which we have set out above as deducible from the *Balsara case*[2].

Incidentally we might mention that the argument that the restrictions are unreasonable and void by reason of these preparations containing alcohol normally

1. (1953) 2 M.L.J. 724.
2. (1951) 2 M.L.J. 141 : 1951 S.C.J. 478 (S.C.).
3. (1955) 1 M.L.J. 32 : 1955 An. W. R. (S.C.) 32 : 1955 S.C.J. 73 (S.C.).

intended for industrial use not being exempted in the first instance and then brought within the regulation was also addressed to this Court in *Nageswara Rao* v. *The State of Madras*[1] and was repelled by the learned Judges. At pages 730 and 731 the learned Judges said :

" The ground of the attack has no relation to the substance of the provisions; it is rather metaphysical in character having reference to the *modus operandi* adopted by the State Legislature in including medicinal preparations in the definition of 'liquor' and excluding them by a process of exemption instead of excluding them from the definition of 'liquor' and bringing them in by a system of regulation. It is difficult to see how this mode of the legislative treatment of the subject could in any way, prejudice the rights of the petitioners. Even if the legislature enacted a law limiting the prohibitions to intoxicating liquor and then providing for the regulation of medicinal preparations, the licences prescribed thereunder must be of the same character as under the impugned legislation ....There is clearly therefore no substance in this attack."

The point that emerges from this discussion is that the mere fact that preparations used for medicinal toilet or industrial purposes are liable to be misused while not a sufficient ground for banning them completely, the Legislature or the rule making authority is entitled to take steps to regulate their manufacture, possession or sale provided the regulation does not impose any unreasonable restraint or amounts virtually to a prohibition of their possession or use. Proceeding on this basis we are unable to find anything in rule 6 which enacts any prohibition or which exceeds the limits of a reasonable restriction which the State may impose under Article 19 (5) of the Constitution. We have heard no argument that if as undoubtedly the State possesses such a right to regulate (the manufacture) possession or (sale, etc.) of these goods for domestic use, the restriction on the quantity to be possessed without a licence being fixed at 3 quarts is unreasonable. We therefore hold that rule 6 of the Notification is valid and that the convictions of the petitioners are legal.

The next question that arises for consideration is whether the Magistrate has jurisdiction to pass an order of confiscation of the property which was the subject-matter of the offence. The relevant provisions of the Act bearing on the point are sections 13 and 14 which run thus :

" 13. In any case in which an offence has been committed against this Act, the liquor, drug, materials, still utensil, implement, or apparatus in respect or by means of which the offence has been committed shall be liable to confiscation along with the receptacles, packages, coverings, animals, vessels, carts or other vehicles used to hold or carry the same.

14. (1) : When the offender is convicted or when the person charged with an offence against this Act is acquitted, but the Court decides that anything is liable to confiscation, such confiscation may be ordered by the Court.

(2) When an offence against this Act has been committed but the offender is not known, or cannot be found, or when anything liable to confiscation under this Act and not in the possession of any person cannot be satisfactorily accounted for, the case shall be inquired into and determined by the Collector or other Prohibition Officer in charge of the district by any other officer authorized by the State Government in that behalf, who may order such confiscation.

Provided that no such order shall be made until the expiration of fifteen days from the date of seizing the things intended to be confiscated or without hearing the persons, if any, claiming any right thereto, and evidence, if any which they produce in support of their claims."

In view of these specifie provisions in this Act it would not be open to the Magistrate to invoke the powers of confiscation under section 517, Criminal Procedure Code. There cannot be any doubt that if the offences with which the accused were charged and under which they were convicted were offences against the Act, the order of confiscation would be permissible and legal but the offence committed by the accused in the present case was one which was created by the Notification issued by the Government under section 16. The power of the State Government to provide punishments for breach of the conditions specified in the Notification is to be found in sub-section (2) of section 16 which enacts

"..........When issuing a notification under sub-section (1) the State Government shall have power to provide that a breach of any of the conditions subject to which the exemption is notified shall be punished with imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both."

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1. (1953) 2 M.L.J. 724.

It is by virtue of the power contained in this sub-section that the Government in their Notification dated 19th December, 1952, enacted rule 10 under which for breach of all of any of the rules, the offender was subject to imprisonment upto a period of six months or fine which may extend to Rs. 1,000 or with both.

The question for consideration is whether when there has been an infringement of the provision of a rule which specifically provides for a particular punishment, the same could be treated also as an offence under the Act so as to enable the Court to impose upon the accused the punishments provided for offences against the Act as distinguished from those provided for the offences against the rules. The basis upon which the Magistrate convicted the accused and ordered confiscation was that they had committed an offence which fell within section 4 (1) (*a*) of the Act read with rules 6 and 10 of the Notification. The argument on behalf of the State in support of this position was that French polish for illegal possession of which the several accused were convicted was ' liquor ' as defined in section 3 (9) of the Act as it was a liquid which contained alcohol and as the Proviso to section 4 (1) did not exempt the possession by the accused the quantity in their possession being in excess of that which was permitted by the rules, the accused were guilty of an offence under section 4 (1) (*a*). It may be mentioned in passing that the point in this form has not been urged by the accused in the Court below. But as it is purely one of law, we have permitted it to be raised here.

Though the general principle is that a valid rule made under an enactment has the same force as a provision in a statute and a breach of the rule might in a sense be considered as a contravention of the enactment itself, this would naturally depend upon the language used in the particular statute. In this connection certain decisions which have interpreted the scope of rule 81 (4) of the Defence of India Rules might usefully be referred to. The rule as originally framed ran :

> " If any person contravenes any of the provisions of this rule he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both."

And this was subsequently amended so as to read :

> " If any person contravenes any *order made under this rule* he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both."

A question was raised before the amendment whether when an accused person contravened an order made under the rules, he could be punished, on the basis of his having contravened the rule itself. In In re *Chokkalingam Chetty and others*[1], Byers, J., answered it in favour of the accused saying

> " No discussion is necessary to make it clear that in its original form rule 81 (4) provided no punishment for an infringement of an order framed under rule 81 (2) (*b*) (which enabled orders to be made) ....The learned Public Prosecutor has argued that although there is this defect in the sub-rule, the intention in framing it was to make penal the infringement of these orders and therefore, the rule should be construed in a liberal sense otherwise rule 81 (4) becomes meaningless. This argument is no doubt plausible but it offends against all recognised principles in the construction of penal statutes."

This decision was followed by this Court in *Ademma* v. *Satyadhyana Thirtha Swamivaru*[2] and a similar view was expressed by Rowland, J., in *Krishnachandra* v. *Emperor*[3] and by Meredith, J., in *Jugal Singh* v. *Emperor*[4].

We are clearly of the opinion that on a proper construction of the provisions of the Madras Prohibition Act the expression " the offence committed against the Act " in sections 13 and 14 cannot comprehend the contravention of a notification issued under section 16. Any other construction would in our opinion lead to glaring anomalies in the application of the Act. To test the correctness of the argument on behalf of the State, we might take the case of a sale of varnish in contravention of rule 4 of the Notification. Under this rule a person is forbidden to sell varnish except under a licence in the prescribed form which he might get on payment of an annual licence fee. If a sale were effected in contravention thereof rule 10 provides punishment which is imprisonment which may extend to six

1. (1943) 1 M.L.J. 20.
2. (1943) 2 M.L.J. 289.
3. A.I.R. 1943 Pat. 313
4. A.I.R. 1943 Pat. 315.

months or fine which may extend to Rs. 1,000. Now if the argument of the learned Advocate-General that a sale of varnish in contravention of rule 4 would also be an offence which falls within section 4 (1) of the Act were accepted, the accused can be sentenced to imprisonment which may extend to two years and fine which may extend to Rs. 5,000 or with both under sub-section (1) of section 4 of the punishment portion. This would clearly establish that a breach of the rule enacted under section 16 (1) was not contemplated by the framers of the Act to fall within section 4 (1) also. Though this test if applied to the present case might not yield a positive result, as the maximum punishment both under the Act and under the rules is the same it is a wholly irrelevant consideration. We are clearly of the opinion that the Act has drawn a clear distinction between the offences in regard to liquor and intoxicating drugs pure snd simple in respect of which a prohibition was being enforced and those preparations containing alcohol used for medicinal and toilet or industrial purposes in regard to which a restriction only was being enacted. We, therefore, hold that a breach of the rule is not an offence against the Act within the meaning of sections 13 and 14 of the Prohibition Act. It therefore follows that there was no power in the Magistrate to direct confiscation of these goods and the order is therefore set aside.

Crl. M.Ps. No. 1318 *of* 1954, *etc.*: This leads us to the consideration of Criminal Miscellaneous Petitions No. 1318 of 1954, etc., in which a claim has been made by the petitioner for the return of the goods to him. The goods were seized from the accused-petitioners in the criminal revision cases we have dealt with. Normally if the order of confiscation is set aside the goods might have to be returned to them. But the accused in all these cases disclaimed ownership to these goods and therefore there is no question of any order being passed directing the return of the goods to them. In regard to the claimant, both the Sub-Divisional Magistrate as well as the Sessions Judge on appeal have disbelieved his case as regards ownership. We do not see any justification for interfering with the order of the Sessions Judge declining to set aside the order of the Magistrate under section 520, Criminal Procedure Code and direct the goods to be delivered to the claimant. The goods cannot be directed to be delivered to him and will accordingly be treated as unclaimed property and dealt with accordingly by the Sub-Divisional Magistrate. The Sessions Judge had made it clear that it was open to the claimant to establish his right to the goods by civil action and this sufficiently safeguards his property rights if any to them.

The Criminal Miscellaneous petitions are therefore dismissed.

R.M. —— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE GOVINDA MENON.

V.R. Lakshmanan Chettiar by power of attorney agent N. Alwar Iyengar and another .. *Appellants**

v.

Minor S. K. Kamarajendra Kadirveluswami Pandian by mother and guardian the second respondent and another .. *Respondents*

Contract Act (IX of 1872), sections 23 and 65—Contract forbidden by law—Contract partly performed—Principle of restitution if applicable.

Where a contract has been performed in part the principle of restitution does not come in and section 65 of the Contract Act cannot be invoked. The principle of compensation on account of frustration of contract does not apply to a case where the contract has been part-performed. In such a case restitution cannot be claimed, on the contract being discovered to be void.

Fiborsa Spolka Akcyjna v. *Fairbairn Lawson Ltd.*, L.R. (1943) A.C. 32, *Sankaran* v. *District Board, Malabar,* (1933) 66 M.L.J. 108; *President, District Board, S. Kamara* v. *Santhappa* A.I.R. 1925 Mad. 907, and *Secretary of State* v. *Tatya Saheb*, A.I.R. 1932 Bom. 386, referred to.

*S.A. No. 1920 of 1952. 2nd March, 1955.

Appeal against the decree of the District Court of Madurai in Appeal Suit No. 164 of 1950 preferred against the Decree of the Court of the Subordinate Judge of Dindigul in Original Suit No. 8 of 1949.

R. Gopalaswami Ayyangar for Appellants.

K. S. Ramamurthi and *K. Vaitheeswaran* for Respondents.

The Court delivered the following

JUDGMENT.—Exhibit A-1, dated 27th July, 1947, is a charcoal licence agreement between the first defendant and the first plaintiff on behalf of the plaintiffs in O.S. No. 8 of 1949 on the file of the Sub-Court, Dindigul, by which it was agreed that the first plaintiff shall be at liberty to cut at his own cost for a period of two years from the date of the document the trees in the forest described in the schedule to the document and belonging to the first defendant except a few varieties of wood specified therein for manufacturing charcoal and for the purpose of removing the charcoal from the place of manufacture the first defendant was to issue a pass from time to time. It was also stipulated that the first plaintiff was to pay to the first defendant at the rate of Rs. 0-7-0 per bag of charcoal removed by him from the place of manufacture. A sum of Rs. 3,000 was paid to the first defendant as advance. It was agreed that for every bag of charcoal Re. 0-3-6 should be deducted out of the sum of Rs. 3,000 paid by way of advance and only Rs. 0-3-6 per bag would be paid to the first defendant. It was also provided that the first plaintiff before the 5th of every month shall make an account of the charcoal bags taken as per the agreement and shall pay at the rate of Rs. 0-3-6 per bag in cash and that the balance of the amount should be adjusted out of the advance amount. If the first plaintiff has not been able to adjust the entire advance amount by manufacturing charcoal and its removal from the place of manufacture within two years from the date of the agreement any balance of the advance amount remaining unadjusted and outstanding shall belong to the first defendant. According to this agreement the first plaintiff cut the trees, manufactured charcoal and removed a number of bags from the place of manufacture. Exhibit A-3 dated 26th September, 1947, shows that 1087½ bags were manufactured and removed and the price paid at the rate of Re. 0-7-0 per bag and a sum of Rs. 475-12-6 has been paid over to the first defendant. Similarly Exhibit A-4 shows that from 27th September, 1947, to 25th October, 1947, 431 bags of charcoal were removed and at the rate of Re. 0-7-0 per bag, a sum of Rs. 188-9-0 had been paid. While matters were at this stage the Government issued a notice on the 8th November, 1947, to the Manager of the firm of the plaintiffs under the Madras Act XVIII of 1946 that trees were being cut from the forest and charcoal manufactured out of the same without the permission of the Collector and that if the same was continued any further prosecution will be launched under that Act. An application was made to the Collector for permission to fell the trees and convert them into charcoal in accordance with the agreement but under Exhibit A-7 the permission sought for was refused. It is alleged that the first defendant did not take any steps to obtain permission from the Collector for the felling of trees and converting them into charcoal, and, therefore, the suit out of which the present second appeal arises was filed for refund of the balance out of the sum of Rs. 3,000 paid by way of advance after deducting the amount due at the rate of Re. 0-3-6 per bag on the number of charcoal bags removed and for damages incurred by the plaintiffs by way of loss and interest on the balance of the advance amount. Both the lower Courts have dismissed the suit mainly on the ground that the contract was illegal under section 23 of the Indian Contract Act and hence the balance of the advance amount cannot be refunded.

It is urged in this second appeal that the contract in question is not a forbidden one as contemplated under section 23 of the Contract Act because the consideration or the object of the agreement was not forbidden by law ; nor is it of such a nature that if permitted it would defeat the provisions of any law and the contract certainly does not come within any other prohibitions contained in section 23 of the Act.

Such being the case the provisions of section 65 of the Contract Act have to be attracted and the person who has received the advantage under the agreement or contract is bound to restore it or to make compensation for it to the person from whom he has received it. The contract was discovered to be void or became void not at the very inception but only when the Collector prohibited the further cutting of trees. Viewed in this light there is no obstacle to the application of section 65 of the Contract Act. Section 3, sub-section 2 of the Madras Act XVIII of 1946 is in the following terms :—

"No owner of any forest or any person claiming under him whether by virtue of a contract, licence or any other transaction entered into before or after the commencement of this Act or any other person shall without the previous permission of the District Collector cut trees or do any act likely to denude the forest or diminish its utility as a forest."

What is prohibited by this sub-section is the cutting of trees or doing acts likely to denude the forest or diminish its utility as a forest, without the permission of the Collector and such being the case it is argued that after the contract was entered into it was possible for the parties to get the permission from the Collector to cut trees in which case there was nothing to make the contract impossible of performance. There should be a contract between the parties for the cutting of trees and it is only thereafter that the Collector can be approached for the purpose of obtaining permission for the felling of trees. The fact that subsequently the Collector either granted permission or refused it would not make the anterior contract in any way illegal. It is also argued that there is nothing prohibiting an entering into a contract if the parties expect that the Collector would grant permission. It is therefore a case where the contract becomes void after it was entered into or it was found to be void sometime thereafter in which case section 65 of the Contract Act would be applicable. Reliance is also placed on the illustration (*e*) of section 56 of the Contract Act where it is stated that if *A* contracts to act at a theatre for six months in consideration of a sum paid in advance by *B* and on several occasions *A* is too ill to act then the contract to act on those occasions becomes void. Mr. Gopalaswami Iyengar for the appellants further urged that the contract is an executory one and therefore with regard to such portions of the contract as have not been performed it becomes void in which case section 65 of the Contract Act is applicable. A number of cases has been cited in support of this contention. In the decisions in *Srinivasa Iyer* v. *Sesha Iyer*[1], and *Gulab Chand* v. *Fulbai*[2], the contracts were marriage brokerage contracts which were *ab initio* void. I do not think that the principles laid down in those cases can have application to the facts of the present case. The next case on which reliance was placed is *Petherpermal Chetti* v. *Muniandy Servai*[3], where the parties entered into a fraudulent document and it was held that the purpose of the fraud not having been effected there was nothing to prevent the plaintiff from repudiating the transaction as being benami and recovering possession of the property. The case in *Madura Municipality* v. *Alagiriswami*[4], related to a contract entered into by the municipal council on behalf of the municipality which did not bind the municipality under section 69 (2) of the District Municipalities Act because it was entered into in contravention of the provisions of section 68 (2) of the Act and hence there was no valid contract between the parties. In such a case the High Court held that compensation could be recovered under section 65 of the Indian Contract Act. The case in *Harnath Kuar* v. *Indar Bahadur Singh*[5], related to a contract which was *ab initio* void as the vendor in that case had only an expectancy and therefore under section 65 of the Contract Act the purchase money was recoverable with interest from the date of the suit. My attention has also been invited to the judgment of the Calcutta High Court in *Ram Nagina Singh* v. *Governor-General in Council*[6], where the principles underlying section 65 of the Indian Contract Act have been discussed. The learned Judge held that section 65 of the Indian Contract Act applies only to a case where benefit or advantage is derived under an agreement before it is discovered to be void. If the benefit is received

1. (1917) 34 M.L.J. 282 : I.L.R. 41 Mad. 197.
2. (1909) I.L.R. 33 Bom. 411.
3. (1908) I.L.R. 35 Cal. 551 (P.C.).
4. I.L.R. (1939) Mad. 928.
5. (1922) 44 M.L.J. 489 : L.R. 50 I.A. 69 : I.L.R. 45 All 179 (P.C.).
6. (1949) 84 Cal. L.J. 275.

after the agreement is discovered to be void then it is clear that advantage cannot be said to have been received under the agreement. It was further held that though an agreement may be void from its inception there may yet be circumstances in which it may be held that the discovery took place long after the date of the agreement and therefore section 65 embodying the principle of restitution applies to the case where an agreement entered into between the parties is void by reason of non-compliance with the express statutory provision. Relief under section 65 has not been forbidden by any law and it cannot be legitimately argued that in trying to secure such reliefs there is any attempt to do indirectly what has been forbidden by law to do directly, "and that the principle of restitution enunciated in section 65 should be liberally construed in order to do equity and justice between the parties." The decision in *Hadi Bandhu Behera* v. *Gopal Sahu*[1], and *J. C. Field Electric Supply Company* v. *Agarwala Lakshmi Kanta Jha*[2], were also brought to my notice but I do not think that these decisions do apply to the present case, because the principle of compensation on account of frustration of contract does not apply to a case where the contract has been part performed. The most authoritative decision on the subject is the one contained in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barhour, Ltd*[3]. There are observations of the various Law Lords at pages 46, 49, 51, 52 and 56. See also the decisions in *Sankaran* v. *District Board, Malabar*[4], *President Dt. Board, S. Kanara* v. *Santhappa*[5], and *Secretary of State* v. *Tatya Saheb*[6]. *In Sankaran* v. *District Board, Malabar*[4], what happened was the District Board sued the licensees of the toll-gate for balance of the rentals and it was contended on behalf of the licensees that because of heavy floods bridges had broken down resulting in the suspension of traffic and therefore the contract became incapable of performance. The learned Judges held that the occurrence which renders a contract incapable of execution must be of a kind not within the contemplation of the parties when the contract is entered into. The learned Judges further held that the contract having been part performed, section 65 of the Contract Act would not apply. In this view the principle applicable to the present case is the same. Mr. Gopalaswamy Iyengar relies upon certain observations of Cheshire on Law of Contracts at pages 376 and 377 where the decision in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barhour, Ltd.*[3] has been discussed. I do not think that that discussion is of much help to the appellants' case.

It seems to me that since the contract has been performed in part the principle of frustration does not come in and section 65 of the Contract Act cannot be invoked. The second appeal fails and is dismissed but in the circumstances of the case each party will bear his costs throughout. No leave.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

S. Rangaraju Naidu .. *Petitioner**

v.

The Collector of Madras .. *Respondent.*

Stamp Act (II of 1899), sections 40, 44 and 48—Scope of— Impounding of instruments unstamped or insufficiently stamped—Stamp duty payable, in the first instance—Principle of liability.

The Stamp Act is silent as to from whom the Collector can demand the proper stamp duty and penalty in regard to the documents forwarded to him by a Court to whose notice such a document comes. There is no difficulty if the person who produces or gets produced a document and desires it to be admitted in evidence happens to be the same person who has to pay the proper stamp duty in the first instance. The difficulty arises only when the party who gets the document produced is one other than the one who has to pay the duty. When such a party wants the document to be produced and rest his claim upon it and the party compelled to produce it does not wish to get it admitted in evidence, the recovery of the stamp duty and penalty should in the first instance be

1. (1943) I.L.R. 22 Pat. 334.
2. (1951) I.L.R. 30 Pat. 137.
3. L.R. (1943) A.C. 32.
4. (1933) 66 M.L.J. 108.
5. A.I.R. 1925 Mad. 907.
6. A.I.R. 1932 Bom. 386.

* Writ Petition No. 697 of 1954 and Application No. 5409 of 1954 in C.S. No. 30 of 1953. — 18th January, 1955.

from the party wishing to use the documents in evidence in support of his claim, leaving it open to him to recover the same under section 44 of the Stamp Act from the person liable in the first instance under section 29 of the Act.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the order of the Collector of Madras in B-2-14451/54, dated 8th October, 1954 and quash the said order.

T. R. Srinivasan for Petitioner in W.P. No. 697 of 1954 and Defendant in C.S. No. 30 of 1953.

The Special Government Pleader (*V. V. Raghavan*) for Respondent in W.P. No. 697 of 1954.

K. Krishnaswami Aiyangar and *N. C. Raghavachari* for Plaintiff in C.S. No. 30 of 1953.

The Court made the following

ORDER.—Application No. 5409 of 1954 is by the plaintiffs to give time for the defendant to pay the deficit stamp duty called for by the Collector of Madras, and, on failure to pay the deficit within the extended time, to strike off the defence; and the writ of *certiorari* is by the defendant for quashing the order of the Collector of Madras in B-2-14451/54, dated 8th October, 1954.

The facts are :—Sri S. Kamesam was the owner of a patent right for manufacturing a wood preservative by name "Ascu". This Kamesam Pantulu conveyed this patent right to the defendant Rangaraju Naidu, Agent, Burmah-shell, Salem. This conveyance dated 9th April, 1945, was executed in Bangalore, where S. Kamesam Pantulu was residing, and, the entire stamp duty payable on that document as per the Mysore Stamp Act, *viz.*, Rs. 4,687--8--0 was paid by the grantee Rangaraju Naidu. It is common ground that a counterpart has been executed and is in the possession of Kamesam Pantulu. The original stamped instrument as per the Mysore Stamp Act has been in the possession of Rangaraju Naidu. On 12th March, 1945, Rs. 50,000 was paid by cheque by the defendant to Kamesam Pantulu. On 29th March, 1945, Rs. 1,00,000 has been paid in cash out of the sum of four lakhs assured in favour of Kamesam Pantulu under the deed of assignment dated 9th April, 1945. On the date of execution, 9th April, 1945, a sum of Rs. 50,000 has been paid. Kamesam Pantulu has thereafter been pressing for the repayment of the balance of two lakhs assured under this document dated 9th April, 1945.

On 3rd July, 1946, the advocate for the defendant has replied alleging discharge of payment of Rs. 2,00,000 and stating that the defendant was liable only for a balance of one lakh of rupees. On 9th September, 1946, a reply has been made by the defendant that only one lakh of rupees was due and that the deed was actually executed on 2nd April, 1945, and had been altered into 9th April, 1945. Thereafter Kamesam Pantulu has filed a suit in the Court of the Subordinate Judge of Salem, O.S. No. 8 of 1947, on 19th December, 1946, producing the counterpart along with the plaint. The defence was that the assignment has been brought about by undue influence and misrepresentation amounting to fraud, and, the transaction was unfair and unconscionable in character and that advantage has been taken of the defendant's youth and that the deed was insufficiently stamped as per the Madras Stamp Act and was inadmissible and unenforceable. On 24th June, 1949, the defendant produced the original of the assignment into Court on a subpoena issued by the Court at the instance of the plaintiffs, who naturally wanted it to be marked in order to establish their claim.

On 28th April, 1950, the Subordinate Judge of Salem impounded the document and sent it to the Collector with a covering letter for levying the stamp duty and the penal duty in connection with the same and for certifying and retransmitting the same to the Court.

Thereupon the Civil Revision Petition was filed in the High Court against the Order of the Subordinate Judge of Salem. I shall later refer to its disposal by Govinda Menon, J., in *Rangaraju Naidu* v. *Kamesam*[1].

The Sub-Court suit has been withdrawn to the original side of this Court and it got numbered as C.S. No. 30 of 1953, and, after the decision of Govinda Menon, J., Panchapakesa Ayyar, J., forwarded the assignment deed to the Collector of Madras.

The Collector of Madras passed an order and communicated it to the defendant in the following terms :

"The document dated 9th April, 1945, executed between Dr. S. Kamesam and yourself has been impounded by the High Court of Judicature at Madras and sent to me for the levy of the stamp duty and penalty. A stamp duty of Rs. 9,000 and a penalty of Rs. 5 have been levied under section 40-1 (*b*) of the Madras Stamp Act. Please remit the sum of Rs. 9,005 (Rupees nine thousand and five, only) into the Madras Taluk Treasury and send the chalan to me before 20th October, 1954, so that the document may be returned to the Court duly certified under the Stamp Act."

The defendant has naturally refused to pay the amount within the time prescribed, and, thereafter these two applications have been filed for the purposes mentioned above.

The short point for determination is who has got to pay the stamp duty and the penalty in regard to this impounded instrument.

It is instructive to follow the discussion of this debated point in the various commentaries on the Indian Stamp Act of which I have given extracts below :

A.I.R. Commentaries on Indian Stamp Act (Chitaley and Appu Rao), 2nd Edition, 1951 (p. 435).

When a person, who wishes a document to be admitted in evidence in Court, is also one who is originally bound to bear the expense of providing the stamp duty, and he does not choose to pay the stamp duty and penalty required under sub-section (1) of section 40, it is open to the Collector to recover such duty under section 48 by distress and sale of his moveable property. But, very often, the person wishing to admit the instrument in evidence is different from the person who is originally bound to bear the expense of stamp. In such a case, if he does not choose to pay the requisite stamp duty and penalty, the question arises whether he can be compelled to pay the same.

There is no distinct provision in this section or anywhere else in the Act empowering the Collector to demand the proper stamp duty and penalty from the person who produces it in Court. Sub-section (1) (*b*), no doubt, empowers the Collector to " require " the stamp duty or deficiency to be paid but it is silent as to the person or persons who can be required to pay the same. According to the High Court of Allahabad, it is the person who wishes a document to be admitted in evidence in Court, who primarily is the person from whom the requisite duty and penalty should be recovered in the first instance, and if it is due from a third person, he can recover it under section 44. *Secretary of State* v. *Basharatullah*[2]. The Lahore High Court, on the other hand, holds that section 44 is not conclusive on the point. According to it, the Court or the Collector cannot compel such person to pay the duty and penalty. The payment is left to his choice. If he chooses to pay, section 14 enables him to recover the same. But the stamp duty and penalty can compulsorily be recovered only from the person liable to pay the proper stamp duty in the first instance. It was also observed that if in a particular case this Act did not fix the liability for payment on any particular person, the Collector should keep the impounded document in his custody and no person interested in the deed would be able to make any use of it unless and until the necessary duty and penalty were paid ; *Mahommad Hussain* v. *Emperor*.[3]

Donough Indian Stamp Law (p. 448), (9th Edition), edited by K. Rustomji (1935), (Butterworths).

There is no enactment which declares an unstamped writing to be void ; the absence, therefore of any such enactment, and the circumstances of the provisions for stamping after execution, on certain conditions, are a sufficient indication of intention not to deprive an instrument of its due effect and operation, but merely to prevent its being used as evidence whilst it is unstamped ; so that an instrument, although not written upon a stamp, is effective from its commencement, but is incapable of being made use of, to show its operation, until it is stamped (Tilsley, p. 244) ; see also (1926) I.L.R. 53 Cal. 515 (where it was held that failure duly to stamp a document does not affect the validity of any contract therein contained), and the observations of Lindley, L.J., in *Powell* v. *London and Provincial Bank*[4]. " No case that I know of can be cited to show that an erroneous stamp would invalidate the deed."

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1. (1953) 1 M.L.J. 498.
2. (1908) I.L.R. 30 All. 271.
3. A.I.R. 1940 Lah. 315.
4. L.R. (1893) 2 Ch. Div. 555 at p. 560.

Page 453 :

There is no special direction, but those who desire the admission of the document in evidence should be charged the duty and penalty. This may be recovered afterwards from the proper person under section 44 (*Secretary of State for India in Council* v. *Basharatullah*)[1].

For instance if a plaintiff produces in Court in support of his claim an unstamped or improperl stamped document, he *primarily* is the person from whom the requisite stamp duty (and penalty) may be recovered under section 40 of the Stamp Act; (*Ibid.*).

The deficient duty and penalty may be levied from either party, the provisions of section 29 notwithstanding ; Bengal Stamp Manual, p. 102.

Abdul Haque, P.C.S. (Punjab Civil Service). The Indian Stamp Act (p. 161), First Edition (1936).

Presumably it is the person who produces the document who must pay the penalty and duty (1908) I.L.R. 30 All. 271). He can, however, subject to the limitations of section 44 recover it from the person primarily liable to pay the same.

K. Jagannatha Aiyar, The Indian Stamp Act. (p. 283, third Edition) (P. R. Rama Iyer & Co., Madras) (1916).

The duty and penalty are primarily to be recovered from the person from whom they are due, and it would be unfair to *compel* him to pay ; but they may be levied from either party, the provisions of section 29 notwithstanding. The person from whose custody the document has come, if he is not concerned in the execution of it, may pay them if he be interested, and recover them under section 44 from the person bound to pay. Clause (1) (*b*) of this section is silent as to the person from whom the payment of the proper duty and penalty is to be required. If the Collector requires it from the wrong person, his procedure is open to review, as provided by Chapter VI of the Act.

Basu, Indian Stamp Act (p. 153), (Second Edition), (1926), (Eastern Law House).

Section 37 (1) (*b*) (now section 40) of the Stamp Act I of 1879 determines the penalty leviable in all cases. *Reference under Stamp Act, section* 46.[2]

" Section 40, clause 1 (*b*), is silent as to the party from whom the payment of the proper duty and the penalty is to be required."

" The plaintiffs who wished the document admitted in evidence in support of the claim, are the persons from whom the Collector in the first instance can recover duty and penalty before the document can be admitted in evidence.

Under section 40 (1) (*b*) the Collector is to require payment of proper duty together with penalty but that section is silent as to whom the Collector is to require the payment from. If the Collector requires it from a wrong person his procedure is open to review under Chapter VI, but if he is to recover from a wrong person, the remedy of that person lies in a suit against the person from whom it ought to have been required. *Secretary of State for India in Council* v. *Basharatullah*[1].

Mulla and Pratt, Indian Stamp Act (pp. 128—129), (Fifth Edition, 1950), (Eastern Law House).

Clause (*b*) is silent as to the person from whom the payment of the proper duty and penalty is required. According to the High Court of Allahabad (1908) I.L.R. 30 All. 271) if a person produces in Court in support of his claims a document not duly stamped, he primarily is the person from whom the requisite stamp duty and penalty may be recovered under this section. But if some other person was bound to bear the expenses of providing the proper stamp, the person who has paid the duty and penalty is entitled to recover the same from him under section 44 of the Act.

The High Court of Lahore (*Mohammad Hussain* v. *Emperor*[3]), has taken a different view and has held that there is no provision in the Act to compel a person to pay penalty on an insufficiently stamped instrument when he was not originally bound to pay the duty thereon.

M. N. Murzban, Indian Stamp Act, (p. 138), (Whiteaway & Laidlaw Chambers, Esplanade, Fort, Bombay).

Nothing specific has been laid down in the Act as to which of the parties concerned the Collector "shall require the payment of the proper duty, etc." The Select Committee on the Bill for Act I of 1879 (vide *Gazette of India*, 7th September, 1878) remarked as follows :

" When the person, from whose custody the instrument has come, has not been concerned in the execution of it, it would be unfair to compel him to pay and when he has been so concerned, the proper course is clearly to prosecute him for the offence, he has not committed."

But the Madras Board of Revenue, in its Proceedings No. 15 of 6th January, 1880, promulgated the following Order :

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1. (1908) I.L.R. 30 All. 271.
2. (1882) I.L.R. 5 Mad. 394 (F.B.).
3. I.L.R. (1940) Lah. 637.

" A Collector can look for the payment of the deficit duty and penalty to the person from whose custody the instrument was impounded, and it is to this person, or his agent, that the instrument should be returned. The parties should be left to make their arrangements and seek redress, if necessary, as laid down in section 41 (now section 44 of the Stamp Act II of 1899).

Krishnamurthi and Mathrubutham, Indian Stamp Act (p. 267), (1950), (M.L.J. Publication).

The section has to be read with section 48 according to which the duty and penalty are to be recovered as arrears of land revenue from the person from whom the same is due. This would mean that the amount should be recovered from the person who ought to have paid the duty in the first instance, and not the person who has produced the instrument. The latter may, in order to validate the instrument, pay the duty and penalty and recover the amount from the person bound to bear the expense of providing the stamp in the first instance. *See* section 44. It is presumbaly to enable this to be done that clause (*b*) of sub-section (1) does not mention the person who should be required to pay the duty and penalty though ordinarily the Collector would notify every person interested about the requisition for payment of the duty and penalty. There is nothing in section 35 or section 40 to enable either the Court or the Collector to compel a person who merely wishes to have an insufficiently stamped document, admitted in evidence to pay the duty or penalty, when he is not himself the executant. The payment of such duty and penalty is left to his choice. If he does not pay, he has to take the consequence of not being able to use the document. But it would be obviously hard and unfair to compel such a person to pay the duty on the document merely because he attempted to produce it in evidence ; *Mohammad Hussain* v. *Emperor*[1]. But the Allahabad High Court has held in one case that proceedings under sections 40 and 48 may be taken against the person who produced the document in Court : *Secretary of State* v. *Basharatullah*[2].

S. Kasturi Rangachariar v. *The Stamp Act* (p. 121). (The Lawyers' Companion Series, second edition, (1925).

Certain documents insufficiently stamped, were put in evidence by the representative in interest of the executants. The Collector recovered from the persons filing them, the duty and penalty by sale of their property. *Held*, that the Collector's order was open to review by Revenue Authorities, and no suit lay against the Secretary of State for refund of penalty, realised. *Held* further, that the persons, who wish a document to be admitted in evidence, are the persons from whom a Collector can realise the duty and penalty, and if it is due from a third person, they can bring a suit and recover it from him. ((1908) I L.R. 30 All. 271).

K. Seshadri Aiyangar (Madras Registration Department) Stamp Law of British India (p. 207). G.A. Natesan and Company (1901).

It is to be observed that this section 40 gives the Collector power to require the payment of duty and penalty. Under the old Act I of 1879 the Collector had no power to recover the penalty by revenue or other process in the event of the person who is required to make the payment refusing or omitting to comply with the demand nor was there any direction in it as to whom the demand for payment was to be addressed. The practice was to demand it of the person from whose custody the document had come but there was no objection to any other person interested in the validation of the document paying the required amount and recovering it from the individual who was bound by law or agreement to bear the cost of providing the proper stamp on the instrument impounded. Very frequently the party required by the Collector to pay was not necessarily the person who was bound by the law to see that the document was properly stamped at the time of execution. There was thus a flaw in the Act and the defect has been remedied in the present Act by the introduction of section 48 by which all duties and penalties required to be paid under this section may be levied by the Collector in the same manner as an arrear of revenue from the person by whom the same are due, *i.e.*, to say from the person who ought to have paid the duty in the first instance.

In addition the following ancillary decisions may be noted. In *Harjimal & Sons* v. *H. S. Palta & Sons*,[3] Achhru Ram, J., held

".Mere production of a document does not amount to a tendering of that document in evidence and if without being moved by a party for issue of notice to the other party to admit or deny a certain document the Court *suo motu* and for its own facility calls upon each of the parties to admit or deny documents produced by the other party, this act of the Court cannot be regarded as an implied tender by the party of the document in evidence. In such a case, the party cannot be called upon to pay the stamp duty and penalty on the document if he is not otherwise the person by whom the stamp duty is payable under the Act : *Mohammad Hussain* v. *Emperor*[1], relied on.

Editorial Note of A.I.R. :

"The decisions and the remarks in the judgment (para. 3) seem to imply that if the party tenders the document in evidence he can be required to make good the deficiency in stamp duty in such a case. This view is opposed to the very Full Bench decision relied on in this case.. According to the

1. I.L.R. (1940) Lah. 637 (F.B.).
2. (1908) I.L.R. 30 All. 271.
3. A.I.R. 1947 Lah. 319.

Full Bench, whether the document is tendered in evidence or not a person not originally liable to pay the stamp duty on a document cannot be 'required' to pay such duty merely because he brings that document into the Court."

See (1939) N.L.J. 364 (365), *Roopchand Motiram* v. *Secretary of State* [(1933) Madras Stamp Manual, page 44 (citing B. Ps. 15; 6th January, 1880 : 2408-R. 28th November, 1907. 521-R. Mis. 27th March, 1908]—When documents are impounded and sent to the Collector or Divisional Officers under section 38, Act I of 1899, all that they need is to look for payment of the penalty and insufficient stamp duty to the person from whose custody the documents came into the hands of the impounding officer. But stamp duty and penalty can be *compulsorily* levied under section 48 only from the person liable to pay the proper duty in the first instance. [(1933) Mad. S.M. page 45 (citing B.P. 504, 30th August, 1885)].

In *Panakala Rao* v. *Kumaraswami*[1], Venkataramana Rao, J., held :

"Section 29 of the Stamp Act will only be applicable to a case where the document is not produced before the Court; but when once the document has been produced before the Court and tendered in evidence, the right of recovery is only by virtue of section 44 of the Stamp Act."

In *Rangaraju Naidu* v. *Kamesam*[2], Govinda Menon, J., held:

"A mere handing of a document, even if it is as a result of a summons from Court, cannot be said to be production. There must be volition on the part of the person bringing it into Court to use it for some purpose. The mechanical act of carrying the document as a result of an order of Court and handing it over to the officer of Court would not be production. But such act would come within the meaning of the term 'comes before the Court in the performance of its judicial functions' as laid down in *King Emperor* v. *Bala Kuppayyan*[3]."

The learned Judge relied on three Lahore cases : *Ujjal Singh Sundersingh* v. *Ahmed Yarkhan*[4], *Uttam Chand* v. *Perman Nand*[5], and *Harjimal & Sons* v. *H. S. Patta & Sons*[6], for the proposition that the mere bringing into a Court of document would not be sufficient to make it a production. In order that there should be production, it must be with the object of tendering it in evidence and using it for the benefit of the party himself. The learned Judge also referred to the instructive case of In re: *Narayanadas Nathuram*[7], where Vivian Bose, J. (as he then was) held that the word 'produced' has a technical meaning and means either produced in response to a summons or produced voluntarily for some judicial purpose such, for instance, as evidence. A document which falls accidentally or incidentally into a Judge's hand cannot be said to be produced. The word "produced" carries with it, when used in this connection, a mental element. The mere physical act of production is not enough when there is no intention to 'produce'.

In fact, it is on the foot of this reasoning that civil Courts cannot impugn not properly stamped documents found in a book other than that forming the basis of the claim in the instant controversy before the Court, *Sashishi Mohan Saha* v. *Kumudhkumar Biswas*[8].

To sum up, the Stamp Act is silent as to from whom the Collector can demand the proper stamp duty and penalty in regard to the document forwarded to him after coming to Court. Judicial opinion is sharply divided in regard to initial recovery of stamp duty and penalty : one view holding that it should be from the person who wishes the document to be admitted in evidence in Court for the purpose of resting his claim in the suit or proceedings upon it, the other view being that stamp duty and penalty are compulsorily recoverable only from the person liable to pay the same in the first instance. This conflict, however, is not so deep-seated as it appears to be. Carefully construed, they can be harmonised. There is no difficulty if the person who produces or gets produced a document and wishes it to be admitted in evidence happens to be the same person who has to pay proper stamp duty in the first instance. It is from him the duty has to be recovered.

1. (1937) 46 L.W. 470.
2. (1953) 1 M.L.J. 498.
3. (1901) I.L.R. 25 Mad. 525.
4. A.I.R. 1936 Lah. 985.
5. A.I.R. 1942 Lah. 265.
6. A.I.R. 1947 Lah. 319.
7. I.L.R. (1943) Nag. 520 : A.I.R. 1948 Nag. 97.
8. (1936) 35 I.C. 415.

The difficulty arises only when the party who gets the document produced be one other than himself who has to pay the proper stamp duty in the first instance and wishes it to be admitted in evidence to rest his claim upon it, and the party compelled to produce it does not wish to get it admitted in evidence. In such a case the language of sections 40 and 48 of the Act and the provisions made under section 44 and the balance of convenience and fair-play and the purpose of stamping, *viz.*, that an instrument although not written upon a stamp is effective from its commencement but is incapable of being made use of to show its operation until it is stamped —all indicate that the recovery of the stamp duty and penalty should in the first instance be from the party wishing to use the document in evidence in support of his claim leaving it open to him to recover the same under section 44 from the person liable in the first instance under section 29 of the Act.

Bearing these principles in mind, if we examine the facts of this case, the order of the Collector has got to be quashed and is hereby quashed in the Writ Petition; and the application of the plaintiff has got to be dismissed and is hereby dismissed. No costs.

R.M. ——— *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE RAMASWAMI.

L. Bappu Ayyar and another .. *Appellants**

v.

Renganayaki *alias* Meenakshi Ammal and others .. *Respondents.*

Hindu Women's Right to Property Act (XVIII of 1937) *and Madras Act (XXV of* 1947), *sections* 3 *and* 4—*Retrospective effect—Rules of interpretation—Applicability.*

Hindu Law—Joint family—Manager—Liability to account for past receipts—When arises—Onus of proof —Practice.

Where a Statute is in its nature a declaratory Act and is explanatory of an earlier Act then these Acts must be taken together as if they were one and the same Act. In such cases the presumption against construing a Statute retrospectively is inapplicable. A declaratory Act is one which is intended to remove doubts existing as to the meaning or effect of any Statute. Such Acts are usually held to be retrospective.

The Madras Act XXVI of 1947 is a declaratory Statute which has adopted certain clauses relating to inheritance of agricultural lands from the earlier Central Act. But for the provision section 3, the Madras Act would have operation from 1937, the date of the present Central Act. Further, section 3 of the Madras Act is only a saving clause which has the effect of giving retrospective operation to the Statute. Though the Madras Amending Act of 1947, came into force only in December, 1947, it has retrospective operation in such manner as to take in cases of intestacy occurring after 26th November, 1946. Decision in App. No. 169 of 1949 ; App. No. 881 of 1950 ; L.P.A. No. 206 of 1951, followed.

The Hindu Women's Right to Property Act and its extension to agricultural property as well in the Madras State can come into play only where a person dies intestate and not where he has disposed of his property by means of a will. Dying intestate is a necessary pre-requisite for the application of the Act and it is only in that way that the saving sections, namely, sections 3 and 4 have to be interpreted. There is no distinction between the joint family property and the separate property of a Hindu for the application of these Acts. Section 4 of the Madras Amendment Act cannot be said to take away the application of the Act to Agricultural land belonging to the category of joint family property.

If when the manager of a Hindu joint family places before the Court the properties, which according to him, are liable for division, the Court is not bound to accept that as a final word on the subject and it is open to the plaintiff to let in evidence to show that some properties belonging to the joint family have been excluded from the list furnished by the manager and if the Court is satisfied that it is so, they will be included. The omission to include such properties might be by an inadvertent mistake or because of some other reason. In such cases it cannot be said that the manager is guilty of fraud or misappropriation. Likewise, it is open to the plaintiff to show by evidence that the manager has been acting fraudulently during the course of his management and that acts of misappropriation, malversation or fraud have taken place in which case the Court is at liberty to direct a general account of the mismanagement. Without clear evidence regarding acts of fraud or misappropriation there cannot be a general back accounting by the manager. Merely because there is some slight evidence of the manager having received some amounts it cannot be said that he is guilty of fraud or misappropriation.

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*Appeal Nos. 556 and 576 of 1950 and 204 of 1951. 22nd July, 1954.

Appeals against the Decree of the Court of the Subordinate Judge of Tiruchirapalli, dated 8th August, 1950 and passed in O.S. No. 20 of 1948.

Appeal No. 556 *of* 1950.

K. V. Venkatasubramania Aiyar and *K. Thirumalai* for Appellant.

S. Ramachandra Aiyar, S. Amudachari and *A. V. Raghavan* for Respondents.

Appeal No. 576 *of* 1950.

S. Amudachari for Appellants.

S. Ramachandra Aiyar, K. V. Venkatasubramania Aiyar and *K. Thirumalai* for Respondents.

Appeal No. 204 *of* 1951.

S. Ramachandra Aiyar and *S. Tyagaraja Ayyar* for Appellant.

K.V. Venkatasubramania Aiyar, K. Thirumalai, S. Amudachari and *A. V. Raghavan* for Respondents.

The Court delivered the following

JUDGMENTS: *Govinda Menon J.*—This is an appeal against the decree and judgment of the Subordinate Judge of Tiruchirapalli in a suit for partition and separate possession of a half share in the properties comprised in schedules A, A-1, B,C,F,F-1 and F-2 of the Plaint and for possession of the properties comprised in schedules D and E or for Rs. 1,996 being their value and for future mesne profits at Rs. 4,000 per annum and decreed in part. The appellants in this appeal are defendants 1 and 5. The plaintiff is the widow of one Subbaraya Aiyar who was the son of the first defendant, L. Bapu Iyer. Defendant No. 2 is the daughter of Bappu Ayyar while defendants 3 and 4 are the minor sons of the second defendant. The 5th defendant Seethalakshmi Ammal is another daughter of the first defendant. At the time of death of Subbaraya Aiyar on 24th August, 1947, Bappu Ayyar and his son Subbaraya Iyer were the sole undivided members of a joint Hindu family the second defendant and the fifth defendant having been married out of their family sometime prior to that. The plaintiff was married to Subbaraya Aiyar as his third wife in 1940. She, on the strength of the Hindu Women's Right to Property (Extension to Agricultural Lands) Act, Madras Act XXVI of 1947, has filed the present suit for recovery of possession of a half share in the entire joint family properties. As a result of the passing of the Hindu Women's Right to Property Act, Central Act XVIII of 1937, as amended by Act XI of 1938, it was provided by section 3, sub-section (2), that when a Hindu governed by any school of Hindu Law other than the Dayabhaga School or by customary law dies having at the time of his death an interest in a Hindu joint family property his widow shall, subject to the provisions of sub-section (3), have, in the property, the same interest as he himself had. Sub-section (3) stated that any interest devolving on a Hindu widow under the provisions of section 3 shall be a limited interest known as a Hindu Women's estate, provided, however, that she shall have the right of claiming partition as a male owner.

The Federal Court of India in In re *The Hindu Women's Right to Property Act*[1], held that in view of the provisions of the Government of India Act of 1935, by the time the Central Legislature came to pass Act XVIII of 1937, devolution of Agricultural lands had become a provincial subject and consequently the scope of Act XVIII of 1937, as amended by the Act XI of 1938, did not extend to succession to agricultural lands. Various Provinces took up this matter and passed necessary Acts by which the operation of the Hindu Women's Right to Property Act was extended to agricultural lands as well, in their respective Provinces. Thus, for example, the Bombay Act XVII of 1942, the Bihar Act VI of 1942, and the United Provinces Act XI of 1944 came to be passed. The Madras Legislature also finding that it was not expedient to have two rules of succession one with regard to agricultural lands and the other for other species of property, passed the Madras Act XXVI of 1947 to remedy the decision of the Federal Court. The Bill which

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1. (1941) 2 M.L.J. 12 : (1941) F.C.R. 25 : (1941) F.L.J. 1 (F.C.).

ultimately became the Act, namely the Madras Act XXVI of 1947, was published in the *Fort St. George Gazette* on the 26th November, 1947 and it became law on 18th December, 1947, having received the assent of the Governor on that date. By section 2 of this Act the term "Property" in the Hindu Women's Right to Property Act, 1937 and the Hindu Women's Right to Property (Amendment) Act, 1938, was made to include "agricultural land" as well. Section 3 stated that "nothing contained in this Act shall apply to the property of any Hindu dying intestate before the 26th day of November, 1946" and there was an Explanation added to section 3 which was to the effect that a person shall be deemed to die intestate within the meaning of the section in respect of all property of which he has made a testamentary disposition which is capable of taking effect. It is therefore, clear that by the Madras Act XXVI of 1947 the Central Acts, namely, the Hindu Women's Right to Property Act, 1937, and the Amending Act, the Hindu Women's Right to Property Act (XI of 1938) were extended in their operation to all kinds of property, whether agricultural or otherwise, in which the deceased male member had a right. The learned Subordinate Judge, therefore, held that in view of section 3 of the Madras Act XXVI of 1947 the plaintiff is entitled to the right of partition and to recover possession of her husband's half share in the joint family properties. There were also disputes with respect to what the divisible properties were, and the points that arose in those disputes were decided partly in favour of defendants, 1,2 and 5 who claimed rights in them. As stated already, Appeal No. 556 of 1950 is by defendants 1 and 5. Appeal No. 576 of 1950 is by the defendants 2 to 4 against the conclusion by which certain properties in F-2 schedule of the plaint were held to be partible. Appeal No. 204 of 1951 is by the plaintiff regarding properties mentioned in F, F-1 schedules and Rs. 40,000 cash. As my learned brother has exhaustively considered the correctness of the decision of the learned Subordinate Judge on the questions of fact raised before him and as I am in complete agreement with the conclusions arrived at by him I do not wish to discuss those points argued in the appeal. I would content myself with expressing my opinion on two questions of law which have been exhaustively argued by Mr. K.V. Venkatasubramania Iyer on behalf of the appellants in Appeal No. 556 of 1950, and by Mr. S. Ramachandra Iyer on behalf of the plaintiff, appellant, in Appeal No. 204 of 1951.

The argument of Mr. K. V. Venkatasubramania Iyer is that despite section 3 of Act XXVI of 1947, the Act has no retrospective application and therefore, the plaintiff cannot have any rights to partition in the joint family properties of her husband as he died on 24th August, 1947, nearly four months before the Act came into force. It would be advantageous to compare section 3 of the Madras Act XXVI of 1947 which corresponds to section 4 of the Central Act XVIII of 1937. While in section 4 of the Central Act it was stated that nothing in the said Act would apply to the property of any Hindu dying intestate before the commencement of the Act, section 3 of the Madras Act fixed the date 26th November, 1946 and provided that nothing contained in the Act shall apply to the property of any Hindu dying intestate before the 26th day of November, 1946, though the Act came into force only on 18th December, 1947. In both the Acts the section is put in the negative form. That is, the declaration is that the provisions of the Act shall not apply if the death took place before a particular date and not that the provisions of the Act shall apply if the death took place after a particular date. I am mentioning this because the learned counsel for the appellants has laid great stress that a positive provision cannot be inferred from a negative statement in an enactment. The other argument is that both sections, section 4 of Act XVIII of 1937 and section 3 of Act XXVI of 1947, shall apply only to separate properties which the deceased person could have disposed of by a will and not to his interest in joint family properties which under the customary law he cannot bequeath by means of a will. I shall express my opinion on this aspect of the matter later on.

Sub-section 3 of section 1 of the Madras Act XXVI of 1947 states that the Act shall come into force at once, and in section 2 it is stated that the term "Property" in the Central Act XVIII of 1937 as amended by Act XI of 1938 shall include agricultural land. The word "shall" in these two sections is relied upon to show that

the provisions of the Act are only prospective and despite section 3 of the Madras Act they could have no retrospective operation at all. On the other hand, the contention on bahalf of the repondents is, that since the Madras Act is a declaratory or explanatory one, if section 3 had not been enacted, then the Act would have co-extensive operation as the Central Act XVIII of 1937 and would be applicable with regard to agricultural lands in the case of every Hindu dying intestate after the commencement of the Central Act XVIII of 1937. We may also in this connection advert to a circumstance namely, that the Bill which later on became the Madras Act XXVI of 1947 contained a clause to the effect that nothing contained in the Act shall apply to the property of any Hindu dying intestate *before the commencement of the Act*. It was during the course of the discussion in the Legislature that the latter portion of the original clause was removed and the date 26th of November, 1946, was fixed as the utmost backward limit. The corresponding section to section 2 of the Madras Act in the other Provinces stated that the term "property" etc., shall include and shall be deemed always to include agricultural lands. Whether the omission of the words "shall be deemed always to include" in the Madras Act makes any difference is a matter for consideration.

Learned Counsel for the appellants' argument is that when section 2 uses the words "shall include" they can only refer to future application and that there could not have been any intention to include within the ambit of the Act succession to estates where a Hindu male had died before the date of coming into force of the Act and in support of this argument our attention is invited to the provisions of section 1 (3) where it is stated that the Act shall come into force at once. It is urged that a combined reading of sections 1 (3) and 2 can lead to only one conclusion, namely, that the Act can only be prospective and can have application only from the date of its coming into force and not from any antecedent date. Mr. Venkatasubramania Iyer had tried to prop up his argument by means of what he considers the historical background, of the Hindu Women's Rights to Property Act, Act XVIII of 1937, and why in section 3 of the Madras Act XXVI of 1947 the earlier date has been fixed. According to section 2 of the Hindu Law of inheritance (Amendment Act II of 1929) a son's daughter, daughter's daughter, sister and sister's son shall in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's brother. In interpreting this section, Sundaram Chetti, J., delivering the judgment of the Court in *Gavarammal* v. *Manikammal*[1], observed that it did not apply to cases of Hindu males who died intestate before its coming into force and that in determining the order of succession to the estates of such persons, the Hindu law as it stood before the Act should be applied. That means that if the succession opened after coming into force of the Act by the death of a limited owner, such a circumstance would not attract the application of the Act but that in such cases the customary Hindu law should apply.

The result of this decision was that if a Hindu male died leaving a widow before the Act came into force and the estate was inherited as the Hindu widow's estate, then if she dies after coming into force of the Act the inheritance shall be not in accordance with the provisions of the Act, that is, the dautghter's son would not have precedence as is contemplated by the Act. It was considered that this decision did not correctly lay down the law and after some controversy, in *Lakshmi* v. *Anantharama*[2], a full bench of this Court overruling the view of Sundaram Chetti, J., laid down that when the last male owner, a Hindu died before the passing of the Hindu Law of Inheritance (Amendment) Act II of 1929 leaving a female heir (a limited owner under the law) who was alive after the Act had come into force, the succession to the last male owner is governed by the provisions of the Act and therefore when a female heir intervenes the fictional death of a Hindu male is something different from his actual death, the result being that the date of his death is for this purpose postponed to the death of the limited owner. This question

1. (1933) 66 M.L.J. 70: I.L.R. 57 Mad. 718.

2. (1937) 2 M.L.J. 209 : I.L.R. 1937 Mad. 948 (F.B.).

was considered by their Lordships of the Judicial Committee in *Duni Chand* v. *Anar Kali*[1], where it was held that the Act applies not only to the case of a Hindu male dying intestate on or after the Act came into force but also to the case of such a male dying intestate before the date of the Act coming into force if he was succeeded by a female heir who died after that date, such being the case, the material point of time for the purpose of the Act is the date when the succession opens, namely, the date of the death of the female heir. The Madras Full Bench case and the Privy Council case referred to above have given the quietus to the view held in *Gavarammal* v. *Manikammal*[2].

According to the learned counsel for the appellants at the time of the passing of the Madras Act XXVI of 1947 the Legislature had before it all these decisions and what was intended by the insertion of section 3 was to restate the view put forward by Sundaram Chetti, J., in *Gavarammal* v. *Manikammal*[2], and thereby declare that the law enunciated therein is correct and not what the Full Bench or the Privy Council had stated. The object and purpose of section 3 therefore, was that the Act should not apply if the Hindu male owner had died before 26th November, 1946, leaving a female heir but only died after the passing of the Act. Our attention has also been invited to the observation of single Judges of the Allahabad High Court in *Mt. Phulla* v. *Narpat Singh*[3], and in *Mst. Audhraj* v. *Pateshar Nath*[4], In *Mt. Phulla* v. *Narput Singh*[3], Kidwai, J., had to consider the scope of section 2 of the Hindu Law of Inheritence (Amendment) Act (1929) and the Hindu Women's Right to Property Act (1937) section 4 and the learned Judge was of the opinion that the crucial point for consideration was when the succession opened and not when the Hindu male owner died. The learned Judge observed that applying the principles laid down by their Lordships in *Duni Chand* v. *Anar Kali*[1], what has to be considered is when the succession opened and not when the Hindu male died. A similar view was taken by Wanchoo, J., in *Mst. Audhraj* v. *Pateshar Nath*[4]. Mr. Venkatasubramania Iyer, therefore, argues that section 3 was introduced into the Madras Act XXVI of 1947 only with the object of fixing the point of time when the Act has to come into force, that is the date of the death of the male owner and not the date when the succession opens and that date should be before 26th November, 1946 and not any subsequent date and it is not sufficient if the succession opened after that date. To justify this argument the learned counsel has brought to our notice a few English decisions and passages from text books to the effect that where there is a negative provision in an enactment nothing positive can be inferred from such a negative statement, for according to him, section 4 of the Central Act and section 3 of the Provincial enactment lay down a negative set of circumstances, that is, the Act should not apply to the property of a Hindu dying intestate before 26th November, 1946. It does not say that the Act shall apply to the property of a Hindu dying intestate after 26th November, 1946. If there had been such a positive definition, then there would be no difficulty whatever in holding that in the present case the provisions of the Act would apply. We are, therefore, asked to state that if the Legislature had intended that this Act should be applied only after 26th November, 1946, what prevented them from putting their intention in a positive form unless it be that the intention of the Legislature was that the Act should only be prospective in its operation. In the case of *West Derby Union* v. *Metropolitan Life Assurance Society*[5], the House of Lords have laid down that where there are no affirmative words indicating the granting of any power, the same cannot be inferred by a negative statement contained in a proviso. All the Law Lords including the Lord Chancellor have agreed with the observations of the Court of Appeal in the case reported in *Guardians of West Derby Union* v. *Metropolitan Life Assurance Society*[6]. It is not necessary for the purpose of this case not to accept the maxim as laid down by their Lordships but the whole question

1. (1946) 2 M.L.J. 290 : L.R. 73 I.A. 187 : I.L.R. (1946) All. 748 (P.C.).
2. (1933) 66 M.L.J. 70 : I.L.R. 57 Mad. 718.
3. A.I.R. 1954 All. 307.
4. 6 D L.R. 270.
5. L R. (1897) A.C. 647 at pp. 651, 652.
6. L.R. (1897) 1 Ch. D. 335.

is what did the Legislature want to lay down by the provisions of section 3 of the Act. Paragraphs 513 and 514 at page 670 in Vol. 31 of the Halsburys Laws of England and passages at p ges 212 and 213 of Maxwell's Interpretation of Statutes (10th edition) were also relied on.

On the other hand Mr. Ramachandra Iyer for the plaintiff, respondent, has argued that by necessary implication section 3 of the Madras Act XXVI of 1947 must apply to a case where a Hindu male died after 26th November, 1946 and that section 3 is only a saving clause that is, it is a remedial provision but for whose existence the retrospective operation of the statute would be from 1937 itself, that is, from the date of the coming into force of the Central Act XVIII of 1937 and that what the Legislature wanted was that the retrospective operation of the Madras Act should be restricted to the date, 26th November, 1946 and not to the year 1937 which would have been the effect, had it not been for the enactment of section 3, because but for it, the whole of the Central Act would have been incorporated so far as the agricultural lands are concerned in the Madras Act from the date of its passing. He further contended that because section 1 (3) of the Madras Act states that the Act shall come into force at once it does not mean that it cannot have retrospective effect. For this purpose a passage from Halsbury's Laws of England, Volume 31 at page 515 to the following effect was quoted :—

> " It does not follow that because a statute does not contain the words " from and after the commencement of this Act " it is retrospective or that when it contains them it is not retrospective. The word " retrospective " is in itself ambiguous. A statute is not to be construed to have a greater retrospective operation than its language renders necessary."

If we look at the history of the legislation it would be clear that the Madras Act is declaratory or explanatory which would automatically have retrospective effect and according to the learned counsel but for section 3 of the Act, the Act would have had application from 1937 which the Legislature did not want. In Craies Statute Law (5th edition) at page 364 there is the following passage :—

> " Where a statute is passed for the purpose of supplying an obvious omission in a former statute, or as Parke, J.. said in *R.* v. *Dursley* " to ' explain ' a former statute," the subsequent statute has relation back to the time when the prior Act was passed. Thus, in *Att-Gen.* v. *Pougett* it appeared that by 53 Geo. 3, c. 33, a duty was imposed upon hides of 9*s.* 4*d.* but the Act omitted to state that it was to be 9*s.* 4*d.* per cwt. and to remedy this omission 53 Geo. 3 c. 105, was passed. Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9*s.* 4*d.* per cwt. but Thomson, C.B. in giving judgment for the Attorney-General said : " The duty in this instance was in fact imposed by the first Act but the gross mistake of the omission of the weight for which the sum expressed was to have been payable occasioned the amendment made by the subsequent Act, but that had reference to the former statute as soon as it was passed, and they must be taken together as if they were one and the same Act." Where an Act is in its nature declaratory, the presumption against construing it retrospectively is inapplicable."

Declaratory Acts are defined at page 56. A declaratory Act is defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective.

In Maxwell—Interpretation of Statutes (10th edition) at page 222, the learned author observed that if a statute is in its nature a declaratory Act, the argument that it must not be construed so as to take away previous rights is not applicable, and quotes several authorities for this proposition. There are various passages in the well known treatise "Statutory Construction and Interpretation of Laws" by Crawford regarding the declaratory and remedial rights. See section 74 at page 107, section 78 page 110 and more especially section 234 at page 439, where the effect of adopted statutes is clearly explained. In such cases the adopted provisions become a part of the adopting statute. It is, therefore, argued in this case that if the Madras Act XXVI of 1947 is a declaratory statute which has adopted certain clauses relating to inheritance of agricultural lands from the earlier Central Act, then but for the provision of section 3 the Madras Act would have operation from 1937. We are of the opinion that there is much force in this argument. We have already remarked that clause 3 of the Bill which later on crystallised into an Act stated that nothing contained in the Act shall apply to the property of any Hindu dying intestate before the commencement of the Act and it was becaus e

between the date of the publication, namely, 26th November, 1946 and the date when the Bill became the law on 19th December, 1947, more than a year had elapsed when section 3 came to be enacted.

Another way of looking at the question is to conclude that section 3 is only a saving clause which would certainly have the effect of restrospective operation. At pages 161 and 304 of Maxwell on Interpretation of Statutes we have the principles laid down as to how the saving clauses are to be construed and following those principles we are of the opinion that section 3 can be construed as a saving clause which has the effect of giving retrospective operation to the statute.

It is not as if the point which we have to consider now is bereft of authority. In Appeal No. 165 of 1949, Satyanarayana Rao and Balakrishna Iyer, JJ., had to consider the retrospective operation of the statute. What they stated is as follows :—

" The next question is whether the Act is retrospective. In our opinion, the language of section 3 is clear in this respect for it says that " nothing contained in this Act shall apply to property of any Hindu dying intestate before the 26th of November, 1946", " thereby implying that if a person died intestate after that date, the Act would apply notwithstanding that the Act came into force only after the institution of the suit, the language of the Act by necessary implication extends the provisions of the two Central Acts to agricultural lands in the Province in such a manner as to take in cases of intestacy occurring after 26th November, 1946."

This was followed by the learned Chief Justice and Venkatarama Ayyar, J., in Appeal No. 881 of 1950 and L.P.A. No. 206 of 1951. But Mr. Venkatasubramania Iyer argues that the points which he has raised before us regarding the prospective nature of the statute were not put forward before the two benches who decided the two cases referred to above, with such a wealth and profundity of legal learning as he has done in the present case. We are afraid that such an argument cannot be countermanded, since it seems to us that these two decisions did lay down the correct law and therefore we must follow them and despite the learned arguments of the learned counsel we are not inclined to hold that the Act is only prospective and not retrospective in its operation.

Another point raised by the learned counsel is that even if the Act XXVI of 1947 would take effect only from 26th November, 1946, still on its face section 3 of that Act would apply only to separate property of any Hindu dying intestate after 26th November, 1946 and not to the joint family estate. Under the Mitakshara law it is fairly well settled that an undivided member of a Hindu Joint family cannot dispose of his rights in the joint family properties by means of a will, though there had been some conflict which is now settled as to whether a person can alienate his share in the joint family property by means of a deed *inter-vivos*. If that is so, it is urged because of the expression "A Hindu dying intestate" in section 3 being inapplicable to the case of a Mitakshara joint family, the section must be restricted to the cases of separate property of any Hindu. Even here it seems to us that the learned counsel's argument is not acceptable. One of the decisions of this Court already adverted to by us, namely, Appeal No. 881 of 1950 was with regard to the joint family properties of one Ramaswami Goundan and his two brothers and the learned Judges who decided that case did not make any distinction as regards the applicability of the Hindu Women's Right to Property Act and its extension to separate properties alone. In the parent Act XVIII of 1937, section 2 says "Notwithstanding any rule of Hindu Law or custom to the contrary, the provisions of section 3 shall apply where a Hindu dies intestate." Section 3 of the same Act deals with a Hindu governed by the Dayabhaga school of Hindu law as well as any other school of Hindu law or customary law and with the separate properties of any Hindu following any school of Hindu law, and as stated already section 4 is practically *ad idem* with section 3 of the Madras Act XXVI of 1947 excepting that the date is fixed instead of the words "commencement of the Act." There might have been some doubt as to whether it was absolutely necessary to use the expression "dying intestate" in section 2 but since it has to be applied to the Hindus governed by the Dayabhag school of law who can bequeath their share in the joint family properties by means of a will, the expression used is apposite and even in the case of the Hindus following the Mitakshara law decisions are attempting to broaden

the right of the member of the joint family with regard to testamentary dispositions of his share of the joint family properties. One thing is clear and that is the Hindu Women's Right to Property Act and its extension to agricultural property as well in the Madras State can come into play only, where a person dies intestate and not where he has disposed of his property by means of a will. Dying intestate is a necessary pre-requisite for the application of the Act and it is only in that way that the saving sections, namely, sections 3 and 4 respectively have to be interpreted. Mr. Venkatasubramania Iyer tried to argue that the distinction between the joint family property and the separate property for the application of these Acts was not considered in the two Madras cases mentioned by us above. In the earliest of them namely, A.S. No. 165 of 1949 it may be doubtful whether the properties dealt with therein were the joint family properties or not but surely A.S. No. 881 of 1950 dealt with joint family properties. We are not prepared to say that the mere fact that this point has not been specifically adverted to in the judgment of the learned Chief Justice and Venkatarama Ayyar, J., would detract from the value of that decision, for, if there had been any force in such a point then the learned judges would certainly have referred to it. Two decisions of the Orissa High Court, namely, *Radhi Bewa* v. *Bhagwan Sahu*[1], and *Nandha Kishore* v. *Sukti Dibya*[2], were cited before us. But in neither of them is there any clear exposition or decision that the Act would apply only to the joint family properties and not to separate properties. In the view which we have taken regarding the retrospective nature of the Act, it is unnecessary to advert at any length to these decisions. We are, therefore, of the opinion that the second argument that by the enactment of section 4 the extension of the Act to Agricultural lands is taken away from the category of the joint family property cannot be accepted. On the other points arising in the case in Appeal No. 556 of 1950 I agree with my learned brother in the conclusions he has reached and so I am not adding any observations of my own. He has covered all the questions of fact arising in Appeal No. 576 of 1950 and I am in complete agreement with the conclusions arrived at by him regarding the properties covered by F-2 Schedule.

Appeal No. 204 *of* 1951.

The main point urged by Mr. Ramachandra Iyer for the appellant is that the lower Court has not correctly appreciated the duty of a manager of a Hindu Joint family in a partition suit to account for the entire joint family property that has come into his hands. The manager's liability to account on partition is succinctly stated in Mulla's Hindu law (11th Edition) paragraph 238 at page 282, thus :—

> "In the absence of proof of misappropriation or fraudulent and improper conversion by the manager of a joint family estate he is liable to account on partition only for the assets which he has received, not for what he ought or might have received if the family money had been profitably dealt with. Further in the absence of any such proof a coparcener seeking partition is not entitled to require the manager to account for his past dealings with the family property. All that he is entitled to is an account of the family property as it exists at the time he demands a partition. But it is open to him to show that the expenditure which the manager alleges he has incurred has not in fact been incurred, or that more properties are available for partition than those disclosed by him."

At page 405 paragraph 305 in the same book the learned author states :

> "No coparcener is entitled to call upon the manager to account for his past dealings with the joint family property unless he established fraud, misappropriation or improper conversion."

In Mayne's Hindu law (11th edition) in paragraph 416 at pages 516 and 517 the matter is dealt practically in the same strain. A member who seeks partition is entitled to an account of the family properties as they stand at the date of partition but is not entitled to open up past account or to claim relief against past inequality of enjoyment of the family properties. All that he is entitled to is an account of the family properties as they exist at the time he demands partition. But if he alleges and proves past acts of fraud or misappropriation on the part of the manager the rule would not apply.

In the present case the matter is complicated by the fact that under Exhibits A-9 and A-10 before the branch of Bapu Iyer became separate the joint family

1. A.I.R. 1951 Orissa 378.
2. A.I.R. 1953 Orissa 240.

had received certain sums of money of which one third share had come into the hands of Bapu Iyer. Mr. Ramachandra Iyer relies upon certain alleged admissions made by Bapu Iyer not only when he gave evidence that at the time of the partition in 1943 all the amounts realised were partitioned except Rs. 2,000 and odd. From this it is sought to be argued that large sums of money had come into the hands of Bapu Iyer which he had not accounted for. We do not think that these admissions go to the extent which the learned counsel suggests they do. The evidence of D.Ws. 1 to 3 is to the effect that at the time of the partition the joint family had cash Rs. 19,200 and under the partition each of the three brothers got Rs. 6,400 and some evidence has been let in to show how this sum of Rs. 6,400 was expended. The question in this case is as to the onus of proof. The plaintiff has practically let in no evidence as to what the quantum of the joint family property was on the date of the partition. It is seen that Bapu Iyer became the manager of the joint family only in 1943 and before that Kuppuswami Iyer was managing the affairs of the family. So unless it is shown that the moneys actually came into the hands of Bapu Iyer on the date of the partition he cannot be held liable to account for what ought to have come into his hands. Large sums of money came into the coffers of the joint family when Kuppuswami Iyer was the manager of the family. In *Nibaran Chandra Mukerji* v. *Nirupama Debi*[1], there is a significant phrase at page 528 in the judgment where the learned judges state

> "In an ordinary suit for partition in the absence of fraud or other improper conduct, the only account the kartha is liable for is as to the existing state of the property divisable ; the parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters."

So the question is whether there can be any question of looking back and claiming relief against past inequality of enjoyment and in our opinion there cannot be. But Mr. Ramachandra Iyer contends that a mere *ipse dixit* of the manager as to the quantum of existing properties would not be sufficient, because the junior member who files a suit for partition is not in a position to know what exactly are the properties of the joint family and therefore there must be some burden on the manager of the family to prove what he did with the moneys of the joint family that have come into his hands. A number of cases have been cited bearing on this question, the earliest of them being *Balakrishna Iyer* v. *Muthuswami Iyer*[2]. At page 274 the learned Judges laid down that a member of an undivided family who sues for partition and who has not been excluded from the family is not, unless he establishes fraud or misappropriation, entitled to call upon the managing member to account for his past dealings with the family property. All he is entitled to is an account of the family property at the time he asks for partition.

Mr. Ramachandra Iyer contends that the observations of Philips and Krishnan, JJ., in *Kristnayya* v. *Curavayya*[3], namely, that

> "although the manager of a Mitakshara joint Hindu family is not responsible for the manner in which he disposed of the family income in the past except in case of fraud and misappropriation, he cannot when a partition is demanded evade his liability to give an account of the assets of the family as it existed at the time of the partition. The other members of the family are not bound to accept the statement of the Kartha as to what the properties at the time of the partition consist of and the Court can order an account of the properties to be taken."

are applicable to the facts of the present case and from these observations it is sought to be argued that a general direction to take accounts must be given if the statement of the manager of the joint family as to what exactly are the properties at the time of the partition cannot be taken at its face value. Learned counsel also invited our attention to a number of cases regarding the liability of the manager of the joint family to account for the properties available on partition. They are *The Official Assignee* v. *Rajabadar Pillai*[4], *Arumilli Perrazu* v. *Subbarayadu*[5]. *Tammi Reddi* v.

1. (1921) 26 C.W.N. 517.
2. (1908) 19 M.L.J. 70 : I.L.R. 32 Mad. 271.
3. (1921) 41 M.L.J. 503 at pp. 508-9.
4. (1923) 46 M.L.J. 145.
5. (1921) 41 M.L.J. 33 : L.R. 48 I.A. 280 : I.L.R. 44 Mad. 656 (P.C.).

Gangi Reddi[1] and *Ramakrishna Iyer* v. *Parameswara Iyer*[2] and *Vaikuntam* v. *Avudiappa*[3].

The true view regarding the onus of proof, in our opinion, is, this :—If when the manager of the joint family places before the Court the properties, which according to him, are liable for division the Court is not bound to accept that as a final word on the subject and it is open to the plaintiff to let in the evidence to show that some properties belonging to the joint family have been excluded from the list furnished by the manager and if the Court is satisfied that it is so, they will be included. The omission to include such properties might be by an inadvertent mistake or because of some other reason. In such a cases we cannot say that the manager is guilty of fraud or misappropriation. Likewise it is open to the plaintiff to show by evidence that the manager has been acting fraudulently during the course of his management and that acts of misappropriation, malversation or fraud have taken place *in which case the Court is at liberty to direct a general account of the management.* Without clear evidence regarding acts of fraud or misappropriation there cannot be a general back accounting by the manager. None of the cases cited before us show that merely because there is some slight evidence of the manager having received some amounts, it should be stated that he is guilty of fraud or misappropriation. In the case before us on the evidence on record we are not satisfied that Bapu Iyer has been guilty of any fraud or misappropriation. The matter has been dealt with in deatil in the judgment of my learned brother with which I agree. In the circumstances Appeal No. 204 of 1951 is dismissed subject to the modification stated below.

Ramaswami, J.—These are three connected appeals arising from the decree and judgment of the learned Subordinate Judge of Tiruchirapalli in O.S. No. 20 of 1948.

The facts are :—In Tiruchirapalli town there were three brothers by name Bapu Ayyar, who is the 1st defendant in this suit, Kuppuswami Ayyar who is alive and not examined, and Subba Ayyar, examined as D.W. 2. In this suit we are concerned only with the fortunes of Bapu Ayyar. This Bapu Ayyar had a son by name Subbaraya Ayyar. This Subbaraya Ayyar married his own cousin, the plaintiff herein, as third wife in 1940. It is common ground that this plaintiff's parental family is a fairly impecunious one and was dependent to some extent on Bapu Ayyar, the brother-in-law. This marriage lasted till 1947 and this unfortunate plaintiff lost her husband on 24th August, 1947. It is now common ground that on the date of the death of Subbaraya Ayyar he and his father had not become divided. This plaintiff had no issue by Subbaraya Ayyar. There is no dispute that this family is possessed of considerable immovable and movable properties constituting Schedules A to F-2 in the plaint in this case. There can also be no doubt that obviously to deprive the daughter-in-law of as much property as possible, this Bapu Ayyar executed what is purported to be a settlement deed Exhibit B-12 on 28th October, 1947, under which a few acres of land had been settled upon the plaintiff and which bears no resemblance whatsoever to what she would be entitled to as the statutory heir under the Hindu Women's Right to Property (Extension to Agricultural Lands) Act of 1947. Therefore, the suit has been laid for partition of the properties comprised in Schedules A, A-1, B, C, F, F-1 and F-2 and separate possession of a half share in them, for possession of the properties comprised in Schedules D and E or Rupees 1996 being their value and for future mesne profits on the ground that she, as her husband's sole heir, is entitled to his share of his properties under the aforesaid Act and on the allegation that those properties belonged to the joint family consisting of the 1st defendant and his son Subbaraya Ayyar. Defendants 2 and 5 who are the daughters of the 1st defendant and defendants 3 and 4 who are the minor sons of the second defendant

1. (1922) 42 M.L.J. 570 : I.L.R. 45 Mad. 281.
2. 1931 M.W.N. 215.
3. A.I.R. 1937 Mad. 127.

are impleaded on the allegation that they claim rights in the properties comprised in Schedules F, F-1 and F-2 and item 1 of Schedule D.

The contest raised by the defendants are reflected in the seventeen issues which have been framed in the suit.

The learned Subordinate Judge came to the conclusion that the Hindu Women's Right to Property (Extention to Agricultural Lands) Act of 1947 has retrospective effect from 26th November, 1946 and plaintiff is entitled to a half share in the properties comprised in Schedules A, A-1, B (except items 32, 33 and 34,) in item 2 and Rs. 11,000 in item 3 of Schedule C and in the properties comprised in Schedule F. 2. In regard to the properties comprised in other schedules he found that the plaintiff was entitled to a share in the income of the joint family properties on the date of Exhibit A-50, for possession of the properties comprised in Schedule D (except items 3 to 6) or their value and the properties comprised in Schedule E (except items 1, 6 and 7) or their value with proportionate costs payable by the 1st defendant. Future mesne profits were relegated to be determined on an application under Order 20, Rule, 12 Civil Procedure Code. The learned Subordinate Judge gave a decree embodying these reliefs and these three appeals arise therefrom.

Out of the three appeals before us *viz.*, A.S. Nos. 556 of 1950, 576 of 1950 and 204 of 1951, A.S. No. 556 of 1950 has been preferred by defendants 1 and 5 and this appeal covers the agricultural lands in Schedule A, certain items in the B Schedule which are not pressed before us, item 2 in the C Schedule comprising a sum of Rs. 10,000 in the Trinity Bank, Limited, and the ear-rings and rings comprised in the D Schedule. Turning to A.S.No. 576 of 1950, it has been preferred by defendants 2 to 4 in regard to the F-2 Schedule lands. A.S. No. 204 of 1951 has been preferred by the plaintiff and relates to two sets of controversies *viz.*, that the plaintiff is entitled to a half share in the properties covered by F and F-1 Schedules, that the lower Court ought to have directed accouting in respect of the family properties by the 1st defendant in regard to item 1 of the C Schedule in a sum of Rs. 40,000, that in regard to item 3 of that Schedule the plaintiff would be entitled to Rs. 1000/- in excess of what was granted, and that in regard to item 4 of that Schedule the plaintiff will be entitled to a half of the decree-amount in the Small Cause Court decree.

It will be seen from a narration of the reliefs asked for in the several appeals that two points of law arise on the facts involved. The points of law are whether the Hindu Women's Right to Property (Extension to Agricultural Lands) Act of 1947 is retrospective from 26th November, 1946 and whether the plaintiff is entitled to the accounting from the first defendant as asked for. I shall be dealing in this judgment with the questions of fact and my learned brother will be dealing with the two questions of law. Beyond indicating my concurrence with his conclusions for the reasons mentioned by him I shall not deal with them which means that I shall not be dealing with the controversy relating to the immoveable properties comprised in the A Schedule and the accounting asked for by the plaintiff in regard to item 1 of the C Schedule. I shall now proceed to deal with the following points of fact raised in these appeals, *viz.*,

[His Lordship then dealt with the points of fact raised in the appeals].

In the result, in these three appeals the decree and judgment of the learned subordinate judge are modified to the extents indicated above and will stand confirmed otherwise. In the judgment of my learned brother costs have been provided for and therefore I am not dealing with that point here.

By Court.—Subject to the modification about the price of the earrings now fixed at Rs. 500 A.S. 56/50 is dismissed no costs.

A.S. 576/50 is allowed with costs.

A.S. 204/51 Subject to the modification regarding S.C.S. 132/47 the appeal is dismissed no costs.

R.M. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Omar Salay Mohammad Sait (Mathurai) .. *Petitioner**

v.

The Commissioner of Income-tax, Madras. .. *Respondent.*

Income-tax Act (XI of 1922), section 66 (2)—Order of High Court under, refusing to direct the Tribunal to state a case—If appealable to the Supreme Court—Constitution of India (1950), Article 133 (1) (a) and (c) and Article 135.

No appeal lies to the Supreme Court from an order of a High Court dismissing an application under section 66 (2) of the Income-tax Act to direct the Income-tax Tribunal to state a case.

Sri Mahanth Harihar Gir v. *Commissioner of Income-tax, Bihar and Orissa*, (1941) 9 I.T.R. 246, *Seth Premchand Satramdas* v. *The State of Bihar*, (1950) 19 I.T.R. 108 referred and followed. (1931) I.L.R. 12 Lah. 166, held no longer good law.

Petition under sections 109 and 110, Civil Procedure Code and Article 133 (1) (*a*) and (*c*) and Article 135 of the Constitution of India, praying that in the circumstances stated therein, the High Court will be pleased to grant leave to the petitioner herein to appeal to the Supreme Court of India, against the order of the High Court dated the 9th day of August, 1954 and made in C.M.P. No. 10650 of 1953, the petition to direct the Income-tax Appellate Tribunal, Madras 'A' Bench to state a case and refer for the decision of the High Court, the question of law in R.A. No. 751 of 1952-53 (I.T.A. No. 3254 of 1951-52, Assessment year 1948-49.)

S. Swaminathan for the Petitioner.

C. S. Rama Rao Saheb for the Respondent.

The order of the Court was pronounced by

Rajamannar, C.J.,—This is an application for leave to appeal to the Supreme Court against the order in C.M.P. No. 10650 of 1953 which was an application under section 66 (2) of the Income-tax Act for a direction to the Income-Tax Tribunal to state a case and refer the question of law to this Court. It was held by a special Bench of the Patna High Court in *Sri Mahanth Hairhar Gir* v. *Commissioner of Income-tax, Bihar and Orissa*[1], that no appeal lay to His Majesty in Council from an order of a High Court dismissing an application under section 66 (3) of the Income-tax Act then in force which corresponds to section 66 (2) of the present Income-tax Act to direct the Commissioner of Income-tax to state a case. That decision has been expressly approved by the Supreme Court in *Seth Premchand Satramdas* v. *The State of Bihar*[2], learned counsel for the petitioner relied upon the Full Bench ruling of the High Court in *Feroze Shah* v. *Commissioner of Income-tax*[3] in which no doubt a contrary view was taken. But this view was dissented from by the learned judges of the Patna High Court in the decision referred to above, and the Supreme Court observed that the view expressed in the Patna case was correct. The ruling in *Feroze Shah* v. *Commissioner of Income-tax*[3], can no longer be deemed to be good law.

We, therefore, hold that this application is not sustainable, and dismiss it with costs.

R.M. *Application dismissed.*

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* S.C. C.M.P. No. 285 of 1955. 31st March, 1955.
(C.M.P. No.10650 of 1953).

1. (1941) 9 I.T.R. 246 : A.I.R. 1941 Pat. (S.C.). 225.
2. (1950) 19 I.T.R. 108 : (1951) S.C.J. 5
3. (1931) I.L.R. 12 Lah. 166 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

The Alagappa Corporation Limited, Vepery, Madras .. *Petitioner**

v.

The State of Madras represented by the Secretary to the Government of Madras, Revenue Department, Fort St. George, Madras. .. *Respondent.*

Madras General Sales Tax (Assessment and Turn-over) Rules—Rules 4-*A* (1) *and* 4 (1)—*Liability of first dealer within Madras State in respect of goods purchased in Cochin State—Exemption under Notification No.* 1011, *dated* 28*th May*, 1949—*When available.*

The cotton yarn which was subsequently sold by the assessee within the Madras State was purchased by him in Cochin State. Under rule 4-A (1) read with rule 4 (1) of the Turn-over Rules the assessee as the first dealer in yarn within the State of Madras was liable to pay the tax on the sales turn-over. That liability he could escape only if he could get the benefit of the exemption granted under Notification No. 1011, dated 28th May, 1949, issued in exercise of the powers conferred by section 6 of the Madras General Sales Tax Act. That exemption he could claim only if he could prove that at the time he entered into the agreements to sell that cotton yarn within the State of Madras the goods were actually in Cochin State. [In the instant case it was found that the assessee failed to furnish such evidence.]

Petitions under section 12-B (1) of the Madras General Sales Tax Act praying that the High Court will be pleased to revise respectively the orders of the Sales Tax Appellate Tribunal, Madras, dated 29th July, 1953 and made in T.A. Nos. 1038 and 1037 of 1952 (R.P. Nos. 23 of 52-53 and 22 of 52-53 on the file of the Commercial Tax Officer, North Madras).

V. Sethuraman and *S. Padmanabhan* for the Petitioner.

The Assistant Government Pleader (*K. Veeraswami*) on behalf of the Respondent.

The Order of the Court was pronounced by

Rajagopalan, J.—These applications are in relation to assessment proceedings of 1949-50 and 1950-51. The only question that was argued before us was whether the Appellate Tribunal was right in the interpretation it placed upon the notification No. 1011 dated 28th May, 1949. The notification runs:

"In exercise of the powers conferred by section 6 of the Madras General Sales Tax Act, 1939 (Madras Act IX of 1939), as amended by Madras Act XXV of 1947 His Excellency the Governor of Madras hereby exempts from the tax payable under the said Act, goods which at the time when the contract of sale or purchase in respect thereof is made are actually in the Cochin State."

The Tribunal observed that it was not disputed by the assessee that the cotton yarn, which he subsequently sold, was purchased by the assessee in Cochin State. Nor was it disputed that the cotton yarn was sold within the Madras State. Under Rule 4-A (1) read with R. 4 (1) of the Turn-over Rules, the assessee as the first dealer in yarn within the State of Madras was liable to pay the tax on the sales turn-over. That liability he could escape only if he could get the benefit of the exemption granted by the Notification No. 1011 : and that exemption he could claim only if he could prove that at the time he entered into the agreements to sell that cotton yarn within the State of Madras, the goods were actually in Cochin State. The Tribunal observed that such evidence the assessee failed to furnish. Therefore, the petitioner could not prove that he was entitled to the exemption he claimed, and the Tribunal rightly rejected his claim.

The petitions fail and are dismissed with costs in T.R.C. No. 359 of 1953 only. Counsel's fee Rs. 100.

K.S. *Petitions dismissed.*

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* T.R.C. Nos. 359 and 360 of 1953. 7th March, 1955.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE BALAKRISHNA AYYAR.

Royappan .. *Petitioner**

Criminal Procedure Code (V of 1898), section 161 (3)—Omission to record separately the statements made under—If vitiates the trial.

Whether the failure of an investigating officer to conform to the requirements of section 161 (3) of the Code of Criminal Procedure would vitiate the entire trial or not must depend upon the facts of each case. To say as a general rule that the violation of the provisions of section 161 (3) vitiates the entire trial would produce startling results. It would mean that if an investigating officer has omitted to take down separately the statements of the witnesses he has examined there can be in law no trial at all of the accused person since *ex hypothesi* the entire trial would be vitiated at the outset. While compliance with the provisions of section 161 (3) of the Code should be insisted upon, it cannot be said that in every case where that section has not been complied with the trial stands vitiated even before its commencement and that there can be no conviction at all in such circumstances.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Third Presidency Magistrate of the Court of the Presidency Magistrates Saidapet, Madras dated 25th February, 1955 and made in C.C. No. 271 of 1955.

S. Arputharaj for the Petitioner.

The Court made the following

ORDER : The Third Presidency Magistrate, Saidapet, Madras has convicted the petitioner under section 325, Indian Penal Code and sentenced him to undergo rigorous imprisonment for six weeks and to pay a fine of Rs. 75 and in default to undergo further rigorous imprisonment for three weeks.

The evidence of P.W. 1 makes it perfectly clear that the petitioner hit her on the head with a tamarind post. Naturally she put up her hand to protect her head and one of the blows fractured the metacarpal bones of one hand. P.W. 2 who was grazing a buffalo near by, heard a cry of 'Ayyo' and saw the petitioner beating P.W. 1. Likewise P.W. 3 who was working in a house a few yards away. P.W. 4 did not actually see the petitioner beat P.W. 1, but he testified that she heard an alarm and saw the petitioner running away. These are material witnesses and it is clear that there was sufficient evidence before the learned Magistrate to justify the conviction.

Learned counsel for the petitioner, however, urged one point. Section 161 (3), Criminal Procedure Code provides :

"The Police Officer may reduce into writing any statement made to him in the course of an examination under this section and if he does so he shall make a separate record of the statement of each such person whose statement he records".

It was stated that in the present case the police officer recorded the statement of only P.W. 1 and in respect of the other witnesses merely noted that they corroborated P.W. 1 His omission to record separately the statement of each of the witnesses he examined, it was contended, is an illegality which vitiates the trial. Support for this contention was sought in *K. Venkataratnam* v. *State*[1], *Narayana Reddi* v. *State*[2] and *Gangi Reddi* v. *State of Andhra*[3]. There is nothing in the first of these three cases to support the contention that the violation of the mandatory provision of section 161 (3) vitiates the trial. All that Somasundaram, J., did in that case was to emphasise the duty of investigating officers to conform to the provisions of that section. In the second of these cases, Somasundaram, J., no doubt observed :

"The failure to record separately the statements of P.Ws. 4 and 5, who are the most important eye-witnesses in the case, is a serious irregularity considerably prejudicing the accused and is by itself enough to make the evidence tainted."

Even here, the learned Judge did not say that the failure to record separately the statements of the witnesses would vitiate the entire trial. Moreover, the observa-

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*Criminal Revision Case No. 151 of 1955. 3rd March, 1955.
(Criminal Revision Petition No. 146 of 1955.)

1. (1951) 1 M.L.J. 430.
2. (1952) 2 M.L.J. 7.
3. (1954) 2 M.L.J. 462.

tions of Somasundaram, J., must be read in the context in which they were made. About the case as a whole he observed :

"This case may legitimately be described as a symposium of all the irregularities and illegalities that can be thought of in connection with a criminal case both under the Criminal Procedure Code and under the Evidence Act."

He also observed :

"It is quite clear as pointed out by the learned Sub-Magistrate that the entries in the case diary were not made contemporaneously with the examination and have been fudged".

As already remarked, even here the learned Judge did not say that the violation of the provisions of section 161 (3) itself vitiates the trial. In the third of these cases, Chandra Reddy, J., no doubt did commit himself to this statement :

"It follows that the contravention of this section 161 (3) which is a mandatory one, is a serious irregularity, which vitiates the whole trial".

With respect to the learned Judge, I am unable to share this view. Whether the failure of the investigating officer to conform to the requirements of section 161 (3), Criminal Procedure Code would vitiate the entire trial, or not must depend, it seems to me, upon the facts of each case. To say as a general rule that the violation of the provisions of section 161 (3) vitiates the entire trial would produce very startling results. It would mean that if an investigating officer has omitted to take down separately the statement of the witnesses he has examined, there can be in law no trial at all of the accused person, since *ex hypothesi* the entire trial would be vitiated and to go through the mere form of a trial which stands vitiated at the very outside would be an idle farce. While I agree that we must insist on compliance with the provisions of section 161 (3), I am certainly not prepared to agree that in every case where that section has not been complied with the trial stands vitiated even before its commencement and that there can be no conviction at all in such circumstances.

On the evidence, in the case, the conviction was correct. Mr. Arputharaj pleaded that the sentence is excessive. I do not think so and dismiss the revision petition.

R.M. —————— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE PANCHAPAKESA AYYAR.

V. Rajagopala Ayyar .. *Petitioner**

Criminal Procedure Code (V of 1898), section 173—Power of police to investigate further after laying a final charge sheet, and to file a supplemental charge sheet to add some more persons as accused.

A Court takes cognizance of an *offence* and not of the *offenders* named in the charge sheet and new accused can be added if justified. The police after laying a final charge sheet after completing one investigation, can on further information, resume the investigation against some other persons involved in the same offence and lay a charge sheet against them.

Divakarsingh v. *Ramamurthi Naidu*, (1918) 47. I.C. 273, relied on.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of Additional First Class Magistrate of Cuddalore dated 27th September, 1954 made in Crl. M.P. No. 34 of 1954 in P.R.C. No. 5 of 1954.

V. L. Ethiraj for *G. Gopalaswami* for the Petitioner.

The Court made the following

ORDER.—This is a petition filed by one V. Rajagopala Ayyar, an Advocate of Cuddalore, for revising and quashing the order of the Additional First Class Magistrate, Cuddalore, dated 27th September, 1954, in Crl. M.P. No. 34 of 1954, in P.R.C. No. 5 of 1954 on his file, on the ground that the lower Court had committed a grievous illegality in entertaining a supplemental-charge-sheet filed in that case against the petitioner and four other persons on 30th August, 1954, when a final

*Criminal Revision Case No 958 of 1954. 11th November, 1954.
(Criminal Revision Petition No. 901 of 1954.)

charge-sheet had been laid by the police on 25th May, 1954, against 13 other persons for the same offence of criminal conspiracy to murder one Krishnaswami Odayar. In the lower Court three contentions were raised on behalf of the petitioner against the entertainment of the supplemental charge-sheet. The first was that the charge-sheet filed on 25th May, 1954, was a complete report within the meaning of section 173 (1), Criminal Procedure Code, read with section 190 (1) (*b*) and that cognizance had been taken by the magistrate of that charge sheet or report, and a case taken on file and that the police had no right to continue the investigation or to hold a fresh investigation and file a second charge-sheet for the same offence, impleading some others not mentioned in that first charge-sheet, and that such a supplemental charge-sheet would be null and void, or at least illegal. The second contention raised was that the second charge-sheet was not filed by the officer competent in law to file a charge-sheet under section 173 (1) (*b*), Criminal Procedure Code. The point taken here was that the supplemental charge-sheet was filed by Mr. Chelliah, an Inspector of the C.I.D. Crime Branch, Madras put in charge of the case and not by the Sub-Inspector of police in charge of the station, or the ordinary Inspector of police, his imenediate, superior. The third contention was that the supplemental charge-sheet should have been filed before a Second Class Magistrate, as the offence was a preliminary register case, and not before a First Class Magistrate. The lower Court discussed all these contentions elaborately, and rejected all of them, and held that it had ample power under the law to entertain the supplemental charge-sheet and add the five new accused names in it as having participated in the criminal conspiracy to murder and in the attempt to murder Krishnaswami Odayar. Hence this petition.

Mr. V.L. Ethiraj, who appeared in support of the petition, did not press before me the second and third contentions raised in the lower Court, and rejected by it obviously because they were without substance. It is clear that an Inspector, C.I.D. Crime Branch, Madras, put in charge of the investigation of an offence, in order to probe into the matter more thoroughly and competently, can file a charge-sheet, or a suppelemental charge-sheet if it were otherwise legal. That is why the second contention collapsed in the lower Court and was not pressed here. It is also clear that a First Class Magistrate has all the powers of a Second Class Magistrate, though he has some additional powers also. So, the supplemental charge-sheet, though it related to a preliminary register case, could be filed before the lower Court, if it were otherwise legal. That is why that contention also was not pressed by Mr. Ethiraj.

Mr. Ethiraj, however, pressed vigorously the first contention, *viz.*, that the police, after having laid a final charge sheet under section 173, Criminal Procedure Code, had no power to investigate further into the offence and lay a supplemental charge sheet, and add some more accused. He relied on a ruling of Jai Lal, J., in *Emperor* v. *Ali and another*[1] for this position. But that ruling will not help him for this case. There, the learned Judge, held that when the investigation had been completed and a final charge-sheet laid under section 173, Criminal Procedure Code, against certain persons as accused; the police had no power to resume the investigation *in favour of the accused.* That is a perfectly understandable proposition, and, with respect, I wholly agree with it. Once the police have completed their investigation and laid their final charge-sheet against some persons, as persons guilty of the offence named in the charge-sheet, it will be ridiculous to allow them to go back on that report and resume the investigation to prove that the persons they had named in their charge-sheet as the persons who had committed the offence, had really not committed the offence. When the Court has taken cognizance of an offence under a final charge-sheet and registered a case against the accused named in that charge-sheet, the Court has taken full seizin of the case regarding those accused and it is its duty, after trial, to hold whether the accused named by the police as the persons guilty of the offence are guilty or not. The police cannot be allowed to blow hot and cold, approbate and reprobate, charge-sheet a man and then resume

1. A.I.R. 1932 Lah. 611.

the investigation to show that he had been wrongly charge-sheeted by them. That was the real point of the decision by Jai Lal, J., that will also be apparent from the fact that in a Bench decision in *Mohinder Singh* v. *Emperor*[1], to which Jai Lal, J., was also a party along with Coldstream, J., it was held that *the number of investigations is not limited by law and that when one investigation has been completed another investigation can be begun on fresh information received*. It is obvious that Jai Lal, J., who was a party to this bench decision, dated 7th December, 1931, could not have suddenly changed his opinion, on 23rd May, 1932, in the decision in *Ali's case*, relied on by Mr. Ethiraj, without even disclosing that he had revised his former opinion and arrived at a different opinion. It is, therefore, obvious that the later decision of Jai Lal, J., relied on by Mr. Ethiraj, can only be due to the circumstances that the police in that case were resuming investigation *only in favour of the accused*, in order to go back on their previous charge-sheet, and were not resuming investigation against other accused involved in the same offence, on fresh information. It has, been held in *Divakar Singh* v. *Ramamurthi Naidu*[2], by a Bench of this Court, consisting of Phillips and Krishnan, JJ., that the number of investigations into a crime that can be made by the Police is not limited by law, and that the police, after submitting a report of an investigation, have power to make further investigation on receipt of further information. It is really that decision of this Court in that case that was followed by the Bench of the Lahore High Court in *Mohinder Singh* v. *Emperor*[1] cited above. There is no decision of this Court to the contrary, or of any other Court, so far as I can see. Indeed, an Allahabad case agrees with the Madras view.

Mr. Ethiraj relied upon the Supreme Court decision in *Tara Singh* v. *The State*[3] for his position that when the police had laid a final charge-sheet they had no power to resume investigation and lay a supplemental charge-sheet against some other accused for the same offence. I have looked into that ruling and see nothing whatever there in support of this position. In one place one of the learned Judges, Bose, J., says that he need not express any opinion whether the police are permitted to send in an incomplete report instead of a complete report. This question, whether after laying a final charge-sheet, after completing one investigation, they can, on further information, resume the investigation against some other persons involved in the same offence and lay a charge-sheet against them, was not considered or decided in that case. So, the rulings in *Divakar Singh* v. *Ramamurthi Naidu*[2] and *Mohinder Singh* v. *Emperor*[1] still remain good law.

It was next urged by Mr. Ethiraj that the police could very well have filed a *different charge sheet* against the supplemental five persons instead of a *supplemental charge-sheet* to add these five persons to the other 13 persons already named in the first charge sheet and that the lower Court should have registered *another case*. I cannot agree. A Court takes cognizance of *an offence*, and not of the *offenders* named in the charge-sheet, and new accused can be added if justified. In this case, which was one of *criminal conspiracy to commit the murder of Krishnaswami Odayar*, and attempt to murder him in pursuance of the common intention of conspirators, it would not have been reasonable for the lower Court (nor was it required by law) to separate the alleged five conspirators covered by the supplemental charge-sheet from the other 13 conspirators covered by the original charge-sheet, especially when the enquiry regarding the first 13 accused had not begun. The evidence would be the same, and, in a conspiracy case, the evidence against one conspirator will be evidence against the other conspirators, and wherever possible, Courts should join all the conspirators in one case, instead of dividing the conspiracy case into sections, and the accused into batches, a procedure which will handicap not only the prosecution but also the accused.

The last argument urged by Mr. Ethiraj was that this petitioner Rajagopal Ayyar, had been named to the police even at the time of the first investigation, and

1. A.I.R. 1932 Lah. 103.
2. (1918) 47 I.C. 273.
3. (1951) 2 M.L.J. 291 : 1951 S.C.J. 518 (S.C.).

before they laid the first charge-sheet, as one of the parties to the conspiracy to murder Krishnaswamy Odayar, and yet they had not included him as an accused in the first charge-sheet, and that, therefore, they could not investigate further regarding his case at least and lay a supplemental charge-sheet including him as an accused, I cannot agree. It is well known that all persons named to the police, by the complainant or others, as guilty of a certain offence need not be charge sheeted by them. The very object of an investigation by the police is to see whether there is sufficient evidence against the persons named to them in a complaint, etc., to include them in the charge-sheet. In this country, and especially in factious villages, several persons are unnecessarily named as offenders in a complaint along with some persons who might have had a hand in the offence. So, the police have to investigate and only charge-sheet these against whom there is *prima facie* evidence. It is obvious, therefore, that when there was no *prima facie* evidence in the opinion of the police against this petitioner during the first investigation, he would not be included in the first charge-sheet but that, in the subsequent investigation, when the police (C.I.D.) received further information and thought that there was a *prima facie* case to go to the Court against this individual also, they included him in the supplemental charge-sheet. I cannot see any illegality or impropriety in this. Public interests required that, in proper cases, instead of prohibiting it. Mr. Ethiraj urged that there was nothing to show that the C.I.D. police had any further information regarding the petitioner. But that is a fact which will be known only to the police. It is very rarely that the accused would be told by the police, at such a stage of the case, about the information received by them during the first investigation and the further information received later on. It is, of course, open to the petitioner to show at the enquiry or trial, that he has been unnecessarily or even unjustly implicated in this case. But that is a matter depending on the evidence and has nothing to do with the legal point raised before me.

In the end, therefore, this petition deserves to be and is hereby dismissed.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

A.M. Mohammed Ishak .. *Petitioner**

v.

The State of Madras, represented by the Commercial Tax Officer, Coimbatore (South) .. *Respondent.*

Constitution of India (1950), *Article* 286 (1) (a), Explanation—*Exemption under—When attracted—'Actually been delivered'—Scope and extent—Madras General Sales Tax Act* (*IX of* 1939), *section* 7—*Scope of exemption under.*

If under the terms of a contract between the parties and as one of the stipulations therein a delivery of the goods sold has taken place within the taxing State the Constitution of India does not envisage a fictitious or notional second delivery of the same goods outside that State by reason merely of the goods being transported outside that State by the purchaser even though it be by a transaction which forms part of the very delivery to him within the taxing State. The actual delivery referred to in the *Explanation* to Article 286 (1) (*a*) of the Constitution is delivery by the seller to the buyer and not the delivery involved in a buyer's agent to whom goods have been delivered within the taxing State transporting them across the border and handing them over to his principal.

In order to invoke the exemption under section 7 of the Madras General Sales Tax Act two conditions are necessary: one is that the terms of the contract should provide for delivery outside the taxing State and secondly that in pursuance of such a contract the goods must have been actually delivered outside. The requirements of section 7 of the Act are even stricter and the exemption narrower than that embodied in the *Explanation* to Article 286 (1) (*a*) of the Constitution. Therefore a case to which the latter provisions are not attracted the provisions of section 7 cannot possibly apply.

Petition under section 12-B (1) of the Madras General Sales Tax Act, 1939, praying that the High Court will be pleased to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 14th July, 1953 and passed in Tribunal Appeal No. 141 of 1953.

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*T.R.C. No. 338 of 1953. 2nd March, 1955.

P. S. Balakrishna Aiyar and *P. S. Ramachandran* for Petitioner.

The Assistant Government Pleader (*K. Veeraswami*) for Respondent.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This is a revision petition filed by an assessee against the decision of the Sales Tax Appellate Tribunal raising for consideration the correct construction of the *Explanation* to Article 286 (1) (*a*) of the Constitution.

The assessee is a registered manufacturer of and a licensed dealer in groundnut oil carrying on business in Pollachi and the assessment relates to the year 1950-51. During the accounting year he sold oil to Messrs. Tata oil Mills Co., Ltd., under the terms of a contract on conditions embodied in an order in the form below :

To

Messrs. Tata Oil Mills, Co., Ltd.,

Coimbatore.

Dear Sirs,

Ref : Sales Contract—Groundnut Oil.

This is to confirm that I have this day sold groundnut oil to you as per terms and conditions given below :—

Quantity.—Tons of 2240 lbs. each.

Price : Rs. 2,025 (rupees two thousand and twenty five only per ton of 2,240 lbs. net loose F.O.R. Pollachi Junction including Sales Tax.

Quality : Pure expeller groundnut oil with six per cent F.F.A. or below.

Delivery : F.O.R. Pollachi Junction Oil to be supplied during the month of February (within the 15th) 1951.

Containers : are to be supplied by you F.O.R. Pollachi Junction R.R, as usual.

The course of business between the assessee and the purchasers was as follows : As the sale of the oil was " loose " the containers were supplied by the purchasers who sent their own drums to the assessee for the carriage of the oil. These containers were checked up by the sellers and they were filled in at the assessee's mills. The drums were transported to Pollachi Junction and then loaded on Railway waggons by the sellers who obtained railway receipts in the name of the buyers as consignors, the consignees of course being the same. There is also no dispute that on the instructions of the buyers all the oil sold under these contracts were routed to Ernakulam where they were cleared by the buyers and the commodity was consumed in the latter's mills. The railway receipts were with the relative invoices handed over at Coimbatore to the buyers where they had an office and the sellers received a good portion of the price. The balance was paid after weights were checked and fatty acid tests were carried out by the buyers at Ernakulam.

The total turnover of the goods involved in these contracts for the assessment year was Rs. 1,80,738-13-4.

Before the Deputy Commercial Tax Officer the assessee raised a contention that he was entitled to a rebate of one half of the sales tax due in respect of the turnover under section 7 of the Madras General Sales Tax Act. That section runs in these terms :

" In respect of such finished articles of industrial manufacture as may be notified by the State Government and subject to such restrictions and conditions as may be prescribed, a rebate shall be allowed of one-half of the tax levied on sales of such articles for delivery outside the State if such articles are actually so delivered."

The assessing officer rejected this claim and held that the assessee was not entitled to the exemption claimed. The assessee filed an appeal to the Commercial Tax Officer and at that stage raised the contention that he was entitled to exemption in respect of the whole of the tax paid by reason of the *Explanation* to Article 286 (1) (*a*) of the Constitution. The appellate authority decided against the assessee and a further appeal to the Sales Tax Appellate Tribunal was also rejected. Hence this revision.

Before us two points were argued. The first was that the petitioner was entitled to exemption under the *Explanation* to Article 286 (1) (*a*). The Article and the *Explanation* are in these terms :

"286 (1).—No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(*a*) outside the State ; or

(*b*) * * * * *

Explanation.—For the purposes of sub-clause (*a*), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been de'ivered as a d rect result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

There is no doubt that the purchase by the Tatas was "for the purpose of consumption" in Ernakulam, but that is not sufficient to attract the constitutional exemption which would be satisfied only when goods have "actually been delivered" outside this State. The submission of learned counsel for the petitioner in support of the argument that the requirements of the *Explanation* were complied with, was as follows : As the sale was F.O.R. Pollachi and as it was part of the duty of the seller to obtain the railway receipt and book the goods to Ernakulam outside the State of Madras "the delivery" must be treated as having taken place outside the State bringing the transaction within the *Explanation.* It was contended that "F.O.R. Pollachi" was mentioned in the contract merely in order to ascertain the price and that though for the purpose of the Sale of Goods Act, the property might have passed to the buyer either when the containers of the buyer were filled up in the godowns of the seller or at any rate when the goods were put on rail at Pollachi, this was irrelevent for the purpose of considering whether the petitioner was entitled to the exemption under the Article above set out, since the *Explanation* in express terms renders the passing of property irrelevant for the purpose. It was also contended that delivery "as a direct result of the sale" was distinct from delivery in pursuance of a sale because "a result" can be reached only after the terms of the contract are fulfilled. On this basis it was urged that as it was admitted by the department that eventually the goods did reach Ernakulam at the end of their journey from Pollachi, the goods were delivered at Ernakulam as a direct result of the sale sufficient to bring the transaction within the exemption embodied in the *Explanation.*

We are clearly of the opinion that the argument of learned counsel for the petitioner is without substance. It is true that under the *Explanation* to Article 286 (1) (*a*) the passing of property is immaterial for the purpose of judging whether a sale has taken place within the State or not. But the crucial fact which has to be established before the exemption could be claimed is that there should be an "actual delivery" of the goods outside the State. If under the contract there is a delivery of these goods at Pollachi, there could not possibly be a delivery of the same goods again in Ernakulam. It is therefore necessary to consider whether by reason of the contract between the parties there was or was not a delivery of these goods at Pollachi junction when the petitioner loaded the goods in the train and got the railway receipt in the name of the buyer. We have already set out the terms of the contract under which the delivery was to be at Pollachi junction. In the face of this express stipulation in the contract which was fulfilled it is, in our opinion, impossible to contend that there was no delivery within the State. If delivery had taken place within the State, there could not obviously be a delivery of the very same goods outside the State merely because they were subsequently transported to and reached Ernakulam. In this connection we might refer to the terms of section 39 (1) of the Sale of Goods Act which runs in these terms :

"39 (1).—Where in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, de ivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is *prima facie* deemed to be a delivery of the goods to the buyer."

In terms of this provision which merely re-states the common law rule, the seller was on the terms of the contract we have in this case required to send the goods by a carrier named by the buyer.

As explained in Benjamin on "Sale of Goods" (8th edition) at page 211 and at page 737 :

> "It is well settled that the delivery of the goods to a common carrier, *a fortiori* to one specially designated by the buyer, for conveyance to him or to a place designated by him, constitues an actual receipt by the buyer. In such cases the carr er is, in contemp ation of law, the bailee of the person *to whom* not of the person *by whom*, the goods are sent, the seller employing the carrier, being cons dered as an agent of the buyer for the purpose."

The carrier was thus constituted an agent of the buyer for accepting delivery of the goods on his behalf with the result that the goods have "actually been delivered to the buyer within the Madras State."

It will be noticed that this section which occurs in Chapter IV of the Sale of Goods Act has nothing to do with the passing of property dealt with in Chapter III of the Act which is the matter which is rendered irrelevant by the *Explanation* to Article 286 (1) (*a*) of the Constitution.

In the circumstances, on the terms of this contract we are clearly of the opinion that the delivery of those goods at Pollachi junction was a delivery to the purchaser and if the goods were transported from Pollachi to Ernakulam, it was really by or on behalf of a buyer, who had taken delivery of the goods, that the journey was performed. If the delivery has taken place within the State of Madras, the tax liability has accrued and this is not altered or affected by reason of the subsequent despatch of the goods at the instance of the buyer from the State of Madras to Ernakulam outside the State.

Counsel for the petitioner also relied on the circumstance that the weight of the oil as well as the fatty acid content were checked at Ernakulam and it was only thereafter that the balance of the price was paid to the assessee. In our judgment these do not bear upon the point now under consideration. We are unable to gather from the contract any stipulation that the goods continue to be the property of the seller until they are tested and weighed which is what this argument virtually amounts to and therefore these circumstances do not militate against the buyer having taken delivery of the goods at Pollachi when they were handed over to the buyer's agent, *viz.*, the carrier.

Learned counsel for the petitioner relied in this connection on certain observations in the judgment in *State of Bombay* v. *United Motors, Ltd.*[1], a passage at page 749 where referring to the *Explanation* the learned Chief Justice of the Supreme Court stated :—

> "It provides by means of a legal fiction that the State in which the goods sold or purchased are actually delivered for consumption therein is the State in which the sale or purchase is to be considered to have taken place, notwithstanding the property in such goods passed in another State . . . . The test of sufficient territorial nexus was thus replaced by a simpler and more easily workable test. Are the goods actually delivered in the taxing State, as a direct result of a sale or purchase for the purpose of consumption therein? Then, such sale or purchase shall be deemed to have taken place in that State and outside all other States ;
>
> "The words 'in which goods have actually been delivered' ensure that goods have come into the State and the expression for the purpose of 'consumption in the State' shows that though the tax is formally laid on sales, its incidence is aimed at the consumers in the State" (at p. 752),

and passages of a like type occurring elsewhere in the judgment. From these the argument urged was that it was sufficient if as "a result of the sale" the goods "reached" some place outside the State. That is not however how we consider the judgment has to be understood. If under the terms of the contract between the parties, and as one of the stipulations therein, a delivery has taken place within the State, the Constitution does not envisage a fictitious or notional second delivery of the same goods outside the State affording a like exemption by reason merely of the goods being transported outside the State by the purchaser even though it be by a transaction which forms part of the very delivery to him. In our opinion the actual

1. (1953) 1 M.L.J. 743 : (1953) S.C.J. 373 (S.C.).

delivery referred to in the *Explanation* is a delivery by the seller to the buyer and not the delivery involved in a buyer's agent to whom goods have been delivered in this State transporting them across the border and handing them over to his principal. We are therefore clearly of the opinion that the petitioner is not entitled to exemption under the *Explanation* to Article 286 (1) (*a*) of the Constitution.

The next question that falls for consideration is whether the petitioner is entitled to a refund of half the tax paid on these sales under section 7 of the General Sales Tax Act. From the section which we have extracted above, it will be seen that two conditions are necessary before the exemption can be invoked. One is that the terms of the contract should provide for delivery outside the State and secondly that in pursuance of such a contract the goods must have been (actually) delivered outside. It will thus be noticed that the requirements of section 7 of the General Sales Tax Act are even stricter and the exemption narrower than that embodied in the *Explanation* to Article 286 (1) (*a*). Therefore in a case to which the latter provision is not attracted, the provisions of section 7 cannot possibly apply. In the present case, the contract stipulates for delivery inside the State and so the terms of section 7 of the General Sales Tax Act are not brought into play.

The result is that the petition fails and is dismissed with costs. Counsel's fee Rs. 100.

R.M. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

Family Manager Ponnuswami Goundar .. *Petitioner**

v.

Sinnana Goundar and others .. *Respondents.*

Court-fees Act (VII of 1870), section 7 (iv) (d)—Suits Valuation Act, section 9—Notification, dated 1st November, 1943, under—Scope and effect of.

There are two conditions to be satisfied before a plaint could be held to fall within the Notification; dated 1st November, 1943, under section 9 of the Suits Valuation Act relating to relief of injunction with reference to immovable property. The first is that the suit should be one for an injunction in relation to immovable property restraining the defendant from disturbing the plaintiff's possession or enjoyment. Secondly, it must be possible to gather from the plaint an allegation that the ground on which the defendant is seeking to disturb the plaintiff's possession is on foot of a denial of the plaintiff's title. Unless both these conditions are satisfied the notification will not be attracted and the plaintiff can value the suit under section 7 (iv) (*d*) of the Court-fees Act.

The allegation in the written statement cannot possibly bear upon the question of the Court-fee payable by the plaintiff which must be determined wholly on the allegations in the plaint and the relief sought on such allegations.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif, Udumalpet, dated 24th March, 1954 and made in O.S. No. 509 of 1952.

S. Gopalaratnam for the Petitioner.

P. S. Ramachandran for Respondents.

The Court made the following

ORDER.—This revision petition by the plaintiff in O.S. No. 509 of 1952 on the file of the District Munsif's Court, Udumalpet, is against the Order of the District Munsif as regards the Court-fee payable on the plaint and raises for consideration the proper construction of the notification of 1st November, 1943, issued by the High Court under section 9 of the Suits Valuation Act as regards suits for injunction in relation to immovable property.

The notification is in these terms :

* C.R.P. No. 718 of 1954. 29th March, 1955.

"In suits for injunction where the relief is sought with reference to any immovable property on the ground that the defendant denies title of the plaintiff to the property and disturbs or threatens plaintiff's possession thereto, the value of the subject-matter of the suit shall not be less than half the value of the immovable property calculated in the manner provided for by paragraph (v) of section 7 of the Court-Fees Act of 1870.

The question for consideration in the revision is whether the plaintiff has to value the suit in accordance with this notification. The allegations in the plaint are that certain immovable properties were purchased by the father of the plaintiff from the defendants on 13th August, 1947, under a registered sale deed and that ever since the date of the purchase the plaintiff's family had been in enjoyment thereof. The plaint goes on to say that the plaintiff's father having died a few weeks before the date of the suit, the defendants, taking advantage of the plaintiff's youth were threatening to tresspass upon the suit properties and disturb his enjoyment. He therefore prayed that a permanent injunction might issue preventing the defendants from interfering with his peaceful enjoyment of the suit properties. He valued the relief under section 7 (iv) (*d*) of the Court-fees Act at Rs. 10 and paid a court-fee of Re. 1-2-0 on the basis of this valuation.

In their written statement the defendants denied the plaintiff's title to the properties and also raised for the consideration of the Court whether the suit was properly valued. On this latter contention an additional issue No. 6 was framed and the learned District Munsif held that the suit had to be valued in accordance with the notification, and had directed the appointment of a Commissioner to ascertain the market value of the property. It is against this finding of the learned District Munsif that this revision has been filed by the plaintiff.

The reasoning by which the learned District Munsif reached his decision against the plaintiff was that as the suit was admittedly one for a permanent injunction it fell within section 7 (iv) (*d*) of the Court-fees Act under which Court-fee is payable according to the amount at which the relief sought is valued in the plaint. The relief sought was with reference to immovable property and therefore this condition of the notification was also satisfied. The only question that remained related to the other condition required before the notification could apply, namely :

"that the relief of injunction should be sought on the ground that the defendant denied the title of the plaintiff to the property and disturbed or threatened to disturb plaintiff's possession".

The plaintiff had averred that the defendants were threatening to disturb his possession and enjoyment. The question therefore narrowed down to this, *viz*., whether that portion of the notification which refers to the relief being sought on the ground that the defendant denied the title of the plaintiff to the property was satisfied or not. In dealing with this the learned District Munsif referred to the written statement filed by the defendants in which they attacked the reality of the sale to the plaintiff's father alleging that this was benami for themselves. From this he drew the inference that the substance of the suit was one in which the plaintiff was seeking the relief of injunction on the ground that the defendants attacked his title. He was concious that there was no allegation in the plaint regarding the denial of his title and so stated :

"It is true that the plaint does not contain any allegation that the defendants are denying the title of the plaintiff. But according to the notification for valuing the subject-matter of the suit, an all gation of a mere threat to disturb plaintiff's possession is sufficient to call upon the plaintiff to value the subject-matter at half the market value of the property involved. The effect of the notification is that the plaintfff cannot value the suit at less than half the value calculated in the manner mentioned therein in a suit for an injunction upon an allegation that the defendant is threatening to disturb the plaintiff's possession of the property."

In support of this construction which he placed on the notification the learned District Munsif referred to two decisions of this Court in In re *Ghosh Beevi*[1], and *Sri Sri Satyabhigna Theerthaswamy of Uttaradi Mutt by Alur Markapuram Srinivasacharyulu* v. *Mundra Narasayya*[2].

1. (1944) 1 M.L.J. 340.
2. (1947) 2 M.L.J. 182.

Having considered the matter carefully I find I cannot agree with the view expressed by the learned District Munsif. The notification in question is a fiscal enactment and unless its words are completely satisfied the litigant cannot be charged with the fee payble under it. Under section 7 (iv) (*d*) of the Court-Fees Act and before the notification the plaintiff was free to put his own valuation which was not open to revision by the Courts. In variation of this right we have the notification of 1st October, 1943, the terms of which I have extracted above. There are two conditions specified in it before it could be attracted; the first being that it must be a suit for an injunction in relation to immovable property necessitated by the defendants disturbing or threatening to disturb the plaintiff's possession of the property. There is also a second condition laid down, namely, that, the plaint must allege that the defendant was thus threatening to disturb his possession on the ground that the plaintiff had no title to the property. The construction put upon the notification by the learned District Munsif, if accepted, would virtually lead to the elimination of the second condition which I have set out above and I do not consider that this result could be achieved on any reasonable principle of construction. One thing is clear that the allegations in the written statement or the issues raised thereby cannot possibly bear upon the question of the Court-fee payable by the plaintiff. This must be determined wholly by the allegations contained in the plaint and the relief sought on the basis of such allegations. If the written statement of the defendants were eliminated what we have in the present case is merely a suit for an injunction in relation to immovable property restraining the defendants from disturbing or unlawfully interfering with the plaintiff's possession of the property belonging to the plaintiff on the allegation that this was done taking advantage of the plaintiff's youth and inexperience. On these allegations in the plaint, the present suit would not fall within the scope of the notification but under section 7 (iv) (*d*) under which the plaintiff can value the suit without reference to the market value. In this connection it would be useful to refer to the language of the proviso which was intriduced by the Madras amendment to section 7 (iv) (*c*) of the Court-Fees Act, in these terms :

> "In suits coming under sub-clause (*c*) in cases where the relief sought is with reference to any immovable property such valuation shall not be less than half the value of the immovable property calculated in the manner provided for by paragraph V of the section."

It will be noticed that the proviso is satisfied by the relief of declaration being with reference to any immovable property. The ground upon which the relief is sought is not made an additional condition or part of the qualification for attracting the operation of the proviso.

I will now make a brief reference to the decisions relied on by the lower Court which in my opinion do not support the interpretation sought to be put upon them. In re *Ghosh Beevi*[1], was concerned merely with the question whether the notification was prospective or could apply to appeals filed after that date notwithstanding that it was not in force when the suit was originally instituted. It was assumed that if the notification were in force the suit would fall within its terms but there is no discussion as regards the conditions which have to be satisfied before the notification could be attracted to any particular plaint. *Sri Sri Satyabhigna Theerthaswamy* v. *Narasayya*[2], is a decision by Govindarajachari, J., and the only question considered was whether the trees standing on the land were or were not immovable property within the meaning of the notification. Here also it was assumed that if the answer to this question was in the affirmative the suit was covered by the notification. Besides these two decisions referred to in the order of the learned District Munsif my attention has been drawn to an unreported decision by Horwill, J., in C.R.P. No. 118 of 1946. The learned Judge recognised the necessity for the two conditions namely the injunction relating to immovable property and the plaint raising a question of title, to be satisfied before the notification could be brought into play. The learned Judge, however, on the facts and from the plaint as a whole drew the

1. (1954) 1 M.L.J. 340.
2. (1947) 2 M.L.J. 182.

inference that the plaint had made an allegation of that sort. This decision therefore does not really decide the point now arising as the learned Judge held that both the conditions were satisfied. I might also refer to a decision of Venkatarama Ayyar, J., in *Pappukannu Anni* v. *Thoppayya Mudaliar*[1], where the learned Judge had to deal with the question whether a suit for an injunction in relation to an easement could fall within the scope of the notification. The learned Judge held that such suits fell within section 7 (iv) (*d*) and therefore were not governed by it. But dealing with this notification he said :

> " I am unable to see how this notification applies to the present case. That in terms applies, only when the relief is asked for on the ground that the title of the plaintiff is disputed and possession is in consequence sought to be disturbed.

In my judgment there are two conditions to be satisfied before a plaint could fall within the notification. The first is that it must be a suit for an injunction in relation to an immovable property restraining the defendant from disturbing the plaintiff's possession or enjoyment. Secondly it must be possible to gather from the plaint an allegation that the ground on which the defendant is seeking to disturb the plaintiff's possession is on foot of a denial of the plaintiff's title. Unless both these conditions are satisfied, the notification will not be attracted and the plaintiff can value the suit under section 7 (iv) (*d*) of the Court-Fees Act. On this basis the Court-fee originally paid by the plaintiff is sufficient. The result is that this revision is allowed and the finding of the learned District Munsif on the additional issue No. 6 is set aside. There will be no order as to costs in this revision.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Rama Varma Elaya Raja and another .. *Petitioners**

v.

Chirikkal Kovilakath Kerala Varma Raja and others .. *Respondents.*

Malabar Law—Suit against a karnavan to call him to account for specific misappropriation—If could lie without a prayer for his removal as karnavan.

Practice—Revision against preliminary finding—Scope—Madras Marumakkattayam Act (XXII of 1933)—*Effect.*

Under Malabar Law a suit to call a karnavan to account even for a specific misappropriation does not lie without a prayer for his removal as karnavan. In legal theory there is not much difference between the position of a kartha of a joint Hindu family under Mitakshara or Dayabagha Law and a karnavan under the Marumakkathayam Law or an ejaman under Aliyasanthana Law. So long as his position as such continues junior members cannot call upon him to account.

The Madras Marumakkattayam Act (XXII of 1933) has not altered this position which was the customary law of Malabar prior to the Act.

The High Court has power to interfere in revision and to set aside a preliminary finding on the maintainability of a suit even though it may have the effect of dismissing the suit *in toto*.

Petition under section 115 of Act V of 1908 praying the High Court to revise the decree of the Court of the Subordinate Judge of Tellicherry, dated 18th December, 1951, and passed in O.S. No. 90 of 1950.

M. Chinnappan Nair for Petitioner.

K. Kutti Krishna Menon, A. Achuthan Nambiar, M. Karunakara Nambiar, O.T.G. Nambiar and *G. Maheswaran* for Respondents.

The Court delivered the following

JUDGMENT.—The petitioners are defendants 3 and 5 in a suit O.S. No. 90 of 1950 filed by a junior member of the Chirikkal Kovilakam, an impartible Marumakkatayam tarwad included in the schedule to section 42 (1) of the Madras Maru-

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1. (1952) 2 M.L.J. 108.

* C.R.P. No. 556 of 1952. 16th March, 1955.

makkatayam Act, XXII of 1933. No less than 68 members of the tarwad were impleaded as defendants. The nature of the plaint, which is prolix and sought to be made as complicated as possible, is best reflected in the reliefs sought, a direction to the first defendant as karnavan and manager of the Kovilakam, and the 2nd defandant as *de facto* manager and head kariasthan and agent of the first defendant, to render a true, correct and proper account of various items 7 in number, detailed in the plaint, and for recovery from defendants 1 and 2 of the amounts so found due, which on a correct taking of the accounts defendants 1 and 2 are seen to have misappropriated. The other specific relief was an order for costs against defendants 1 and 2. I have reproduced the language in the relief portion of the plaint as nearly as possible.

The first defendant was the karnavan and Valiya Raja as he is called, the tarwad being a large one, possessed of very considerable property. At the time of the suit he was an old man aged about eighty. The plaint alleges misappropriation of seven different kinds : (1) that the first defendant misappropriated the surplus income in collusion with the second defendant who was managing the affairs of the Kovilakam since 1935 ; (2) that first defendant had amassed a large fortune in the name of his wife and his children by acquisitions in their names out of Kovilakam income ; (3) that the second defendant has similarly amassed large wealth by misappropriating Kovilakam moneys; (4) that money obtained by granting demises and renewal fee collections which should have gone into the Kovilakam accounts have been misappropriated and suppressed; (5) contributions raised for a building in connection with a High School to the extent of Rs. 20,000 were not brought into account and fraudulently suppressed ; (6) that valuable movables such as gold swords, gold cups and jewellery belonging to the Kovilakam, which are really family heirlooms have been wrongfully sold by the karnavan and their value misappropriated in collusion with the second defendant and (7) that the second defendant was fraudulently diverting an amount of 1000 seers of paddy each year from the Kovilakam assets for the personal needs of his wife. Accounts were sought to be taken as regards all these alleged misappropriations for no specified period in the plaint, but it would appear from about the year 1933.

The plaint allegations had the active support of the 7th, 16th, 19th and 20th defendants. Defendants 3, 5, 6, 8, 9, 14, 21, 39, 44, 50, 57 and 59 supported the 1st defendant contending that he was an ideal karnavan who managed the tarwad affairs satisfactorily, their written statements stoutly denying that there was any fraud or misappropriation. The other defendants were *ex parte* and no inference can be drawn from this that they are in any way supporting the plaintiff. Defendants 1 and 2 contended *inter alia* that the suit as framed was not maintainable in law and the learned Additional Subordinate Judge went elaborately into this issue and found that it was maintainable. This revision petition seeks to challenge this finding.

A previous Civil Revision Petition No. 51 of 1952 was filed by the first and second defendants, but dismissed *in limine* by Ramaswami, J. The 1st defendant died subsequently and has been succeeded by the 3rd defendant as karnavan and Valiya Raja. Defendants 3 and 5 succeeded in getting the present C.R.P. No. 556 of 1952 admitted by Raghava Rao, J., and furthermore, obtained an order confirming the stay in the suit in C.M.P. Nos. 3161 of 1952 and 3459 of 1952 from Ramaswami, J., himself before whom these matters came up in the Admission Court. In a considered order Ramaswami, J., expressed the specific opinion that his dismissal of the previous petition C.R.P. No. 51 of 1952 would not preclude defendants 3 and 5 coming forward with their contentions or him from dealing with them himself in the Admission Court.

I may dispose of here a preliminary objection strongly urged by Mr. Kuttikrishna Menon for the plaintiff-respondent that the dismissal of C.R.P. No. 51 of 1952 to revise this finding by defendants 1 and 2 who were alone affected by it, concludes the matter as against the other defendants also against whom no relief is sought in the suit. Mr. Chinnappan Nair for the 3rd defendant has strongly urged

that he is very directly affected by the finding of maintainability as if the trial of the suit is to be proceeded with, a great burden will be placed upon him as karnavan and Valiya Raja of producing several cart-loads of accounts covering a period of more than twenty years, and that he would be put to unnecessary harassment and vexation in defending a suit which is really not maintainable in law. I am quite unable to see how the dismissal of C.R.P. No. 51 of 1952 by Ramaswami, J., *in limine* filed by defendants 1 and 2 can operate in the circumstances as, *res judicata*, or *per se* bar the hearing on its merits of the present revision petition admitted by another learned Judge of this Court. Mr. Chinnappan Nair has relied strongly on the observations of Ramaswami, J., in granting stay as being due to a consciousness that his dismissal *in limine* of C.R.P. No. 51 of 1952 was not justified. All that I am prepared to say is that the orders passed by the late Raghava Rao, J., and by Ramaswami, J., on this revision petition and the connected petitions for stay remove all legal impediments which may have existed which would otherwise normally bar defendants in turn seeking to get a revision petition dismissed *in limine* by one Judge admitted by others.

Mr. Kuttikrishna Menon has next challenged the maintainability of this revision petition. He has relied on *Vythilinga Pandara Sannidhi* v. *Sankaralinga Thambiran*[1], in which Beasley, C.J. and King, J., observed that because a High Court has power to interfere in revision it ought not to do so unless the particular point can be shortly and conveniently disposed of through this avenue. There can be no doubt as regards the power of the High Court to interfere in revision and to set aside a preliminary finding such as this though it may have the effect of dismissing the suit *in toto* and indeed in view of the length and the elaborate nature of the learned Judge's finding and my own diffidence in the domain of Marumakkatayam and Aliyasanthana law on which I do not claim to have had much experience, my first impluse was to dismiss the petition. I have, however, allowed Mr. Chinnappan Nair's urgent plea that he be given an opportunity to take me into the legal merits. I did so on the distinct understanding that I would on no account interfere in revision unless I was quite satisfied that the finding of the learned Subordinate Judge was wrong in law, and that if I had any doubt about this, I would feel myself constrained to dismiss the petition. The result is that I have had placed before me able and interesting arguments on the legal position by Mr. Chinnappan Nair for the petitioners, Mr. Kuttikrishna Menon for the plaintiff-respondent and also by Mr. O.T.G. Nambiar who has appeared for the 2nd defendant and claimed his right to be heard, though his own revision petition was dismissed *in limine* as a respondent served on this petition.

The main contention against the maintainability of such a suit against the karnavan boils down simply to this, that under Malabar law a suit of this kind to call a karnavan to account even for a specific misappropriation does not lie without a prayer for his removal as karnavan. In legal theory there is not much difference between the position of a *kartha* of a joint Hindu family under Mitakshara or Dayabaga law and a karnavan under the Marumakkatayam law or an ejaman under Aliyasanthana law. It is well settled in Hindu law, despite the argument of Mr. Kuttikrishna Menon who is unable to cite a single decision to the contrary, that as regards the *kartha* of a joint Hindu family under Mitakshara law, a suit for an account even for any specific misappropriation will not lie except in a suit for partition, and so long as the manager of the family continues in this position as such, junior coparceners cannot call upon him to account. This is so for obvious and practical reasons, because if the family is to continue joint, there is no one really capable in law of representing it and bringing the Manager to account. This position is made clear in Mayne's Hindu Law, 11th Edition, at page 367, where authority is cited for the position of a *kartha* or manager being *sui generis* : the relation between him and the other members of the family being not that of principal and agent, or of partners, but more like that of a trustee and *cestui que trust*. Several decisions which I need not refer to specifically are cited there to

1. (1934) 68 M.L.J. 218 : I.L.R. 58 Mad. 771.

support the position that if a *kartha* spends more for family purposes than other members approve of, the only remedy of the latter is to have a partition. In the case of tarwads under Marumakkatayam Law, as regards which until Act XXII of 1933 was passed there was no right of partition, the corresponding remedy for a junior member was to file a suit for removal of the karnavan and in such a suit he could be called to account. In Sundara Ayyar's " Malabar and Aliyasanthana Law", at page 53, the position of the karnavan as it stood in 1922 was described as follows :—

> " If the karnavan squanders the family income, there is no means of recovering it for the family. There is no precedent for compelling the manager to make good out of his private properties the loss sustained by the family by his improvidence or even by his fraudulent dealing. The only remedy that the family has is to remove him. We must take the observations in *Kenath Puthan Vttil Tavazhi* v. *Narayanan*[1] in this sense."

There can I think be no doubt that this was the customary law of Malabar prior to Act XXII of 1933 despite Mr. Kuttikrishna Menon's arguments to the contrary that junior members of the tarwad did have the right of suing the karnavan independently for alleged specific misappropriation.

Mr. Kuttikrishna Menon has relied somewhat strongly on the observations of Jackson, J., in *Manavedan* v. *Sredevi*[2], a Bench decision of the year 1926, on which Mr. Chinnappan Nair also relies for the petitioners. It must be stated at the outset that in that suit some junior members of a tarwad sued for the removal of the karnavati on allegations of fraud, mispppropriation of family funds in general and devoting the funds to her particular branch. In the course of the suit the first defendant ceased to be karnavati, because under the family law of succession she moved to a higher sphere. There was therefore no longer any question of removing her and the suit was dismissed. Mr. Kuttikrishna Menon has sought to harness in support of this plaint certain observations of Jackson, J., which however must be taken in the context of that suit, which was one for the removal of the karnavati. For instance when Jackson, J., said at page 439 ;

> " If it be proved against him that he has abused this discretion and fraudulently misappropriated the family estate, he must account for that transaction. If it be proved generally that he is a bad manager, he will be liable to removal."

All that was intended to apply to a suit for removal, I am unable to see anything in this Bench decision which supports the maintainability of the present claim.

The reason why the present claim has not included a prayer for the removal of the karnavan seems to be due to an obvious fiscal hurdle, the heavy Court-fee payable on one-third the value of the entire tarwad property, which in the case of the present tarwad is admitted to be very considerable (*vide* Appendix C to Krishnamachari's Court-fees Act of 1951 under Government notification, dated 20th February, 1903). In the Appendix on " Marumakkattayam and Aliyasanthana Law " to "Mayne's Hindu Law and Usage", for which we are indebted to my learned brother Govinda Menon, J., I can find no support whatever for the contention of Mr. Kuttikrishna Menan that even for alleged fraudulent misappropriations a junior member of the tarwad can maintain a suit without a prayer for the removal of the karnavan. There is a wealth of authority to support the position that it is only under very special circumstances that a junior member of a tarwad can maintain a suit on behalf of the tarwad, and where the Karnavan has made an improper alienation of tarwad property, a Court will interfere at the instance of a junior member but cannot challenge an alienation made by a deceased karnavan without proving that the next succeeding karnavan was consulted and declined to sue. In *Vasudevan* v. *Sankaran*[3], it was held that a decree against a karnavan in a suit in which he is joined as a defendant in his representative capacity, which he honestly defends, is binding on the other members of the family, though not actually made parties. I have not been referred to a single decision prior to Act XXII of 1933 in which a karnavan has been sued for an account even on specific allegations of misappropria-

1. (1904) 14 M.L.J. 415 : I.L.R. 28 Mad. 431. 182 (F.B.).
2. (1926) 52 M.L.J. 277 : I.L.R. 50 Mad. 129 (F.B.).
3. (1897) 7 M.L.J. 102 : I.L.R. 20 Mad.

tion except in a suit for his removal. This undoubtedly in my opinion was the customary law in Malabar prior to Act XXII of 1933.

The next point for determination is whether this customary law has in any way been changed by this Act which introduced drastic changes in the old law. It is true that under section 32 of this Act the karnavan shall keep true and correct account of the income and expenditure of the tarwad and the accounts of each year shall be available for inspection at the tarwad house by the major anandravans once in a year during a specified period, and that they may take copies or extracts from such accounts. Under section 50 nothing contained in the Act shall be deemed to affect any rule of Marumakkatayam Law, custom or usage, except to the extent expressly laid down in the Act. The position was considered in *Thachunni* v. *Unniappan*[1] where the learned Bench held that under the customary law of Malabar a junior member of the tarwad was not entitled to sue the karnavan for accounts, that section 32 of the Act does not contemplate such a suit but only the maintenance of correct accounts and their production for inspection. There is absolutely no warrant in Act XXII of 1933 for such a suit for an account against the karnavan on misappropriations of various descriptions over a period of more than 20 years, and the maintainability of this suit must be determined on customary Marumakkatayam Law which has in this respect not been altered by proved custom or judicial decisions. Rather curiously the learned Subordinate Judge has come to the conclusion that the present suit was maintainable on the strength of observations in *Manavedan* v. *Sredevi*[2] forgetful of the fact that the suit in that case was one for the removal of the karnavati. It is true that Jackson, J., in that decision cited *Vasudevan* v. *Sankaran*[3] as authority for the position that members other than the karnavan have the right to prevent the karnavan from wasting or improperly alienating the family property. But in the very next paragraph he made the following observation :

> "In these circumstances it would seem proper that the karnavan should make good from his personal estate any of his defalcations from the family property ; but there happens to be no case directly in point."

Whether this observation had reference to a suit for the removal of a karnavan in which such personal liability was sought to be fastened or not is not easy to say. Even assuming that Jackson, J., expressed the opinion that it would seem proper that a karnavan should make good from his personal estate defalcations from family property in a suit for an account without a prayer for the karnavan's removal, I do not think that this opinion can form the basis of customary law in the absence of a judicial decision specifically determining this point.

I have found it extremely difficult to follow the reasoning of the learned Additional Subordinate Judge in paragraphs 25 and 26 of his finding, which is tantamount to holding that although the suit is filed as one for account under section 7 (4) (*f*), it was a suit alleging specific acts of misappropriation and was therefore maintainable. After giving my best consideration to the state of Malabar law on the liability of karnavans to account, I have not the least hesitation in finding that a suit such as that framed in the present case calling on the karnavan to account for alleged acts of misappropriation of various descriptions covering a period of over twenty years without a prayer for his removal is not maintainable in law. As I observed *supra*, if I had any doubt myself about the incorrectness of the Subordinate Judge's finding, I would have had no hesitation in dismissing this petition. Having however come to this conclusion it appears to me to be my duty to reverse the Subordinate Judge's finding of maintainability and to direct the dismissal of the suit with costs. It is a well-established principle that in deciding a point of maintainability the plaint allegations only have to be considered and that no extraneous material should in determining jurisdiction or maintainability be invoked.

The learned Subordinate Judge in setting out the pleadings referred to a contention in the written statement of defendants 1 and 2 that the whole of this suit was

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1. (1945) 1 M.L.J. 7 : I.L.R. 1948 Mad. 558.
2. (1926) 52 M.L.J. 277 : I.L.R. 50 Mad. 431.
3. (1897) 7 M.L.J. 102 : I.L.R. 20 Mad. 129 (F.B.).

engineered by a dimissed kariasthan, one Parameswaran Embrandiri who was in his employ for many years. I feel it my duty to mention that this individual was present in Court during the hearing of this revision petition which went well into its second day. Plaintiff is a young man and a very junior member of this tarwad. His plaint does not indicate the sources from which he obtained a great deal of detailed knowledge as regards the alleged misappropriations relied on. Nor is it averred that he availed himself of the right conferred upon him by section 32 of the Act to inspect the accounts maintained by the karnavan during the specified period for each year under this section. There appears to me considerable substance in the contention of Mr. Chinnappan Nair that this suit is a harassing and vexatious one with a fishing and roving enquiry into 20 years' accounts as its objective, and that although no specific relief is sought in the plaint against the 3rd defendant who is now the karnavan, he will be put to a very great deal of trouble and annoyance and vexation during the trial of the suit if it is to be permitted. I consider that in the circumstances he is perfectly entitled to contend in revision that the suit also on this ground is not maintainable as lacking in *bona fides* apart from its maintainability under customary Malabar law. In the result the petition is allowed with costs against the plaintiff-respondent. Advocate's fee fixed at Rs. 150.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

Sengoda Goundan .. *Appellant**

v.

Muthuvelappa Goundan minor by next friend Palani Goundan and others. .. *Respondents.*

Hindu Law—Joint family—Alienation of unproductive property—When valid and binding on minor members as being for benefit of the family.

The sale of unproductive family property at an advantageous price for the purpose of buying other land could be supported on the ground of benefit of the family. But where though the sales were for an adequate price and but for a town planning scheme the properties (dry lands) would have had no appreciable market value and were not fetching any income to the family, in the absence of proof of utilisation of the sale proceeds in the purchase of other property for the family the alienations cannot be held to be for the benefit of the family. The only equity to which the alienees are entitled is to have the properties alienated allotted to the shares of the members of the family who were parties to the alienations.

Appeal under clause 15 of the Letters Patent preferred to the High Court against the Judgment and Decree of the Hon'ble Mr. Justice Subba Rao, dated 17th January, 1951 and passed in Appeal No. 534 of 1947, referred to the High Court against the decree of the Court of the Subordinate Judge of Coimbatore, dated 11th December, 1946 and passed in O.S. No. 149 of 1945.

K. S. Desikan, T. Raghavan and *M. R. Narayanaswami* for Appellant.

B. V. Viswanatha Aiyar, T. R. Srinivasa Aiyar and *A. Shanmughavel* for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal under the Letters Patent against the judgment of Subba Rao, J., in A.S. No. 534 of 1947, which arose out of a suit filed by the first respondent in the Court of the Subordinate Judge, Coimbatore, for partition of joint family properties. The plaintiff is the grandson of the first defendant-appellant before us, by a deceased son whose widow is the fourth defendant, The 2nd and 3rd defendants are two other sons of the 1st defendant. The plaintiff claimed a one-fourth share in the suit properties after setting aside certain alienations which had been made by the 1st defendant and others. The 1st defendant and other alienees pleaded *inter alia* that the properties in suit were the self-acquisitions of the 1st defendant, but that plea was found against, and it has not been pressed

* L.P.A. No. 167 of 1951. 15th February, 1955.

before us. There was a further plea that the alienations were binding on the plaintiff, as they were made either for necessity or for the benefit of the family. The learned Subordinate Judge upheld all the alienations except in regard to item 6 and passed a preliminary decree for partition in regard to the remaining family properties. The plaintiff filed an appeal to this Court which was heard by Subba Rao, J., as mentioned above. The learned Judge held that some of the alienations were valid and binding on the plaintiff on the ground that they were made, for necessity. He differed from the trial Judge and held that the other alienations were not binding on the plaintiff, as they could not be supported either on the ground of necessity or benefit of the family. The 1st defendant has filed this appeal in respect of the alienations which had been held to be not binding on the plaintiff.

The learned Judge dealt with the several alienations in five groups : the first of these groups we are not concerned with, because the learned Judge has upheld the alienations falling in this group. The second group comprises two sales covered by two deeds, dated 2nd November, 1935, in favour of defendants 23 and 24, Exhibit P-12 and D-22. The third group comprises two sales under Exhibit D-23 and Exhibit D-24, dated 6th February, 1937 and 22nd May, 1939, in favour of defendants 25 and 26, and 27th defendants respectively The fourth group comprises 12 sales made between 22nd April, 1940 and 21st May, 1941, in favour of defendants 28 to 42. It is not necessary to give a reference to the sale deeds as they are mentioned in the judgment of Subba Rao, J. In the fifth and last group fall 7 sales under deeds executed between 26th April, 1943 and 10th May, 1943, in favour of defendants 43 to 50. It may be mentioned that in the sale deeds falling in the fourth group there were recitals that the plaintiff's share of the consideration had been paid to the plaintiff's mother, 4th defendant, while in the sale deeds falling in the 3rd group there were recitals that the plaintiff's share of the consideration had been left with the respective vendees.

The learned Judge, Subba Rao, J., held that the alienations falling within these four grounds, that is, groups 2 to 5 could not be supported either on the ground of necessity or benefit to the family. Learned counsel for the appellant, Mr. Narayanaswami, did not attempt to argue that these alienations could be supported on the ground of necessity. He confined his argument to the contention that they would be justified on the ground of benefit to the family. He developed the argument thus : The lands covered by these alienations were dry lands which were not yielding any income to the family or to use his expression, they were unrproductive properties. They, however, became valuable, because of a town planning scheme which had been made by the Municipality and therefore, there was the prospect of obtaining a good price for the lands if and when sold in small plots. So it was argued that the family stood to gain by these alienations. Learned counsel relied upon the judgment of Yahya Ali, J., in In re *Thiruvengada Mudaliar*[1], as supporting his contention that a sale by the manager of a joint family of family of lands which had not been yielding any income, for an advantageous price which could be obtained because of special circumstances would *per se* be for the benefit of the family. We, however, do not agree that the decision of Yahya Ali, J., supports this proposition. In that case, the father and manager of a Hindu joint family who had two adult sons and five minor sons applied to this Court on the Original Side under clause 17 of the Letters Patent for being appointed guardian of the family property and for sanction of the sale of that property as being beneficial to the interests of the minor sons. The learned Judge found that the proposed sale was highly advantageous to the interests of the entire family, including the minors and gave his sanction subject to proper safeguards being provided for the minor's share of the purchase money, by being invested in Government Securities, which should be deposited with the Registrar of the High Court. This circumstance, namely, that in giving the sanction the learned Judge gave directions as to the disposal of the minor's share of the sale proceeds is not without significance, as that should not be treated separately from the order granting sanction. If so viewed, the decision is in accordance with other decisions

1. (1948) 2 M.L.J. 47.

of this Court in which, for instance, it was held that sale of unproductive family property at an advantageous price for the purpose of buying other land could be supported on the ground of benefit of the family. The instances given by Venkatasubba Rao, J., in *Sellappa Chettiar* v. *Subbanna Chettiar*[1], are all instances where these two elements are present, namely, sale of unproductive property and investment of the proceeds in purchase of other and better productive property. In this case, it may be assumed that the sales were for an adequate price and that but for the town planning scheme these properties would have had no appreciable market value and were not fetching any income to the family. But the latter requirement is totally absent. There is no evidence, and it was not even suggested that with the proceeds of these sales other income-fetching property was purchased. There was an attempt to rely upon a purchase made by the mother, the 4th defendant (Exhibit D-15) as having been made with the plaintiff's share of the purchase money. But that attempt failed as the mother herself denied that the property had been purchased for the benefit of the minors. In the absence, therefore, of any proof of utilisation of the sale proceeds in the purchase of other property for the family, we must hold that the alienations were not for the benefit of the family. In this view, it is immaterial whether the plaintiff's share of the consideration was received by the mother in any of these transactions or whether the plaintiff's share was retained by the respective vendees. We agree with Subba Rao, J., that the alienations were not for the benefit of the family and therefore were not binding on the plaintiff.

The learned Judge Subba Rao, J., himself directed that in the final decree proceedings the properties alienated to the various defendants should be allowed to the shares of the members of the family who were parties to the alienations. In our opinion, this is the only equity to which the alienees are entitled.

This would not affect the rights, if any, which the 1st defendant may have either against his vendees or against the 4th defendant, consequent on the setting aside of the alienations so far as the plaintiff's share is concerned. The rights *inter se* between the 1st defendant and his alienees or between the 1st defendant and the 4th defendant are outside the scope for the suit for partition.

In the result, the appeal fails and is dissmissed with costs of the plaintiff-respondent.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

Shah Mohammad Khan .. *Petitioner**

v.

H.N. Woodfall .. *Respondent.*

Civil Procedure Code (V of 1908), Order 37—Suit under—Application for leave to defend—If could be entertained after the period of ten days from the date of service of summons prescribed by Article 159 of the Limitation Act.

Under Order 37, rule 3 of the Code of Civil Procedure the Court shall, upon application by the defendant, give leave to appear and defend the suit instituted under the provisions of the said Order, after the defendant satisfies the Court by facts disclosed in affidavits that there is *prima facie* defence. Article 159 of Schedule I to the Indian Limitation Act prescribes a period of ten days from the time when the summons is served for an application for leave to appear and defend a suit under Order 37 of the Code of Civil Procedure. An application filed after the prescribed period of ten days would be barred by limitation and will have to be rejected under section 3 of the Limitation Act, unless the period is extended under any of the provisions contained in sections 4 to 25 of the Limitation Act. Section 5 of the Limitation Act has not been made applicable to an application under Order 37, rule 3 of the Code of Civil Procedure. Hence the Court has no power to extend the period of ten days prescribed by Article 159 of the Limitation Act. Except in cases of fraud when section 18 of the Limitation Act would apply there is no other provision of law under which the period for filing an application under Order 37 of the Code can be extended.

James Manickam v. *Jaya Narayana Daga*, (1953) 1 M.L.J. 825, approved.

1 (1937) 1 M.L.J. 422 ; I.L.R. (1937) Mad. 906.

*C.R.P. Nos. 1885 and 1886 of 1953. 18th March, 1955.

Murahari Rao v. *Bapayya*, (1949) 1 M.L.J. 514 and *Srinivasan* v. *Baktavatsalu Naidu*, (1953) 2 M.L.J. 180, dissented.

Hence a Court has no power to condone the delay in filing an application for leave to defend under Order 37, rule 3 of the Code of Civil Procedure. The provision in Order 37, rule 4, which relates to a stage after decree, has no bearing on this question.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the Orders of the Court of the Subordinate Judge of Coimbatore, dated 2nd September, 1953 and made respectively in I.A. Nos. 265 and 266 of 1953 in O.S. No. 126 of 1953.

Inamdar Abdus Salam for Petitioner.

T. R. Srinivasa Aiyar for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—These revision petitions were first heard by Somasundaram, J., who directed them to be posted before a Division Bench, because of the conflict of decisions on the only question which arises in these petitions, namely, whether an application for leave to defend in a suit under Order 37, of the Code of Civil Procedure can be entertained after a period of ten days, from the date of service of the summons.

The question appears to us to admit only of one answer. Before dealing with the decisions on the question, the material statutory provisions may be first noticed. Under Order 37, rule 3 of the Code of Civil Procedure, the Court shall, upon application by the defendant, give leave to appear and defend the suit, after the defendant satisfies the Court by facts disclosed in affidavits that there is *prima facie* defence. Order 37, rule 2 (2) of the Code, provides that in any case in which the defendant has not obtained such leave, the allegations in the plaint shall be deemed to be admitted and that the plaintiff shall be entitled to a decree. We are not now concerned with the provision in rule 4 of Order 37 which empowers the Court in special circumstances to set aside the decree and then give leave to the defendant to appear and defend the suit. Article 159 of Schedule I to the Indian Limitation Act prescribes a period of ten days from the time when the summons is served for an application for leave to appear and defend a suit under Order 37 of the Code of Civil Procedure. So an application filed after the prescribed period of ten days would be barred by limitation and will have to be rejected under section 3 of the Limitation Act, unless the period is extended under any of the provisions contained in sections 4 to 25 of the Limitation Act. Section 5 is one such section. It runs thus :

"Any appeal or application for review of judgment for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period".

This section has not been made applicable to an application under Order 37, rule 3, of the Code. Therefore, the Court would have no power to extend the period of ten days prescribed by Article 159. We are not aware of any other provision of law under which the period for filing an application under Order 37 can be extended, except no doubt where fraud is alleged, in which case section 18 of the Limitation Act would apply.

In the case before us, the application under Order 37, rule 3 of the Code was admittedly filed out of time. That was why the defendant filed along with it another application (I.A. No. 266 of 1953) purporting to be under section 5 of the Limitation Act, to condone the delay in filing the application. This was allowed. The petitioners' contention is that the Court had no power to condone the delay, as section 5 of the Limitation Act did not apply. It appears to us impossible to resist this objection.

So far, we have not referred to the decisions on the question. The first of these is that of Mack, J., in *Murahari Rao* v. *Bapayya*[1]. The learned Judge held that the

1. (1949) 1 M.L.J. 514.

Court had power to give the defendant leave to defend notwithstanding the fact that he had not made an application for such leave within ten days of the service of summons. The reasoning on which he came to this conclusion may be best set out in his own words. The learned Judge said :

"It is true that there is no specific provision in Order 37, rule 2 or in the Limitation Act empowering a Court to condone a delay in appearance beyond the ten days prescribed by the summon in Form No. 4. Technicality can be met with technicality, because the default recited in this summons for non-appearance within ten days is that the plaintiff will be entitled after the expiration of this period to obtain a decree with costs. It is common ground that no decree was passed by the Court when the defendant filed his application for leave to defend on the 11th day. Furthermore under Order 37, rule 4, even after decree the Court may, under special circumstances, set aside and give leave to the defendant to defend the suit on terms it thinks fit. *A fortiori* if the Court has passed no decree, it clearly has ample discretion to give the defendant such leave, notwithstanding the fact that he has not appeared within ten days of the service of the summons on him in Form No. 4, Appendix B ".

The learned Judge finally enunciated a general rule that

" It is not necessary that every procedural order of the Court should be supported by a specific statutory provision, and when there is neither provision nor prohibition it has to be guided by ordinary principles of common sense, justice, equity and good conscience."

The next case in which the same question arose is *James Manickam* v. *Jaya Narayan Daga*[1]. Chandra Reddy, J., held that there was no power in the Courts to condone the delay in filing the application for leave to defend. The decision of Mack, J., was cited but he expressed his respectful disagreement with it.

After pointing out that Order 37 does not contain any provision for extending the time and that section 5 of the Limitation Act has not been extended to an application under Order 37, rule 3, he observed :

" When a period has been fixed for the purpose of doing an act or taking a proceeding under the statute of Limitations or under any other enactment, Courts do not possess the power to extend the time unless and until such a power is specifically conferred upon them. In this case the Courts have not been invested with such a power. That being so, in my opinion, it is not competent for a Court acting under Order 37, Civil Procedure Code, to excuse delay in filing an application for leave to appear and defend in a suit under the Summary Chapter ".

The learned Judge also referred to certain observations in a decision of the Division Bench in *Kamalamma* v. *Ismail*[2], to which we shall refer later. In *Srinivasan* v. *Baktavatsalu Naidu*[3], Govinda Menon, J., followed the decision of Mack, J., and held that the period of ten days fixed under Article 159 of the Limitation Act is not an inflexible one and that in a proper case leave to defend could be granted *ex debito justitiae* even though an application for leave was filed after the period prescribed by Article 159.

With great respect to the learned Judges, Mack, J., and Govinda Menon, J., we must express dissent from their view. We shall first take up the reasoning of Mack, J. The learned Judge is of the opinion that because no decree was passed by the Court when the defendant filed his application for leave to defend, the application would not be barred, even though filed after the time prescribed. We find it difficult to follow this reasoning. The only question before the Court is whether an application under Order 37, rule 3, is maintainable, and if so, under what provision. The learned Judge has no answer to this question. Equally, we are unable to see how Order 37, rule 4, has any bearing on this question. That provision refers to a stage after decree. Nor are we able to accept the dictum of Govinda Menon, J., that it cannot be said that the period of ten days fixed under Article 159 of the Limitation Act is an inflexible one. We have never heard of any Article of the Limitation Act being flexible. The learned Judge was inclined to hold that Article 159 only prescribed the period of ten days when the summons did not specifically fix a date for the hearing. But Article 159 applies to all applications for leave to appear and defend, and the third column is specific as to the date from which limitation begins to run, namely, when the summons is served. With

1. (1953) 1 M.L.J. 825.
2. (1951) 1 M.L.J. 676.
3. (1953) 2 M.L.J. 180.

great deference to the learned Judges, we may say that though the bar of limitation may be technical, nevertheless Courts must apply the statutory provisions imposing such bar. Section 3 of the Limitation Act is mandatory, and when an application is filed beyond the time prescribed by the relevant Article, it must be dismissed unless the period can be extended under one or other of the provisions contained in sections 4 to 25 of the Limitation Act. In this case, admittedly section 5 of the Limitation Act which is the only section which could have saved the application from the bar of limitation has no application. The result is that the delay in filing an application under Order 37, rule 3, cannot be condoned. The decision in *Kamalamma* v. *Ismail*[1], to which one of us was a party, was not concerned directly with an application under Order 37, rule 3 of the Code. But the reasoning in that decision proceeded on the assumption that there was no provision for enlargement of the time prescribed for an application under Order 37, rule 3 of the Code of Civil Procedure.

We are in entire agreement with the reasoning and conclusion of Chandra Reddy, J., in *James Manickam* v. *Jayanarayana Daga*[2], which was apparently not brought to the notice of Govinda Manon, J., in *Srinivasan* v. *Baktavatsalu Naidu*[3].

We hold that the Court had no power to condone the delay in filing the application under Order 37, rule 3. The two Civil Revision Petitions are, therefore, allowed and the applications by the defendant are dismissed with costs in the Court below. There will be no order as to costs in the Civil Revision Petitions.

R.M. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE BALAKRISHNA AYYAR.

Singaraju *alias* Lurtharaju .. *Petitioner**.

Criminal Procedure Code (V of 1898), section 109 (a)—Order to furnish security—When sustainable.

Section 109 (*a*) of the Code of Criminal Procedure is directed against a person taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, when there is reasons to believe that such person is taking such precautions with a view to committing any offence. A suspect mixing with the crowd or moving into the crowd in the third class waiting shed in the Railway station while not purchasing any ticket himself, does not amount to taking precautions to conceal one's presence within the local limits of a Magistrate's jurisdiction. An order directing such a person to furnish security under section 109 (1) (*a*), Criminal Procedure Code, to be of good behaviour is unsustainable.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the Order of the Fourth Presidency Magistrate, George Town, Madras, of the Court of the Presidency Magistrate, Madras, dated 8th January, 1955 and made in M.P. No. 394 of 1954.

A. C. Muthanna for the State Prosecutor (*S. Govind Swaminathan*) for the State.

The Court made the following

ORDER.—The Fourth Presidency Magistrate, George Town, directed the petitioner under section 109 (*a*) of the Code of Criminal Procedure to furnish security in the sum of Rs. 100 with one surety in a like amount to be of good behaviour for a period of six months. As he failed to furnish the surety demanded, he was committed to prison. Section 109 (*a*) of the Code of Criminal Procedure is directed against a person taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, when there is reason to believe that such person is taking such precautions with a view to committing any offence. But the evidence adduced in this case does not fulfil the requirements of the section. No doubt, P.W. 2 deposed that at about 8-45 P.M. on 10th December, 1954, when he

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1. (1951) 1 M.L.J. 676.
2. (1953) 1 M.L.J. 825.
3. (1953) 2 M.L.J. 180.

*Criminal Revision Case No. 120 of 1955. 23rd March, 1955.
(Criminal Revision Petition No. 116 of 1955).

was watching suspects in the third class waiting shed in the Central Station he noticed the petitioner moving about and dashing into the crowd while not purchasing any ticket himself, and that he arrested him on suspicion. Now, mixing with the crowd, or moving in and out of the crowd or dashing into it does not amount to taking precautions to conceal one's presence within the local limits of a Magistrate's jurisdiction.

The order made by the learned Magistrate appears to be clearly unsustainable and it is set aside. The petitioner will be set at liberty unless he be otherwise lawfully detained.

K.S. —— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Srimathi Ananthalakshmi Ammal .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), *section* 34 (*as it stood in* 1943-44)—*Scope*—" *Definite information* "—*What constitutes*—*Competent appellate authority reversing a finding of fact that business of wife held by the Income-tax Officer to be really that of husband*—*Subsequent notice to wife under section* 34—*If sustainable.*

The Income-tax officer on the facts placed before him held that the business and income (claimed to be that of a separate business of a wife) belonged to her husband and included it in his taxable income. The Appellate Tribunal to which the husband ultimately appealed held on 3rd November, 1945, that the business and income belonged to the wife. The Income-tax Officer thereupon initiated proceedings under section 34 of the Income-tax Act and on 15th January, 1948, he assessed her to income-tax on her income for 1942-1943. In the circumstances,

Held : The order of the Appellate Tribunal, dated 3rd November, 1945, did not constitute " definite information " as a consequence of which the Income-tax Officer discovered that the income of the assessee in 1942-1943 has escaped assessment.

Commissioner of Income-tax v. *Janab S. Khaderwalli Saheb*, (1951) 2 M.L.J. 183, relied on.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Income-tax Act (XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act (VII of 1939), in 66 R.A. No. 230 (Madras) of 1951-52 on its file for decision on the following questions of law, *viz.*:

"Whether the assessment proceedings under section 34 were validly initiated."

K. Srinivasan for Applicant.

C. S. Rama Rao Sahib, for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The assessee, Srimathi Ananthalakshmi Ammal, is the wife of S.S. Ramudu Ayyar. He was a partner of Sri Kothandarama Spinning Mills, Mathurai, with a substantial income of his own. In the assessment year 1943-44 the assessee submitted a return which showed an income of Rs. 40,387 in the accounting year ending with 13th April, 1943, which, she declared, constituted her profit that year from the trade she had carried on in cotton. She claimed that she had carried on that business with the help of her brother, Nageswara Ayyar, as her clerk and power-of-attorney agent. He was also an employee of Sri Kothandarama Spinning Mills. The Income-tax Officer held on the facts placed before him that the business and the income belonged to Ramudu Ayyar and included it in his taxable income. The Appellate Tribunal, to which Ramudu Ayyar ultimately appealed, held on 3rd November, 1945, that the business and the income belonged only to Ramudu Ayyar's wife. The Income-tax Officer, thereupon, initiated proceedings under section 34 of the Income-tax Act and on 15th January, 1948, he

*Case Referred No. 4 of 1952. 6th April, 1955.

assessed her to income-tax on her income for 1942-43, the main item of which was the profits of the business in cotton. The contention of the assessee, that the finding of the Tribunal in the appeal preferred by Ramudu Ayyar did not constitute definite information and that it did not lead to any discovery within the meaning of section 34 of the Act was overruled by the departmental authorities, and the Tribunal agreed with them. On the application of the assessee, the Appellate Tribunal stated a case and referred to this Court under section 66 (1) of the Act the following question :

"Whether the assessment proceedings under section 34 were validly initiated."

The relevant portion of section 34 of the Act as it stood in the assessment year ran :

" If in consequence of definite information which has come into his possession the Income-tax Officer discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year . . . . . the Income-tax Officer may . . . . . . serve on the person liable to pay tax on such income, profits or gains . . . ."

Despite the frame of the question referred to this Court, the real question that arises for determination is, whether in the circumstances of this case the order of the Appellate Tribunal, dated 3rd November, 1945, constituted definite information as a consequence of which the Income-tax Officer discovered that the income of the assessee in 1942-43 had escaped assessment.

The Income-tax Officer recorded in his assessment order, dated 15th January, 1948 :

" The assessee's income from trade in cotton amounting to Rs. 40,387 was originally included in the total income of her husband S. S. Ramudu Ayyar and assessed in his hands. On appeal the Appellate Tribunal deleted the sum included from the total income of her husband.

This definite information which has come into my possession subsequently has led to the discovery that the income of the assessee has escaped assessment in her hands. Hence notice under section 34 were issued to the assessee."

Did this finding satisfy the requirements of section 34 as it stood in the relevant assessment year is the question.

Though what constitutes " definite information " within the meaning of section 34 must necessarily depend upon the circumstances of each case, and there can be no rule of universal application, in our opinion, the rule laid down by a Bench of this Court in the *Commissioner of Income-tax* v. *Janab S. Khaderwalli Saheb*[1], governs this case, and the question referred to us must be answered in favour of the assessee.

It was a well-settled proposition of law to which Viswanatha Sastri, J., referred in *Commissioner of Income-tax* v. *Janab S. Khaderwalli Saheb*[1].

" It is clear that mere change of opinion based on the same facts and figures which were present to the mind of the Income-tax Officer at the time of the original assessment does not amount to discovery."

The learned Judge observed further :

" The discovery must be the result of definite information, that is to say, new information that has come to the knowledge of the Income-tax Officer. The Income-tax Officer cannot act under this section even though the tax-payer has escaped assessment if he is acting on information which was already in his possession and within his knowledge. Unless it can be said that there is fresh information which was not in his possession at the time when the original assessment was made, action under section 34 of the Income-tax Act is not justified. The mere fact that a different opinion on the same facts was taken by somebody else is not definite information leading to discovery on the part of the Income-tax Officer who was in possession of the same facts and entire facts at the time of the original assessment."

We respectfully agree with these observations.

The learned counsel for the respondent contended that the "definite information" required by section 34 would also include a decision on matters of law or on matters of mixed fact and law rendered by a competent appellate authority. It is not

1. (1951) 2 M.L.J. 183.

necessary for us to consider in this case under what circumstances a provision of law which had been overlooked in the original assessment or an authoritative pronouncement of law by a Court either with reference to the same assessee or another assessee, subsequent to this original assessment would amount to definite information within the meaning of section 34. In the case before us, the question for decision all through was one of fact: whose was the income, the assessee's or her husband's? The Income-tax Officer applied his mind and adjudicated upon the question at issue, and that decision on a question of fact was reversed as erroneous by a competent appellate authority. That appellate decision with nothing more will not amount to definite information within the meaning of section 34 of the Act to enable the Income-tax Officer to exercise the powers conferred on him by section 34 with reference to the same set of facts. In this case the order of the Income-tax Officer, dated 15th January, 1948, made it clear that the only basis on which he invoked section 34 was the decision of the Appellate Tribunal. He realised he had committed a mistake. The facts for consideration remained the same. Only his erroneous decision was eliminated. It was nothing more than a change of opinion on the same set of facts, though the change in this case was apparently forced by the decision of the Tribunal. There was no definite information or any discovery in consequence of such information with the meaning of section 34.

The question is answered in the negative and in favour of the assessee. The assessee will be entitled to the costs of this reference. Counsel's fee Rs. 250.

K.S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAJAGOPALAN.

The Executive Officer for Sri Navaneethakrishnaswami Devasthanam, Veerakeralampudur .. *Appellant**

v.

Rukmani and Company, Ltd., through its Director L. Muthiah and others .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *section* 45—*Compensation amount deposited with Tribunal—Claims to payment out of—Principles—Decree against holder of impartible estate—How far binding—Repeal of Madras Impartible Estates Act (II of* 1904) *by section* 56 *of Madras Act (XXVI of* 1948)—*Effect—Agreement to finance litigation—If champertous—Contract Act (IX of* 1872), *section* 56—*Applicability—Frustration.*

In disposing of the claim under section 45 of the Madras Estates (Abolition and Conversion into Ryotwari) Act the Tribunal has to determine the creditors who are lawfully entitled to have their debts paid from and out of the assets of the impartible estate taken over and the amount to which each of them is entitled. After deducting this amount the balance of the total compensation is divisible among the sharers and the maintenance-holders; the total amount payable to the maintenance-holders should not in any event exc ed one-fifth of the remainder after payment to the creditors. The balance of the aggregate compensation after paying the maintenance-holders the one-fifth has to be divided among the sharers, as if they owned such balance as a joint Hindu family and a partition thereof being effected among them on the notified date.

The estates notified by the Government under the provisions of the Madras Estates Abolition Act and taken over may be divided broadly into two classes, partible estates and impartible estates. Partible estates may be separate property of the owner or may be joint family property of which the owner is the manager and the head. In the case of latter estates, under the rules framed under the Act by the local Government by virtue of the power vested in them under section 67 of the Act, it is provided by rule 2, that if the partible property were joint family property before the notified date the Tribunal shall determine the aggregate compensation payable. Out of the compensation payable the Tribunal should in the first instance determine the creditors who are lawfully entitled to have their debts paid from and out of the assets of the estate and the amount to which each of them is entitled. It is only the remainder of the compensation that is divisible amohg the sharers and the maintenance-holders, so that if the creditors' debt is one which binds the joint family estate it will be a debt payable from and out of the assets of the estate. If it is not so payable it could only be paid out of the share of the compensation money payable to the sharer and he has no right to proceed against the entire compensation. The maintenance claim in the case of a partible joint family property also has to be

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*S.T. Appeal Nos. 10 to 12 of 1953. 6th May, 1954.

determined by the Tribunal as laid down by the rules. After these two classes of claims are determined, the balance of the aggregate compensation is divided among the sharers as if they owned such balance as joint family property and a partition thereof had been effected on the notified date.

In the case of impartible estates it may be the separate property of the holder or may be one which cannot be regarded as the property of joint Hindu family for the purpose of ascertaining succession, in which event section 45 of the Estates Abolition Act does not apply, and perhaps the procedure prescribed under section 44 may have to be applied. But if the impartible estate is regarded as the property of a joint Hindu family for the purpose of succession, undoubtedly section 45 and the procedure laid down for distribution of the compensation will apply. The creditor under section 45 (3) of the Abolition Act has to establish that he is entitled to have his debt paid from and out of the assets of the impartible estate. If he is so entitled the amount to which he is entitled has also to be determined under this clause. If the debt, whether secured or unsecured, is one which is payable out of the assets of the impartible estate, then alone is he entitled to be paid out of the total compensation amount deposited. But if it is not so payable, he cannot proceed against the entire compensation. He may be entitled to be paid only from and out of the share of the sharer who is liable to pay the debt. The test to be applied to determine the validity and binding nature of the debt is to consider whether, at the time it was incurred it could be said to be a debt binding on the estate within the meaning of section 4 of the Madras Impartible Estates Act, and the fact that to day when the claim against compensation is put forward the person who had incurred the debt is alive and the question of successor who could impeach the validity of the debt does not arise does not make any difference. If the debt, when it was contracted, whether secured or unsecured, could not be said to be a debt falling within section 4 of the Madras Impartible Estates Act so as to bind the estate, it could not be enforced against the compensation amount but would be payable only from out of the share of the principal landholder. The legislature must have meant to draw the line at the date on which the debt was incurred. The circumstances attendant on the date the compensation amount was claimed are not material. If it is binding only on the life estate-holder the creditor has no claim against the estate and against the entire compensation amount deposited with the Tribunal.

The position of an impartible estate-holder apart from section 4 of the Impartible Estates Act, has now been clearly established by decisions. The income is at his absolute disposal and the power of alienation is analogous to that of a manager of a joint Hindu family under section 4 of the Impartible Estates Act. When, therefore, a claim against the estate is made in respect of acts not his own, but that of some predecessor, or even by a person claiming a hostile title to the estate, and the litigation is fought out *bona fide*, a decree obtained in such a suit would obviously bind the successor. It would be illogical to deny him in such a case the power to compromise the litigation for the benefit of the estate and to compel him to fight the litigation to the finish to the detriment of the estate. He should have the same kind of discretion which the manager of a joint Hindu family or the widow who inherits a limited estate possesses under Hindu law. Such compromise decree is binding on the estate.

The English law of champerty does not apply to India and agreements to finance litigation are not opposed to public policy. But if such agreements are contrary to principles of equity and good conscience or unconscionable and extortionate in their terms, Courts would not enforce the agreements according to their terms.

In the circumstances and the difficult situation in which the borrower was placed when he had to recover a big fourtune (an impartiable estate) against heavy odds and other would-be financiers demanded onerous terms, the agreement by the borrower to pay a heavy sum as bonus and also give some portion of the property in case he succeeds in the litigation which the creditor was financing up to the final decision by the Privy Council cannot be said to be a bargain which is extortionate or unconscionable in the circumstances of the case.

On the construction of the agreement and compromise decree in respect of that agreement it was held that the liability to pay the amount to the financier was not conditioned on the continued existence of the estate. All that was provided in those documents was the mode of discharging the debt from and out of the assets of the estate with a charge on it. There is no frustration of contract or impossibility of specific performance by reason of the abolition of the estate. In view of section 56 of the Indian Contract Act, recourse cannot be had to principles of the English law on the subject of frustration of contracts.

The estate is represented by the compensation money against which a statutory right is conferred upon creditors, who could establish that their debts were liable to be paid out of the assets of the zamindari.

A *cestui que trust* claiming to follow trust property (on the ground that trust funds were mixed with the zamindari's property which had ultimately been converted into the compensation) is not a creditor as understood by section 45 of the Madras Estates Abolition Act.)

Appeal against the Order of the Court of the Estates Abolition Tribunal, Mathurai, dated 7th March, 1953 and passed in O.P. No. 64 of 1952.

M. Seshachalapathy and *T. M. Chinnayya Pillai* for Appellant in S.T.A. No. 10 of 1953.

A. Sundaram Ayyar and *M. Natesan* for Respondents in S.T.A. No. 10 of 1953.

M. Natesan, R. Ramamurthi Ayyar and *V. Meenakshisundaram* for Appellants in S. T. A. Nos. 11 & 12 of 1953.

A. Sundaram Ayyar for Respondents in S. T. A. Nos. 11 & 12 of 1953.

The Advocate-General, (*V. K. Thiruvenkatachari*) for the Madras State.

The Advocate-General, (*D. Narasaraju*) for the Andhra State.

The Court delivered the following

JUDGMENT.—These three appeals were preferred under section 51 of the Madras Estates (Abolition and Conversion into Ryotwari) Act (Madras Act XXVI of 1948) to the Special Tribunal against the decision of the Estates Abolition Tribunal, Mathurai, in O.P. Nos. 63 and 64 of 1952. S.T.A. No. 10 of 1953 is by the Executive Officer of Sri Navaneethakrishnaswami Devasthanam, Veerakeralampudur, against the decision in O.P. No. 64 of 1952. S.T.A. No. 11 of 1953 is by the zamindar and his two sons against the decision of the Tribunal in O.P. No. 64 of 1952 relating to Uthumalai estate. S.T.A. No. 12 of 1953 is also by the same persons against the decision in O.P. No. 63 of 1952 and pertains to Surandai estate.

All these appeals relate to claims preferred by various persons to the compensation deposited by the Government after the estates of Uthumalai and Surandai were taken over after the notification, dated 3rd January, 1951, under the Madras Estates (Abolition and Conversion into Ryotwari) Act, hereinafter called the Act. The Tribunal declared that the first petitioner in O.P. Nos. 63 and 64 of 1952 was entitled to a sum of Rs. 1,33,250-5-7 out of the deposit to the credit of Uthumalai and Surandai estates, and petitioners 2 to 5 were similarly entitled to a sum of Rs. 2,05,572-0-6. A sum of Rs. 86,941-13-0 was directed to be kept in deposit pending decision in O.P. No. 129 of 1952 in respect of the claim by the Union Government for the payment of income-tax. From out of the balance after keeping the said amount in deposit a sum of Rs. 1,556-0-4 was directed to be paid to the employees by the consent of all parties. There was available from and out of the deposit a sum of Rs. 75,662-3-4 and the first petitioner was directed to be paid out this amount. The other petitioners Nos. 2 to 5 did not get anything as the entire amount was directed to be paid to the first petitioner in O.P. No. 64 of 1952. In O.P. No. 63 of 1952 a sum of Rs. 14,034-0-0 was directed to be paid to the first petitioner and as no more money was available no order for payment of any amount to petitioners 2 to 5 was directed. The petitioners and the respondents in O.P. Nos. 63 and 64 of 1952 are the same. O.P. No. 64 of 1952 related to Uthumalai estate and O.P. No. 63 of 1952 related to Surandai estate, and both form part of the impartible estate of Uthumalai and was included in the schedule to the Madras Impartible Estates Act II of 1904.

The estates of Uthumalai and Surandai were notified on 3rd January, 1951, under the Act. For Uthumalai and Surandai zamins respectively were deposited in the office of the Tribunal Rs. 1,64,160 and Rs. 14,054. In respect of this compensation deposited with the Tribunal there were several claims. The landholder himself filed O.P. No. 209 of 1951 and there were claims by maintenance-holders and also by persons claiming to be creditors of the zamindar. Income-tax was payable to the Union of India and they filed O.P. No. 129 of 1951. The Executive Officer of Sri Navaneethakrishnaswami Deity, Veerakeralampudur, filed O.P. No. 125 of 1951. There were other petitions also by other people details of which are set out in the judgment of the Tribunal but they are not very material. The two petitions which were taken up for trial, and in which the maintenance-holders and creditors were allowed to contest the claim by filing counter-affidavits were O.P. Nos. 63 and 64 of 1952. They were made *eo nomine* parties and were allowed to contest the petitions.

O.P. Nos. 63 and 64 of 1952 were filed under section 42 of the Act. In O.P. No. 64 of 1952 the prayer of the petitioners was that a sum of Rs. 1,33,250-5-7 out of the compensation amount should be paid to the first petitioner and a sum of Rs. 30,909-9-10 to petitioners 2 to 5 from and out of the compensation amount deposited with the Tribunal in respect of Uthumalai estate. In O.P. No. 63 of

1952 the same petitioners prayed that a sum of Rs. 14,034 should be paid to the petitioners 2 to 5 from the compensation amount deposited with the Tribunal. The first respondent in these two petitions was the zamindar, the holder of the impartible estate which was taken possession of by the Government under the provisions of the Act and respondents 2 and 5 were his minor sons represented by their mother and guardian Rani Rama Thalavachi Nachiar. The claim of the petitioners was founded on the ground that they had a charge for the amount of the claim over the enetire estate of Uthumalai and Surandai under a compromise decree, to which the first respondent, the zamindar, was a party and which was made in O.S. No. 25 of 1941, on the file of the Sub-Court, Tirunelveli, on 24th March, 1945, (Exhibit A-38). That suit was filed by petitioners 2 to 4 who are the sons of the 5th petitioner, and one Sundaram Chettiar. Petitioners 2 to 4 were plaintiffs 1 to 3 in that suit and Sundaram Chettiar was the fourth plaintiff. The fifth petitioner was the 19th defendant in that suit and the Imperial Bank of India was the 18th defendant. The present zamindar, who is the first respondent in the petitions, was the second defendant, and his father who was then alive was the first defendant. The decree in that suit was for a sum of Rs. 6,25,000 and out of the said sum a sum of Rs. 3,24,609-14-3 was to be paid to the Imperial Bank of India with interest at 4½ per cent. per annum. The compromise decree declared a charge over the entire zamindari of Uthumalai and Surandai for the full amount of Rs. 6,25,000. The claim of the Imperial Bank of India, it is common ground, was subsequently satisfied. The claim, therefore of the petitioners alone remained undischarged.

To appreciate the contentions between the parties it is necessary to state the background and the facts which led up to the compromise decree in O.S. No. 25 of 1941. On the 12th July, 1891, Hirudalaya Marudappa Thevar, the then zamindar of the impartible estate of Uthumalai, adopted a boy called Navaneethakrishna Marudappa Thevar. Hirudalaya died on 12th August, 1891 and immediately after, the death of the adoptive boy also followed on 16th November, 1891. Hirudalaya had two wives and in making the adoption he associated the junior wife, Meenakshi, with him, and after the death of the boy dispute to the succession to the estate arose between the two widows of Hirudalaya, each claiming to be the mother of the adopted boy. It was finally settled by the Privy Council in *Annapurni Nachiar* v. *Forbes*[1], that as Meenakshi, the junior widow, was associated in the adoption she was entitled to inherit the impartible estate on the death of the adopted son in preference to the senior widow, Rani Annapurni Nachiar. Meenakshi held the estate till her death in 1921. At the time of her death the estate was under the management of the Court of Wards. After her death there were three claimants to the estate. One Subbiah Thevar claimed to be a *bandhu* of the last male-holder entitled to succeed to the estate. Another person put forward a claim to the estate on the ground that he was the adopted son and a third person also raised a similar claim that he was the second adopted son. The result of these claims was the institution of three suits in 1922, O.S. Nos. 3, 2 and 1 of 1922, on the file of the District Court of Tirunelveli by the respective claimants. It was estimated that the value of the claim was about Rs. 8 lakhs. Subbiah Thevar had no money to fight the litigation and had necessarily to approach people who were willing to finance the litigation to its successful termination. On 18th November, 1921, he entered into a financing agreement, Exhibit A-69, with one Thamthaseen Taraganar, a merchant, and in consideration of Taraganar carrying out the covenants of the agreement he was promised possession of the estate together with pannai lands (private lands) for a period of 12 years after the estate was put into his possession besides promising to give to him absolutely 50 kottahs of first class wet land in the village of Viranam belonging to the estate to be selected by him, with the condition attached, however, that he should convert them into ryoti lands and pay Rs. 5 per acre per year. Taraganar, however, disappointed Subbiah Thevar, and he was at his wit's ends to find another person to render him financial help to fight the battle to the finish. Several persons came forward, but they demanded heavy dividends

1. (1899) 9 M.L.J. 209 : L.R. 26 I.A. 246 : I.L.R. 23 Mad. 1 (P.C.).

and stipulated onerous conditions. Finally, on 22nd May, 1925, Exhibit A-1 an agreement to finance the litigation, was entered into between Subramanya Chettiar the fifth petitioner and Subbiah Thevar. Shortly stated the terms of the said agreement were that the financier should spend for the litigation up to a lakh of rupees till it reached the final termination in the Privy Council and in consideration of the advance made by him he should be paid a sum of Rs. 5 lakhs as bonus over and above the one lakh of rupees and certain extents of private lands also should be handed over to him. Exhibit A-1 also provided that, if it became necessary for the financier to spend more than Rs. 1 lakh, it was agreed that the excess amount so spent by him should be repaid with compound interest at 2 per cent. per annum, with six monthly rests from the date of such excess expenditure. There were also other terms which would be adverted to in due course when dealing with the binding nature of the agreement. There was a supplemental agreement on 30th October, 1926, Exhibit A-2, which added to the terms of the previous agreement, and under which certain private lands were agreed to be given to the financier. On 3rd January, 1929, the suit was decreed in favour of Subbiah Thevar, and on 11th February, 1929, under Exhibit 44 the amount due to the financier, Subramanyam Chettiar was settled at Rs. 9 lakhs, which consisted of the Rs. 1 lakh originally advanced, Rs. 5 lakhs promised to be paid as bonus and Rs. 3 lakhs consisting of the principal and interest on the amounts advanced by the financier over and above the amount of Rs. 1 lakh. In due course appeals were preferred against the three decisions to the High Court. When the litigation was pending in the High Court, differences arose between Subbiah Thevar and the Chettiar regarding the amounts advanced and the arrangement to be made for carrying on the appeals in the High Court and also in case there should be further appeals to the Privy Council, such appeals. The differences at that time became very serious. Subbiah Thevar was represented by eminent counsel, Mr. Grant and Mr. K. S. Krishnaswami Ayyangar. Mr. Grant intervened between the parties, and in order to have independent advice for the zamindar the good offices of Mr. Patanjali Sastri, as he then was, were utilised. With the advice of these three eminent counsel a settlement was reached between the parties, which is evidenced by the agreement of 29th April, 1929, Exhibit A-16. The litigation in the High Court terminated successfully in 1935 and the appeal therefrom to the Privy Council was also successful (1951). The decision of the Judicial Committee is reported in *Balasubramanya* v. *Subbayya*[1]. Under the terms of the agreement, Exhibit A-15, while this litigation was pending in the High Court certain amounts which were in deposit in Court were drawn, and Subbiah Thevar was put in possession of the estate, subject to certain conditions imposed by the High Court. The financier assigned a portion of his rights under the agreement to the Imperial Bank of India who helped in advancing the necessary money for the litigation. Though the financier received a portion of the amount, the balance due to him was not paid by Subbiah Thevar even after the termination of the litigation in the Privy Council; and Subbiah Thevar died on 1st January, 1941. As the financier could not recover his moneys and had assigned a portion of his rights to others it became necessary to institute a suit O.S. No. 25 of 1941, for the recovery of the amount, and to that suit Subbiah Thevar's son, Sivagnana Marudappa Pandian, the father of the present zamindar, was impleaded as the first defendant, and his son, the present zamindar, Navaneethakrishna Sivasubramanya Hirudalaya Marudappa Pandian, as the second defendant. The Imperial Bank of India was impleaded as the 18th defendant, and the financier, Subramanyam Chettiar, as the 19th defendant. The suit was hotly contested and every interlocutory application in the case was brought to the High Court in revision. The trial proceeded, and the evidence of Mr. Patanjali Sastri who by then had become a Judge of the High Court, of Mr. Grant and that of Mr. Krishnaswami Ayyangar, who had also become a Judge, was recorded on commission. A number of documents were exhibited. While the examination of the financier as a witness was proceeding, wiser counsel prevailed, and the parties thought it proper to settle the matter, and for that purpose they obtained adjournments from the Court

1. (1938) 1 M.L.J. 426 : L.R. 65 I.A. 93 : I.L.R. (1938) Mad. 551 (P.C.).

from time to time. The trial actually commenced on 22nd December, 1944. On 12th February, 1945, a joint petition, Exhibit A-54, was filed by both parties before the trial Judge in which it was stated that the parties were trying to settle the matter out of Court and for that purpose the parties went to Madras to consult the Imperial Bank of India a week's adjournment was prayed for settlement. The financier who was actually under cross-examination had also to go to Madras, and therefore it was put forward as an additional reason for adjourning the case for a week. On this application the suit was adjourned to 19th February, 1945. On the 19th again another joint petition was filed (Exhibit A-55) praying for further time which was granted by the Judge. In the affidavit in support of this application it was stated :

> " After a prolonged scrutiny of the various items of the claims, the details thereof, the several agreements, and other documents, the second defendant, the plaintiffs, 18th and 19th defendants have yesterday reached an agreement as to the amount binding on the estate and payable and also what immovable properties have to be given over as proper and reasonable performance of the agreements, having in view the provision of section 4 of Act II of 1904 ".

By this time the first-defendant died and the second defendant became the zamindar. On 27th February, 1945, Exhibit A-56 (*a*) another joint application was filed requesting the court to adjourn the trial of the suit for three weeks which was again granted by the learned Judge. The compromise was ultimately reached by the parties and a deed of compromise dated 24th March, 1945, was put into Court praying that a decree may be passed in accordance with the razinama, Exhibit A-32. To this compromise the present zamindar, who was described as the proprietor of the zamindari and also manager of the joint family, Subramanyam Chettiar, the financier, his sons, plaintiffs 1 to 3 in that suit, Sundaram Chettiar, and the Imperial Bank of India were parties. The compromise sets out the facts from the beginning and also settles the amount agreed to be paid to the financier and his assignee, the Imperial Bank of India. The amount settled at a lump sum and agreed to be paid was Rs. 6,25,000 in full quit of the money portion of the claim including costs, and that amount was to carry interest at 4½ per cent. per annum from the date of compromise, and out of it a sum of Rs. 3,24,609-14-3 with interest at 4½ per cent. per annum from the date of compromise was agreed to be paid to the 18th defendant, the Imperial Bank of India, and Rs. 1,44,025-15-0 with interest at 4½ per cent. per annum to Sundaram Chettiar and the balance of Rs. 1,56,364-2-9 was to be paid to the joint family of plaintiffs 1 to 3 and the 19th defendant, that is, the financier. A charge was granted against the estate for these amounts. There were also a number of terms and conditions which would be adverted to in due course. In accordance with this a compromise decree followed in the suit.

This decree is the basis for the claim for compensation that was put forward by the petitioners in these proceedings in O.P. Nos. 63 and 64 of 1952. Under section 42 of the Act, which provides for claims the members of the family claiming portion of such compensation, whether by way of share or by way of maintenance or otherwise and creditors, whether the debts are secured or not, have to apply to the Tribunal within six months from the date on which the amount was deposited or within such time as the Tribunal may in its discretion allow. If the claim is not made within the time specified it shall cease to be enforceable. The procedure prescribed by the Act thereafter is, the Tribunal has to give notice to all persons who had applied under section 42 and to any other persons whom it considers to be interested and should make an enquiry into the validity of the claims received by it and determine the persons, who, in its opinion, are entitled to the compensation deposited and the amount to which each of them is entitled. Section 44 provides for apportionment of compensation by the Tribunal between the principal landholder and any other person whose rights or interests in the estate stand transferred to the Government under section 3, clause (*b*) or cease and determine under section 3 clause (*c*) including persons who are entitled to be maintained from the estate and its income. The apportionment, however, should be made in accordance with the value of their respective interests. Sub-section (2) of section 44 prescribed the mode of valuing those interests, and sub-clause (*a*) of sub-section (2) states that

in the case of impartible estates referred to in section 45, the valuation should be made in accordance with the provisions contained therein, and in such rules not inconsistent with that section as may be made by the Government. No rules have however been made by the Government which are applicable to the claims under section 45. Section 45 is the section which relates to impartible estates which have to be regarded as the property of a joint Hindu family for the purpose of ascertaining the succession thereto immediately before the notified date. Though a contention was raised in the Court below that the Uthumalai estate was separate property of Subbiah Thevar, the grandfather of the present zamindar and that section 4 of the Impartible Estates Act had no application, as the estate was included in the schedule to the Impartible Estates Act, the Tribunal overruled the contention and held that it was an estate governed by the Impartible Estates Act and section 4 applied to it. The rule of devolution is that which applies to the impartible estates which are treated for the purpose of succession as joint family estates. Section 45 of the Act therefore undoubtedly has application to the present case and no dispute was raised before us to the contrary. The case was therefore disposed of by the lower Court and must be disposed of also by us on the footing that section 45 of the Act applies. Under sub-section (2) of the section of the Tribunal has to determine the aggregate compensation payable to the persons enumerated in sub-clauses (*a*) and (*b*) considered each as a single group. The total amount of compensation payable to the maintenance holders shall not exceed one-fifth of the remainder after deducting the amounts payable to the creditors under sub-section (3) of the section. In other words, in disposing of the claims under section 45 of the Act the Tribunal has to determine the creditors who are lawfully entitled to have their debts paid from and out of the assets of the impartible estate and the amount to which each of them is so entitled. After deducting this amount the balance of the total compensation is divisible among the sharers and maintenance holders; the total amount payable to the maintenance holders should not in any event exceed one-fifth of the remainder after payment to the creditors. The balance of the aggregate compensation after paying the maintenance holders the one-fifth has to be divided among the sharers as if they owned such balance as joint Hindu family and a partition thereof being effected among them on the notified date.

The estates notified by the Government under the provisions of the Act and taken over may be divided broadly into two classes, partible estates and impartible estates. Partible estates may be separate property of the owner or may be joint family property of which the owner is the manager and the head. In the case of latter estates, under the rules framed under the Act by the local Government by virtue of the power vested in them under section 67 of the Act, it is provided by rule 2 that if the partible property were joint family property before the notified date the Tribunal shall determine the aggregate compensation payable. Out of the compensation payable the Tribunal should in the first instance determine the creditors who are lawfully entitled to have their debts paid from and out of the assets of the estate and the amount to which each of them is entitled. It is only the remainder of the aggregate compensation that shall be divisible among the sharers and the maintenance holders, so that if the creditor's debt is one which binds the joint family estate it will be a debt payable from and out of the assets of the estate. If it is not so payable it could only be paid out of the share of the compensation money payable to the sharer and he has no right to proceed against the entire compensation. This is provided in section 46. The maintenance claims in the case of a partible joint family property also has to be determined by the Tribunal as laid down by the rules. After the two classes of claims are determined, the balance of the aggregate compensation is divided among the sharers as if they owned such balance as joint family property and a partition thereof had been effected on the notified date. The method therefore adopted in the case of partible joint Hindu family property is very clear and does not present any difficulty. In the case of impartible estates it may be the separate property of the holder or may be one which cannot be regarded as the property of joint Hindu family for the purpose of ascertaining succession, in which event section 45 does not apply, and perhaps the procedure under

section 44 may have to be applied. But if the impartible estate is regarded as the property of a joint Hindu family for the purpose of succession, undoubtedly section 45 and the procedure laid down for the distribution of the compensation will apply. The creditor under section 45 (3) of the Act has therefore to establish that he is lawfully entitled to have his debt paid from and out of the assets of the impartible estate. If he is so entitled the amount to which he is entitled has also to be determined under this clause. If the debt whether secured or unsecured, is one which is payable out of the assets of the impartible estate, then alone is he entitled to be paid out of the total compensation amount deposited. But if it is not so payable, he cannot proceed against the entire compensation. He may be entitled only to be paid from and out of the share of the sharer who is liable to pay the debt. Considerable difficulty was felt in defining the expression " to have their debts paid from and out of the assets of the impartible estate." If the debt was one, whether secured or unsecured, binding on the estate within the meaning of section 4 of the Madras Impartible Estates Act, it is undoubtedly a debt payable out of the assets of the impartible estate, and there is no difficulty in the matter. But if the debt, however, was not one which is binding on the estate under section 4 of the Act but was binding on the holder for the time being, could it be treated as a debt payable out of the assets for the impartible estate, in view of the fact that the holder for the time being is still alive and the Impartible Estates Act is repealed in its application to the estate as and from the notified date as provided by section 66 and there is no question of any successor who could raise the question of the validity and binding nature of the debt on the estate at the time the claim against compensation was made by such a claimant. In view of the conclusion which we have reached in this case, as will be presently shown, it may not be necessary to answer the second question, as in our opinion, the debt in this case is one which is binding on the estate and is payable out of the assets of the impartible zamindari. But we have heard not only counsel appearing in the case but also the learned Advocate-Generals of Madras and of Andhra on this question and we are indebted to them for the able assistance they rendered in the matter. On the whole, though not without hesitation, we have reached the conclusion, that even on the second question, the test to be applied to determine the validity and binding nature of the debt is to consider whether, at the time it was incurred, it could be said to be a debt binding on the estate within the meaning of section 4 of the Act, and the fact that today when the claim against compensation is put forward the person who incurred the debt is alive and the question of successor who could impeach the validity of the debt does not arise and makes no difference. If the debt, when it was contracted, whether secured or unsecured, could not be said to be debt falling within section 4 of the Act so as to bind the estate, it could not be enforced against the compensation amount but would be payable only from out of the share of the principal landholder. The conclusion is in consonance with the scheme of the provisions of the Act and there is no reason to interpret the language applicable in the rules framed under the Act to the partible estates which is identical in terms with the language employed in section 45 (3). The Legislature should have meant to draw the line at the date on which the debt was incurred. The circumstances attendant on the date the compensation amount was claimed are not material. It must be a debt binding on the estate and must be within the provisions of section 4 of the Impartible Estates Act in order to enable the creditor to claim the payment of the amount from out of the assets of the impartible estate. If it is binding only on the life estate holder the creditor has no claim against the estate and against the entire compensation amount deposited with the Tribunal.

The respondents 1 to 3, *i.e.*, the sons of the zamindar and others, raised several contentions before the Tribunal, by which they objected to the payment of the compensation to the petitioners in the two petitions, O.P. Nos. 63 and 64 of 1952. As many as 17 issues were framed by the Tribunal and were considered by it. But most of the issues are not of the case now and the findings of the Tribunal on very many of the issues have not been challenged, and the correctness of them was not canvassed before us by counsel on either side. We must therefore proceed to

dispose of these appeals on the footing, that those findings either for or against the petitioners or respondents in the lower Court are final.

The findings on the issues which were not challenged before us may here be stated. On issue 8 the contention of the petitioners in the lower Court, that the Uthumalai estate was the separate property of Subbiah Thevar and that therefore the decree in O.S. No. 23 of 1941 could not be impeached by respondents 2 and 3, the sons of the present zamindar, under section 4 of Madras Act II of 1904, was rejected, and the issue was found against the petitioners in the lower Court. In view of this findings on issue 8 issue 9 became unnecessary. On issues 10 and 11 it was found that, notwithstanding the repeal of the Impartible Estates Act by section 56 of the Act, section 45 of the Act imposed a duty on the Tribunal to determine the question whether the debts were binding on the estate which was impartible on the date of the notification, and therefore these issues were found against the petitioners. Issue 16 covers the plea of the respondents in the lower Court, *i.e.*, the zamindar's sons, that a sum of Rs. 1,25,000 was paid in addition to the amount given credit to by the petitioners was disbelieved, as during the trial of the petition the fourth petitioner took a special oath in the name of God and denied the receipt of the said amount. The sum therefore was disallowed. Before the Tribunal the zamindar's sons disputed the truth and binding nature of the amounts claimed to have been spent by the financier for the purpose of the litigation. Apart from the admissions of the zamindar in the agreements, the Tribunal considered the question independently and came to the conclusion that all the amounts were in fact spent for the purpose of litigation apart from the sum of Rs. 5 lakhs which was included as bonus. From paragraph 32 onwards of the judgment of the Tribunal these items were considered seriatim, and it was found in paragraph 39 that the financier was able to establish before them that the entire amount claimed except a sum of about Rs. 25,000 was proved to be binding on the estate and in subsequent paragraphs 40 to 43 they also found that other items were binding on the estate. These findings of fact were not disputed before us and no argument was addressed before us to show that the conclusion of the Tribunal was wrong. The finding must therefore be accepted as final.

There is also another aspect of the case which was considered in paragraph 52 of the judgment, and, though pointed attention was drawn to the counsel to the finding in paragraph 52, no attempt was made to show that the view of the Tribunal expressed therein was erroneous. In that paragraph they proceed to discuss the question, that, even if the compromise as such was not binding on the estate, as the petitioners in the lower Court were able to establish the various items of expenditure, that is, the bulk of the consideration, as binding upon the impartible estate, and in respect of those items that were not binding they expressed the view, that, as the amount exceeded the amounts that had been drawn by the financier from Court, which represented the income which the holder of the impartible estate was at perfect liberty to dispose of as he pleased, that appropriation could not be challenged. Deducting the amounts so appropriated the amount claimed now before the Tribunal was much less than the amount which was found by them to be binding on the impartible estate. In this view of the matter they held that the entire amount claimed by the petitioners in the lower Court was due to them and was a binding debt payable out of the assets of the zamindari and that therefore, even if the compromise is held to be not binding on the estate, they would be entitled to the amount claimed. If, therefore, assuming that the Rs. 5 lakhs and odd, which was the bonus promised to the financier by Subbiah Thevar, was not a binding debt on the estate, and if that debt was discharged from the income of the estate by the holder for the time being, the balance that remained represented the binding debt on the estate and was much less than the amount now claimed by the petitioners. They would undoubtedly be entitled to the payment of this amount from out of the compensation. As the appellants before us, *i.e.*, the respondents in the lower Court, did not impugn this view of the Tribunal as incorrect or erroneous, the finding must be upheld and this is sufficient to non-suit the appellants.

Under issues 12, 12 (*a*) and 13 (*b*) it was found there was a clear charge on the entire zamindari in respect of the amounts claimed by the petitioners in O.P. Nos. 63 and 64 of 1952. The construction of the agreements and the decree was not again disputed before us, and therefore that must be accepted. The findings on issue 15 in paragraph 55, on issue 17 in paragraphs 56 and 58, an issue 5 in paragraph 60 and those on issues 3 and 4 were also accepted ; they were not attacked before us.

There remain the main and principal issues on which the arguments before us were addressed by the appellants, the respondents in the lower Court. They raised only three questions. The first was that the agreements to finance were champertous and were extortionate and unconscionable and therefore did not bind the estate. The chief point of attack regarding the agreements was the provision to pay a sum of Rs. 5 lakhs by way of bonus besides giving some lands. The compromise decree in O. S. No. 25 of 1941 it was contended did not bind the estate and was not in any event a *bona fide* compromise enforceable against the minor appellants, the sons the zamindar, *viz*., appellants 2 and 3, as the zamindar had no power to bind them by such a compromise. It was also urged that the fundamental basis of the compromise was the continued existence of the estate, and as the estate was taken over by the Government after notification under the Act, the contract evidenced by the compromise became impossible of performance or in other words, that there was frustration of the contract and therefore the compromise should not be enforced.

The basis of the compromise and the foundation for the suit O.S. No. 25 of 1941 were the agreements, Exhibits A-1 and A-15, entered into between the financier and Subbiah Thevar, under which the financier advanced moneys for the successful prosecution of the litigation which ended with the Privy Council judgment of 3rd December, 1937, in favour of Subbiah Thevar. It must be mentioned that the agreement, Exhibit A-15 of 29th April, 1929, was arrived at between the parties through the intervention and mediation and advice of eminent counsel who appeared, and one of whom was engaged specially for the purpose of giving independent advice to the zamindar. One would have thought that that settlement could not be easily impeached. But whatever it was, when the litigation O.S. No. 25 of 1941 was going on in the Sub-Court, Tirunelveli, and the trial had proceeded to a great extent, the present zamindar, after the death of his father, the first defendant in the case, took active part in the negotiations of compromise, and presumably with the advice of counsel appearing on either side the razinama was effected. The second defendant in that suit, the present zamindar who was *eo nomine* a party to the compromise, and who took active part in acquainting himself with the expenditure that was incurred for the purpose of the litigation by his grandfather, now chooses to impeach the compromise as not binding on him. Whatever may be the position so far as his sons appellants 2 and 3 were concerned, the zamindar, who was a party to the compromise, cannot repudiate the compromise, and he has not pleaded or established any grounds for setting aside the compromise. The attempt on the part of the sons of the zamindar was to impeach the compromise as not being a *bona fide* one, and also on the ground, that their father, who was the holder of the estate, had no power to represent them in the matter of the compromise, and that therefore it was not binding. The considerations applicable for determining the binding nature of the compromise between the parties to it and to a compromise, which was sought to be made binding upon others not parties to it on the principle that the person who was a party to it represented their interests, are no doubt different. Unless there is capacity to represent the sons and unless the compromise is a *bona fide* one, the sons will not be bound by the compromise entered into by the zamindar. In order to determine the *bona fide* nature of the compromise it is said that we must now consider independently whether the agreements entered into by the grandfather of the present zamindar were such as could bind the estate or not, and if we reach the conclusion that they so bind the estate, then alone the compromise would be binding upon the sons of the zamindar. We do not, however, think that this is the correct approach to the question at issue. The *bona fides* of the claim have to be judged upon a consi-

deration of the respective claims put forward and the contentions urged in the suit in order to find out whether the claims were to any extent enforceable or whether they were false to the knowledge of the zamindar and the other party to the compromise. If the claim was false and false to the knowledge of both the parties, it cannot be said to be a *bona fide* claim. As observed by the Judicial Committee in *Ganjeshwar Kunwar* v. *Durga Prasad Singh*[1], a dishonest claim or a claim which was false to the knowledge of the person who entered into the compromise could not be treated as having been induced by a *bona fide* plea in relation to that claim. In that case Bishambar Prasad Singh was not born blind, and Durga Prasad Singh could not possibly have been in ignorance or in doubt as to that fact, when he induced *Mussamat Harbans Kunwar* to enter into a compromise on behalf of the plaintiff, and therefore had no honest and *bona fide* belief in the claim which was made. It was therefore held :

> " That compromise and the decree which was made in pursuance of it could not be allowed to affect in any way the right of the minor ",

(*see* also *Kondama Naicker* v. *Kandaswami Gounder*[2], where a similar principle was applied by the Privy Council). The claim against the zamindar was on the basis of agreements entered into by his grandfather. They were not contracts entered into by him, and his own action was not in dispute in the litigation of 1941. After the first contract there was the later contract of 1929, Exhibit A-15, which, as observed already, was brought about with the advice of eminent counsel appearing for the zamindar Subbiah Thevar. The only dispute in the suit related to the truth and binding nature of the amounts claimed to have been advanced by the financier. Several adjournments were obtained during the course of the trial of the suit when one of the witnesses was under cross-examination, to enable the parties to come to Madras, examine the accounts, take advice and satisfy themselves regarding the justness of the claim. Ultimately the amount was reduced and the matter was settled, as per the terms contained in Exhibit A-38. There was nothing in the whole course of the proceedings to show that the zamindar, the present first appellant, acted with any ulterior motive, and that there was any lack of *bona fides* on his part. We are therefore in agreement with the view of the Tribunal that in these circumstances the compromise was *bona fide*.

The other question is, whether the compromise decree obtained against the zamindar could bind the sons, and whether the zamindar had the capacity to represent the sons' interests in the litigation.

The estate was an impartible one governed by section 4 of the Impartible Estates Act. It must be remembered that section 4 of the Act was enacted after the first Pithapuram case, *Sri Raja Rao Venkata Surya Mahipathi Ramakrishna Rao Bahadur* v. *The Court of Wards*[3], which extended the principle of *Sartaj Kuari* v. *Deoraj Kuari*[4] that an impartible estate holder could alienate the property and that the successors had no right to question it and that he could make a disposition under a will. Prior to *Sartaj Kuari* v. *Deoraj Kuari*[4], the view that obtained in this Court was that the impartible estate holder was practically subject to the same restrictions regarding his power of alienation as in the case of ordinary joint family properties. It was this view that was negatived in *Sartaj Kuari* v. *Deoraj Kuari*[4] and an unrestricted power of alienation was recognised in the holder of the estate for the time being. The power of alienation *inter vivos* was extended to testamentary dispositions. To restore the law it was that the Legislature intervened in 1904 and passed the Impartible Estates Act which was later amended. Section 4 of the Act enacts :

> " 4 (1) The proprietor of an impartible estate shall be incapable of alienating or binding by his debts, such estate or any part thereof beyond his own lifetime unless the alienation shall be made, or the debt incurred, under circumstances which would entitle the managing member of a joint Hindu family, not being the father or grandfather of the other coparceners, to make an alienation of the joint property, or incur a debt, binding on the shares of the other coparceners independently of their consent."

1. (1917) 34 M.L.J. 1 : L.R. 44 I.A. 229 : I.L.R. 45 Cal. 17 (P.C.).
2. (1923) 46 M.L.J. 172 : L.R. 51 I.A. 145 : I.L.R. 47 Mad. 181 (P.C.).
3. (1899) 9 M.L.J. (Supp.) 1 : L.R. 26 I.A. 83 : I.L.R. 22 Mad. 383 (P.C.).
4. (1888) L.R. 15 I.A. 51 : I.L.R. 10 All. 272 (P.C.).

The effect of this provision is, unless the alienation is made or the debt incurred by him in circumstances in which a manager of a Hindu joint family not being the father or grandfather could make an alienation of the property or incur a debt, the alienation or the debt does not bind the successors. After this enactment this Court held that, where the holder for the time being incurred a debt or executed a mortgage over an impartible estate governed by the Act the successor would not be bound by any decree obtained or be liable for the mortgage, whether it be a decree after contest or compromise, as the policy of the Impartible Estates Act was to preserve the property for the family of the zamindar who had practically only a life estate in the zamindari ; as in such a suit the successors in title would have no opportunity of raising the question of the binding nature of the debt or the mortgage on the estate, the decree obtained against the deceased zamindar could be enforced only in a separate suit (vide *Raja Ramachandra Harishchandra Deo Garu* v. *Akella Venkatalakshminarayana*[1], *Venkatalingamma* v. *Muni Venkatadri Rao*[2], *Immudipattam Bommayya Naickan Ayyan* v. *Subramanya Ayyar*[3] and also a recent decision in *Gopalakrishna Choudhry* v. *Krishnamanayanim Vari*[4] where the principle of *Immudipattam Bomayya Naicken Ayyan* v. *Subramania Ayyar*[3], was applied. But in all these cases the debt or the mortgage sued on was the act of the very zamindar who incurred the debt or created the mortgage. It could not, therefore, be said that he was acting in a representative capacity so as to bind his successors in title. In the latest of the cases above cited, the learned Judges were alive to the distinction between cases, where the contract executed by the zamindar himself was in issue, and cases, where the claim was founded upon acts other than his own. For they observed at page 250 :

"We should not be understood as stating that in all respects an impartible estate holder cannot represent the estate in litigation. It is only where his own acts are in question and when his borrowings are sought to be charged on the impartible property that he cannot represent the estate, so that the debt may bind the estate beyond his lifetime. Suppose, for example, there was a dispute as regards portions of the zamindari with a rival landholder and the zamindar for the time being contests the suit and a decision either way is passed, such a conclusion should be binding on the succeeding zamindar on the principle of *res judicata* ; or in other words, in all cases where the action of the zamindar is one that could be impugned by the succeeding zamindar it seems to us that the decree obtained against a zamindar who has himself created the debt cannot be enforced in execution against the estate after his death. . . . . . The distinction between the representative capacity of an impartible estate holder for transactions entered into by him for binding the estate beyond his lifetime and that where he represents the estate in other proceedings in which he has no personal estoppel against third parties is a real one ; and we are of opinion that section 4 of the Impartible Estates Act clearly enunciates this view."

The manager of a joint family in the case of ordinary partible property represents the joint family in suits by or against the family. But where his own acts are in question, he cannot be deemed to represent the estate. That principle is not peculiar to the manager alone, but applies equally to the case of limited owners such as a widow. It is settled law ever since the Sivaganga case, *Katama Nachiar* v. *The Rajah of Sivaganga*[5], that a decree *bona fide* obtained against a widow who holds a limited estate is binding on the reversioners in the absence of fraud or collusion. The case law on the subject was exhaustively reviewed by this Court in a recent decision in *Kaliammal* v. *Sundarammal*[6], which defines the limits under which decrees obtained against a widow whether on compromise or after contest, would bind the reversioners. But there is a clear distinction even in such cases between contracts and acts of the widow on the one hand and claims not connected with law, as tersely put by Coutts Trotter, J., as he then was in *Tirupathiraju* v. *Venkayya*[7] at p. 512:

"I quite assent to the principle that where a widow represents the estate it would be unreasonable to deny her the same discretion to avoid useless litigation as would be vested undeniably in a male manager. But I think that that must be subject to this qualification—which exists in the present case that where the obligation sought to be enforced against the estate is one of her own creation, she stands in exactly the same position with regard to the justification of the compromise as she does with

1. (1918) 37 M.L.J. 65.
2. (1927) 53 M.L.J. 533 : I.L.R. 50 Mad. 897.
3. (1923) 46 M.L.J. 374.
4. (1950) 2 M.L.J. 247.
5. (1863) 9 M.I.A. 539.
6. (1948) 1 M.L.J. 366 : I.L.R. (1949) Mad. 171.
7. (1921) 42 M.L.J. 392 : I.L.R. 45 Mad. 504 at p. 512.

regard to that of her original contract, and is clothed with no higher authority and no less degree of responsibility by the accident that she has super-added to her character of a widow in possession that of a litigant. To hold otherwise, it seems to me, would be nothing less than an abrogation of compromise. I think that the rule that a widow as representing the estate can effectually settle claims arising out of the acts of others, is a salutary one *ut sit finis litium.* But to give her the same power in relation to her own acts would be to make her, as it were, a judge in her own cause; she is not solely concerned with her duty to the estate, as may be supposed in the former case but is obviously liable to a bias in favour of attempting to validate her own act. Such a conclusion would obviously deprive the reversioners of the very protection which the Hindu Law endeavours to give to them; and would unquestionably lead to endless collusive compromises, as the present one may well have been. I do not think that such a conclusion has even the superficial merit claimed for it, that on its face it is a logical deduction from the fact that she has a discretion as to settling claims which do not arise out of her own acts."

We do not see any reason for not adopting and applying the same principles with reference to the holder of an impartible estate. The position of an impartible estate holder, apart from section 4 of the Impartible Estates Act, has now been clearly established by decisions. The income is at his absolute disposal and the power of alienation is analogus to that of a manager of a joint Hindu family under section 4 of the Impartible Estates Act. When, therefore, a claim against the estate is made in respect of acts not his own, but that of the predecessor, or even by a person claiming a hostile title to the estate, and the litigation is fought out *bona fide*, a decree obtained in such a suit would obviously bind the successor. It would be illogical to deny him in such a case the power to compromise the litigation for the benefit of the estate and to compel him to fight the litigation to the finish to the detriment of the estate. He should have the same kind of discretion which the manager of a joint Hindu family or the widow who inherits a limited estate possesses under the Hindu Law. We, therefore, hold that the compromise evidenced by Exhibit A-38 was one entered into *bona fide* by the parties and the claim asserted against the estate was a *bona fide* one.

The present zamindar who entered into the compromise had the power and a capacity to represent not only himself but his successors who would take the estate after him. As we have found that the compromise is binding on the estate, it may not be necessary to examine afresh the binding nature of the arrangements of 1925 and 1929 made by Subbiah Thevar, the then holder of the estate with the financier. But, however, as the counsel for the appellants had strenuously stressed the point it is as well that we deal with that question.

The background under which the first agreement of 1925 Exhibit A-1 was entered into by Subbiah Thevar with the financier has already been narrated. The principal terms of the agreement, Exhibit A-1 may now be stated. After reciting the prior history of the litigation and the failure of Subbiah Thevar to secure financial help and the disappointment occasioned by Tharaganar under the agreement of 1921, the terms of the arrangement are enumerated in the agreement and they are as follows:

(1) The financier was authorised as the agent to spend money on his behalf till the final court of appeal *i.e.* the Privy Council all moneys necessary for the litigation by engaging lawyers, appointing agents and clerks and obtaining documents, etc.

(2) A sum of Rs. 75,000 should be deposited separately without interest in the financier's shop at Madurai for the above expenses. A sum of Rs. 7,500 is allowed as a lump sum fixed travelling allowance to the financier to be incurred by him till the final decision is reached in the litigation.

(3) Rs. 10,000 is to be kept in deposit in the financiers firm without interest for the maintenance expenses and other incidental expenses such as travelling expenses of Subbiah Thevar, etc. who could withdraw not more than Rs. 350 per month.

(4) Another sum of Rs. 10,000 to be kept in deposit to meet the claims that may be made by Tharaganar. These sums together make up a lakh of rupees, the receipt of which was acknowledged by Subbiah Thevar.

(5) In consideration of this, it was agreed to give Rs. 6 lakhs, adding Rs. 5 lakhs to the above Rs. 1 lakh, in consideration and as recompense for the huge profit and the permanent benefits to be derived by Subbiah Thevar as a result of the help of the financier and also for the personal exertion and the risk undertaken by him for the sum of Rs. 1 lakh agreed to be given under the agreement for the maintenance and conduct of the case. A first charge for this amount was created in favour of the financier on the entire Uthumalai zamin consisting of 55 villages.

(6) If it became necessary to spend more than Rs. 1 lakh the financier should spend the same which should be repaid with compound interest at 2 per cent. per annum with six monthly rests from the date of the excess expenditure. This also was secured on the zamindari. As soon as the litigation terminated the financier should be repaid the amount of Rs. 6 lakhs and as that amount carried no interest the financier should take possession of the estate and recoup himself from the income after deducting the expenses. During the period in which the financier was in possession of the estate, he should pay by way of maintenance a monthly allowance of Rs. 2,000 from out of the income of the zamin. The entire income from pannai lands was allowed to be appropriated as no interest was payable on the sum of Rs. 6 lakhs. Liberty was given to the financier to get himself impleaded as a party to the suit or appeal whenever occasion arose. Final decision was interpreted as meaning a favourable decision in the District Court, High Court and the Privy Council. The Financier was also empowered to transfer any of his rights under the agreement to others.

The question is whether this agreement was vitiated either on the ground that it was champertous or that it was extortionate and unconscionable in its terms.

It is settled law that the English law of champerty does not apply to India and that agreements to finance litigation are not opposed to public policy. But if such agreements are contrary to principles of equity and good conscience or unconscionable and extortionate in their terms, Courts would not enforce the agreements according to their terms. This was settled by the Privy Council in *Raghunath* v. *Nil Kanth*[1] and very recently in *Ramanamma* v. *Viranna*[2], the Privy Council summarised the position as follows :

> " It has long been held that in India agreements to finance litigation in consideration of having a share of the property if recovered are not *per se* opposed to public policy. They may be so if the object of the agreement is an improper one, such as abetting or encouraging unrighteous suits or gambling in litigation ; or their enforcement against a party may be contrary to the principles of equity and good conscience, as unconscionable and extortionate bargains."

It cannot be said that this agreement tantamounts to a gambling in litigation, and it was not attacked on any other ground except that the provision of a bonus of Rs. 5 lakhs and the provision to give the income of the private lands were extortionate and unconscionable. The circumstances and the difficult situation in which Subbiah Thevar was placed when he had to recover a big fortune like the estate of Uthumalai, have already been adverted to. He had to fight very heavy odds. There were as many as three litigations in respect of the estate. But he had not a single pie in his hands. One financier had disappointed him. Others demanded onerous terms, and it was only Subramanyam Chettiar that ultimately came to his rescue. For any amount advanced by the financier, whether the original sum of Rs. 1 lakh or excess amount as provided under the agreement he had to take the risk of losing the amount if ultimately Subbiah Thevar should fail in the litigation. Even if he succeeded the amount of Rs. 6 lakhs carried no interest and the event of getting possession of the estate was wholly uncertain on that date. The litigation actually terminated in 1937 though it was started as early as 1922, *i.e.*, 12 years after the agreement and 15 years after the institution. There was the possibility of Rs. 1 lakh not earning any interest, for about 12 years. Though Subbiah Thevar succeeded in the first Court, it was only after giving security the estate came into his possession. The income of the pannai lands as estimated by the Tribunal was about Rs. 22,000 per year. If interest on Rs. 6 lakhs were to be calculated at 12 per cent. per annum the income of the pannai lands would be hardly sufficient to yield 3 or 4 per cent. Even if one lakh of rupees should carry interest at 12 per cent. the interest would be Rs. 12,000 per annum, and the risk involved was very great. The estate was estimated to be worth Rs. 30 lakhs by one of the members of the Tribunal, whereas the other put it higher. The income of the estate was about Rs. 1 lakh. The sum of Rs. 6 lakhs would be about one sixth of the estate. What is more important is that though Subbiah Thevar and his son were all the while disputing the correctness of the amounts advanced by the financier they never complained that this remuneration of Rs. 6 lakhs was unconscionable or extortionate. As will be shown later, without objection this amount was included in the later agreement. The financier had not only to advance the money but also had to

1. (1893) L.R. 20 I.A. 112 : I.L.R. 20 Cal. 843 (P.C.).
2. (1931) 61 M.L.J. 94 : A.I.R. 1931 P.C. 100.

look after the litigation by engaging vakils, keeping the records, paying the lawyers and in fact to do everything on his behalf. He had to advance also further sums over and above Rs. 1 lakh, and he had to take the risk as regards that amount also. He advanced nearly a sum of Rs. 4 lakhs including interest before 1929 and a further sum of Rs. 1,55,000 and odd till 1937, the interest on which comes to Rs. 1,45,000, *i.e.*, another 3 lakhs so that he spent in all a sum of Rs. 7,96,000 including interest. In view of these circumstances which were not disputed, the agreement to pay a bonus of Rs. 5 lakhs and the income from the pannai lands cannot be considered to be extortionate or unconscionable. It is futile for the sons of the zamindar now to contend after the estate was obtained that there was no necessity to borrow money under such terms and to complain that it was unconscionable and extortionate. There is no suggestion anywhere that the Chettiar exercised any undue influence or took undue advantage of the situation so as to extract or wring out from Subbiah Thevar unjust terms compared with the terms of the previous financier, undoubtedly the terms under Exhibit A-1 are more favourable. There is nothing therefore, in our opinion to hold that the terms of this agreement were either extortionate or unconscionable, and this is the only ground on which the agreement was attacked all through. What followed subsequently would emphasise that this conclusion of ours is justified.

The suit was disposed of in the trial Court on 3rd January, 1929. On 11th February, 1929, the parties looked into the accounts up to date along with the vouchers, and it was then ascertained that besides the sum of Rs. 1 lakh already advanced the financier had also advanced a further sum of Rs. 3 lakhs which included principal and interest up to date. Thus in all including the Rs. 5 lakhs agreed to be paid as bonus, the liability of Subbiah Thevar came to Rs. 9 lakhs, and this agreement was signed not only by Subbiah Thevar but also his son. No dispute was raised at the time of the settlement either that the amount advanced or the amount arrived at was not correct, nor was it contended that the bonus agreed to be paid was extortionate and unconscionable. There was also another arrangement evidenced by Exhibit A-7 which is described as yadast dated 27th February, 1929, which also reaffirms the accuracy of the amounts spent by the financier after sanctioning the accounts along with the vouchers, receipts, bills and chittas. The zamindar agrees under this yadast that the possession of the zamin should be obtained including the surplus cash from the District Court, Tirunelveli, by the financier till all the amounts due to him under the above said agreement were fully discharged. He was also given liberty to get himself impleaded if an appeal was preferred against the decision of the trial Court. There was yet another yadast of 18th February, 1929, Exhibit A-8 which contains the charge on the Uthumalai zamin for the amounts due to the financier.

After the appeals were filed there was the agreement of 29th April, 1929, which was brought about by counsel appearing for the zamindar and the Chettiar, *i.e.*, Mr. Grant and Mr. K.S. Krishnaswamy Ayyangar. Mr. Patanjali Sastri, as he then was, was appointed to give independent advice to the zamindar. This agreement sets out elaborately the facts and the circumstances under which the agreement came to be executed and acknowledges mediation by the aforesaid gentleman and it recites that the terms and conditions were fully explained to the zamindar. Under this agreement the zamindar acknowledged that he was fully satisfied of the correctness of the sum of Rs. 9 lakhs payable by the zamindar to the Chettiar. The sum of Rs. 9 lakhs was not to carry interest from 12th February, 1929. The Chettiar, however, was given the income from the entire pannai lands in the zamindari from Fasli 1339. Provision was made for further advances for the conduct of the appeals and it was provided that until disposal of the litigation by the final Court of appeal, the Privy Council, he should advance monies which should carry interest at 12 per cent. per annum. The Chettiar was given liberty to take proceedings to draw the amount lying with the receiver or with the Court after furnishing necessary security. There were also various other terms which it is unnecessary to refer to in detail. It also provided that the Chettiar should pay to the zamindar and his son a monthly allowance of Rs. 250 and 100 respectively for a period of

one year from the date of the agreement. The Chettiar was permitted to appropriate the sum of Rs. 10,000 reserved with him for payment to Thamthasin Tharaganar.

This agreement was attested by the learned counsel, and there is an endorsement that the Zamindar admitted in the presence of Mr. Krishnaswami Ayyangar and Mr. Grant that the document was translated in Tamil and that it was fully explained to him and that he understood the contents. In accordance with the terms of this agreement the financier advanced several sums and the litigation ended successfully in favour of Subbiah Thevar. Subbiah Thevar died on 1st January, 1941. Though he was alive for so many years no attempt was made by him to dispute the agreements on any ground on which it is now attacked.

Then followed the suit O.S. No. 25 of 1941 to enforce payment of the amounts due to the financier, as has been already stated. In this suit again the father of the present Zamindar was a party, but he died during the pendency of the suit and the suit was fought out by the present zamindar. All available pleas were taken, and documents to establish the claim were filed on behalf of the financier, and Messrs. Patanjali Sastri, Grant and Krishnaswami Ayyangar were examined as witnesses whose depositions have been marked as exhibits in the present case. A perusal of those depositions would show that the settlement was arrived at after the zamindar examined and scrutinised the accounts along with the vouchers, receipts, bills, etc. and that there was no complaint by the zamindar Subbiah Thevar that the amount agreed to be paid was extortionate or unconscionable. It is during the course of the suit that the parties, *i.e.*, the present zamindar himself and Subramanyam Chettiar entered into a compromise realising the fact, that it was more beneficial from the point of view of the estate to settle the matter rather than fight the litigation to its finish. As pointed out by the Tribunal, if the suit was fought out, it may be that the zamindar would have been made liable for a sum of anywhere between 11 and 8 lakhs and the amount actually agreed to be taken by the financier was Rs. 6,25,000. This compromise is also a document drawn up elaborately, describing the position of the zamindar as the holder of the impartible estate and also as manager of the joint family and reciting that the parties had in view the provision in section 4 of the Impartible Estates Act and that the debt was in fact binding on the estate. It shows that the zamindar entered into the razinama not only in his individual capacity but also as representing the impartible estate of Uthumalai. It was acknowledged by him in this compromise that he was fully convinced that the interests and benefit of the family and the zamindar of the estate would be served by compromising the suit, and that in doing so he was exercising the powers under section 4 of the Impartible Estates Act. The compromise, as acknowledged by him, was reached after examining the binding nature of the debts in the light of the oral and documentary evidence let in up to that stage and after mutual discussions with the parties and with the help of friends and well-wishers. It is after all this that the second defendant was convinced and satisfied that it was in the power and competence of Subbiah Thevar and first defendant to enter into the agreements and settlements so as to bind the joint family and the zamindari estate of Uthumalai. The compromise created a charge for the amount on the Uthumalai estate. It is unnecessary to refer to all the terms of this compromise. In this compromise also the present zamindar never raised any dispute that the amount of Rs. 6 lakhs agreed to be paid to the financier after termination of the litigation was either execessive or extortionate and unconscionable. The compromise was intended to bind the estate, and the basis on which the compromise was entered into was the agreements which were brought about by the grandfather of the present zamindar, so that it was not the act of the zamindar at the time that was in issue before the parties but it was the action of the grandfather, who borrowed monies for bringing into existence the very estate which came into possession of the zamindar and subsequently notified by the Government under the Estates Abolition Act.

In view of all these circumstances we are unable to accept the contention, that the bargain was either extortionate or unconscionable. In our opinion, the

agreements are binding on the estate and the Tribunal elaborately considered the binding nature of the expenses incurred by the financier and came to the conclusion, that the claimants had established its binding nature. That finding, as already stated, was not challenged before us, and not a word was said about the correctness of those findings. We must therefore proceed on the footing, that those amounts were spent for litigation and for purposes binding on the estate. It therefore follows, that, even apart from the compromise, the agreements entered into by Subbiah Thevar are binding on the estate. It was however, faintly argued that the amount was borrowed by Subbiah Thevar for his own benefit to obtain possession of the estate and not for the benefit of his successors or for a purpose binding on the estate. The argument has no merits. But for the amounts that were borrowed from the financier the estate itself would not have come into existence, and the argument, that he fought the litigation only for his own benefit and not for the successors, is in our opinion purile. Having got the benefit of the estate, it is surprising that the people who are enjoying the benefits and who expect the benefits of the estate further should dispute the binding nature of the debts contracted for the litigation.

The only other point that was urged before us and which remains to be considered is the contention, that the basis of the arrangement and the compromise was the continued existence of the estate of Uthumalai and as that estate has now been taken over by the Government the doctrine of frustration of contract must be applied to the compromise and the agreements, and it must be held that they have become impossible of performance. This argument was, in our opinion, rightly rejected by the Tribunal. A persual of the agreements and the compromise would undoubtedly establish that the liability to pay the amount was not conditioned on the continued existence of the estate. All that was provided in the said documents was the mode of discharging the debt from and out of the assets of the estate, with a charge on it. Merely because the mode of charge contemplated is not now fully available there is no reason to hold that the contract has become impossible of performance. It has now been authoritatively decided by the Supreme Court that in view of section 56 of the Indian Contract Act, recourse cannot be had to principles of the English Law on the subject of frustration of contracts. If, on a construction of the contract, it is possible to conclude that there is an implied or express term according to which the contract will stand discharged on the happening of certain circumstances, the dissolution of the contract would take place on the terms of the contract itself, and there is no scope for the application of section 56 of the Contract Act. The matter would then be governed by section 32 of the Contract Act. However, even apart from any implied term which operates to release the parties from performance of the contract, if the real purpose of the contract was frustrated by the inclusion of occurrences of unexpected events or change of circumstances beyond what was contemplated by the parties no question of finding an implied term in such an event arises, and if the contract by reason of such circumstances became impossible of performance section 56 applies and it becomes void. In arriving at the conclusion whether it became impossible, the belief, knowledge and intention of the parties are evidence, but evidence only on which the Court has to form its own conclusion, whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object. The word 'impossible' in section 56 was not used in the sense of physical or literal impossibility. The performance may not be literally impossible but it may be impracticable. The section applies, unlike in the English Law, to contracts relating to immovable property as well as to movable property, in view of the principle deducible from the decision of the Supreme Court in *Satyabrata Ghose* v. *Magneeram Bangur & Co.*[1], and bearing such principles in mind one has to consider whether the compromise in this case became impossible of performance and therefore became void. The liability of the zamindar and the estate is absolute and is not subject to any conditions. It was expected no doubt, that the debt could be paid from the zamindari but nothwithstanding the fact that the compromise was entered into in 1945 the Zamindar committed

1. (1954) 1 M.L.J. 41 : (1954) S.C.J. 1 (S.C.).

default in carrying out the terms of the compromise fully, and therefore the balance remained due to the petitioners. The estate is now represented by the compensation money, against which a statutory right is conferred upon creditors, who could establish that their debts were liable to be paid out of the assets of the zamindari. It is therefore difficult to hold that the contract became impossible of performance within the meaning of section 56 of the Contract Act. To the extent to which the compensation amount is available the statute gives an undoubted right to the creditor to be paid from the compensation amount, provided his debt was such that it could be paid out of the assets of the zamindari. We are therefore in agreement with the view taken by the Tribunal that the contract did not become impossible or incapable of performance. It would therefore follow from the foregoing discussion and the findings that S.T.A. Nos. 11 and 12 of 1952 must be dismissed with costs in one, S.T.A. No. 11 of 1953.

There is then the appeal S.T.A. No. 10 of 1953 by the Executive Officer of Sri Navaneethakrishnaswami Devasthanam, Veerakeralampudur. The present zamindar was the trustee of this temple, and the hereditary trusteeship vested in the zamindars. A sum of Rs. 80,000 representing the accumulations of the income of the villages set apart for the benefit of the temple became payable by the Court of Wards, and it was paid to Subbiah Thevar, who invested this money in certain bonds. The present zamindar, who succeeded to the estate in 1941, filed O.P. No. 1 of 1944 in the District Court of Tirunelveli for a succession certificate, and on 18th February, 1947 it was granted. He obtained two bonds for the amount, one for Rs. 78,000, and another for Rs. 5,200 in all Rs. 82,000. In July, 1949, when the Government Auditor inspected the accounts and called for the bonds for verification, as they were disclosed in the property register of the temple which had to be maintained under section 22 of the Hindu Religious Endowments Act they were not produced. A requisition was made by the Assistant Commissioner of Religious Endowments upon the zamindar to produce the documents. To this, the reply of the zamindar was that he had utilised the money for payment of peshcush and other obligations binding on the estate, and therefore he sent a promissory note executed by him in his individual capacity in his own favour as the trustee of the temple. The promissory note is dated 24th July, 1949. A prosecution was launched against the zamindar on the ground that he had committed criminal breach of trust. He was convicted and it was confirmed on appeal. But in revision this Court set aside the conviction. The Devasthanam then filed O.S. No. 60 of 1951 in the Sub-Court of Tirunelveli and obtained a decree for the amount against the zamindar on 1st October, 1952. Under section 6 of the Impartible Estate Act, permission of the Collector was required if money was borrowed for purpose of paying peshcush, but that permission was not obtained. Before the Tribunal the Executive Officer made common cause in opposing the claim of the financier as that claim if allowed would take away the entire amount leaving nothing to pay the other debts. Mr. Seshachalapathi, the learned Advocate for the Executive Officer, however, took up a different line of attack before us. He raised two additional contentions. Firstly he claimed as a creditor he was entitled to be paid out of the assets of the zamindari and secondly in any event as the trustee had mixed the funds of the Devasthanam with his own funds he is entitled to follow the assets into the compensation amount on the principle of following trust property into the hands of the trustee or if it is converted into property to proceed against the property. The decree, which was obtained by the Devasthanam on the basis of the promissory note executed by the zamindar, was only a personal decree against the zamindar and therefore as a creditor he could not claim that this debt was a debt binding on the estate and therefore payable out of the assets of the zamindari. Further the financier had a charge over the estate, and therefore his claim has priority. On neither ground therefore the Devasthanam is entitled to a priority. As regards the second point, though it was not raised in that form before the Tribunal we think it unnecessary to go into it for the simple reason, that if he is merely claiming to follow the trust property he could not invoke that principle under the Estates Abolition Act, as to the scope of the claims which could be adjudicated by the

Tribunal was restricted to claims of creditors and claims of maintenance holders. He would in that event be not a creditor as understood by the Act, and his claim will be that his property was mixed with the property of the zamindar, which has now ultimately been converted into compensation money. We do not express any opinion whether the principle of following the trust property would apply to the facts of the present case. Suffice it for our purpose to hold that even on that basis he would not be a creditor and is not entitled to have the amount paid out of the compensation money. Though it is unfortunate, that the temple had lost a large amount, we regret there is no way of helping the Devasthanam in these proceedings. On this short ground therefore the appeal by the Executive Officer, S.T.A. No. 10 of 1953 must be dismissed, but in the circumstances without costs.

K.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

R. V. Manicka Chettiar .. *Appellant**

v.

Rajambal Ammal and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 47—Co-defendant—When becomes representative of the other defendant—Claim of a co-defendant allowed in execution—Decree-holder's right—Separate suit—If could lie—Bar under section 47.

A defendant who purchases the property of a co-defendant pending certain proceedings in a suit instituted against the defendants, should be regarded as the representative of the other judgment-debtor. If in execution of the decree against the property so sold, the purchaser judgment-debtor's claim petition, based on his purchase from the other judgment-debtor is allowed, the proper remedy of the plaintiff decree-holder is to appeal under section 47 of the Code of Civil Procedure against the order in the claim petition and not to file an independent suit. Such a suit is not maintainable as section 47, Civil Procedure Code, is a bar to such a suit.

There is no difference in principle in such cases between purchases made in Court sale or by private treaty.

Appeal against the Decree of the District Court of North Arcot at Vellore in Appeal Suit No. 33 of 1950, preferred against the Decree of the Court of the Subordinate Judge of Vellore in Original Suit No. 92 of 1948.

T. R. Ramachandran for Appellant.

S. Ramanujachari for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This second appeal came on before Krishnaswami Nayudu, J., who suggested that the appeal might be heard by a Bench, as it involved an important question of law. It arises out of a suit filed by the respondents in the following circumstances. One Subramania Mudaliar, the husband of the 1st respondent and the father of the 2nd respondent filed a suit O.S. No. 83 of 1940 in the Court of the District Munsif of Ranipet against the 2nd defendant and others. He applied for an order of attachment before judgment of the properties belonging to the 2nd defendant. The attachment was ordered and made absolute on 7th December, 1940. A preliminary decree was passed in the suit, which was for dissolution of a partnership and the taking of accounts, on 31st October, 1942. On 30th August, 1943, the suit was dismissed against the present 2nd defendant and another defendant. There was an appeal against this order of dismissal, which was allowed on 1st August, 1944, and the suit was remanded as against the 2nd defendant. It was during this interval, on 20th January, 1944, that the property in suit was purchased by the present 1st defendant from the 2nd defendant. Eventually, a revised final decree was passed on 24th October, 1945, which made the 2nd defendant also

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* Second Appeal No. 1924 of 1951. 3rd February, 1955.

liable. A petition to execute this decree was filed in 1946, E.P. No. 37 of 1946. That was dismissed on 27th April, 1946, because the decree-holder was dead. Subsequently, the legal representatives of the deceased decree-holder, Subramanja Mudaliar, namely, the present plaintiffs filed E.P. No. 351 of 1946. The 1st defendant intervened with a claim petition, E.A. No. 117 of 1947. His claim was based on the purchase he had made on 20th January, 1944. This petition was allowed on 17th July, 1947. On 16th July, 1948, the suit out of which this appeal arises was instituted. The relief prayed for was the setting aside of the order passed in E.A. No. 117 of 1947. The ground on which the plaintiffs attacked the order passed on the claim petition of the 1st defendant was that the original attachment which had been made absolute on 7th December, 1940, continued to be in force, because of the subsequent order passed by the appellate Court on 1st August, 1944, and that even if the original attachment ceased to be in effect when the suit was dismissed on 30th August, 1943, against the 2nd defendant, the attachment revived by the order of remand passed by the appellate Court. It was further alleged by the plaintiffs that the order dismissing E.P. No. 37 of 1946 did not have the effect of terminating the attachment, particularly because at that time the decree-holder himself was dead and his legal representatives had not come on record. In addition to these allegations based upon the continuance of the attachment, the plaintiffs also alleged in paragraph 9 of the plaint that the sale in favour of the 1st defendant was not a *bona fide* but a fraudulent transaction nominally got up with a view to defraud the plaintiffs and their decree. In paragraph 12, the plaintiffs stated that they were filing the suit in a representative capacity on behalf of all the creditors under section 53 of the Transfer of Property Act, and in paragraph 13 that the alienation by the 2nd defendant was secretly to benefit himself and delay his creditors. When the suit came on for trial before the learned Subordinate Judge of Vellore, learned counsel for the plaintiffs gave up the case as put forward by the plaintiffs in the plaint that the alienation in favour of the 1st defendant fell within section 53 of the Transfer of Property Act. The suit thereafter was confined to an attack on the validity of the purchase made by the 1st defendant by reason of the subsistence of the attachment originally ordered on 7th December, 1940. The 1st defendant *inter alia* contended that the suit itself was not maintainable because the remedy of the plaintiffs was by way of an appeal under section 47 of the Code of Civil Procedure, inasmuch as the 1st defendant should be regarded as the representative of the judgment-debtor, having purchased the property of the judgment-debtor pending the attachment. The learned District Munsif decreed the suit. He held that section 47 was no bar to the suit and by reason of the remand order, the attachment revived and the purchase by the 1st defendant would not avail as against the claim of the plaintiffs. There was an appeal by the 1st defendant to the District Court. The learned District Judge confirmed the decision of the District Munsif. He held in favour of the plaintiffs on all the contentions raised by the 1st defendant, namely, that the attachment was not subsisting and had come to an end with the dismissal of the suit on 30th August, 1943, and that the remedy of the decree-holder was to appeal under section 47 of the Code of Civil Procedure and not to file a separate suit. Hence this second appeal by the 1st defendant.

In our opinion, the appeal must succeed on the ground that the suit was not maintainable. By virtue of his purchase from the judgment-debtor on 20th January, 1944, the 1st defendant must be held to be a representative of the judgment debtor. There is direct authority for this position in a dicision of a Full Bench of this Court in *Seetharaman Chettiar* v. *Chidambaram Chettiar*[1], followed by Satyanarayana Rao, J., in *Subramanian Chettiar* v. *Official Receiver of Ramnad*[2]. The learned District Judge distinguished that decision on what appears to us to be specious ground, *viz.*, that in that case the purchase was at a Court sale, whereas in the present case the purchase was by private treaty. We are unable to s e any difference in principle between the two kinds of sales and indeed, Mr. T. M. Krishnaswami Ayyar, learned

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1. (1932) 63 M.L.J. 941 : I.L.R. 56 Mad. 447.
2. (1949) 1 M.L.J. 143.

counsel for the respondent, did not wish to support the judgments of the Courts below on that ground.

But Mr. Krishnaswami Ayyar sought to support the judgments of the Courts below on two other grounds. One was that the suit was a representative action, and therefore the bar under section 47, Civil Procedure Code would not apply to such a suit. We may mention that this point was not raised in either of the Courts below. The reason is not far to seek. Though originally there were allegations impeaching the validity of the sale as having been in fraud of creditors and also a statement that the suit was being filed in a representative capacity under section 53, Transfer of Property Act, the suit ceased to be such a suit at the trial. For all practical purposes, the suit was a suit under Order 21, rule 63, simpliciter. In fact, even after the above allegations regarding the validity of the sale had been made, the prayer was only to set aside the order passed on the claim petition. There was not even a prayer for a declaration that the alienation in favour of the 1st defendant was not binding on the creditors. We, therefore, see no substance in this contention.

The second ground we have found it very difficult to follow. So far as we are able to gather, the argument is this: On 30th August, 1943, the attachment ceased, but when the appeal was allowed, there was a reimposition of the attachment with retrospective effect from the original date of attachment. Alongside with this position which Mr. Krishnaswami Ayyar maintained, he also put forward another contention that in spite of this position, between 30th August, 1943 and 1st August, 1944, there was no attachment and therefore the first defendant by reason of his purchase on 20th January, 1944, during this period was not a purchaser of property under attachment and therefore he was not a representative of the judgment-debtor. We find it difficult to accept this inconsistent plea. If what the learned counsel meant was that for all purposes there was no attachment in force between 30th August, 1943, and 1st August, 1944, then obviously the purchase by the first defendant cannot be impugned on the ground that it was made during the subsistence of the attachment. If, on the other hand, the attachment must be deemed to have continued throughout by reason of the subsequent order of the appellate Court having retrospective effect, then it is obvious that the purchase was pending an attachment and by reason of such a purchase the first defendant became a representative of the judgment-debtor. In either event, the respondents cannot succeed.

We hold that the suit is not maintainable, as the only remedy which the plaintiffs had was by way of an appeal against the order dismissing their claim petition. In view of this finding, it is not necessary to deal with the other questions raised in this case.

The second appeal is allowed, and the suit is dismissed with costs throughout.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

G. Srinivasalu Naidu and others .. *Appellants**

v.

Raju Naicker and others .. *Respondents.*

Hindu Law—Joint family—Alienation—Purchase of property for the joint family and agreement by the manager to reconvey the property if sale amount is repaid at any time within ten years—Such agreement to reconvey if requires family necessity for benefit to justify it.

By a deed of sale dated 9th May, 1937, executed by the plaintiffs (who were three brothers and their three sons making a joint family) the suit properties were conveyed to the 2nd defendant, (defendants 1 and 2 being brothers and defendants 3 and 4 being their sons making a joint family). On 14th May, 1937, the 1st defendant executed in favour of plaintiffs 1 to 3 an agreement of reconveyance the material part of which ran as follows :—

*L.P.A. No. 121 of 1951. 18th February, 1955.

"I have obtained a sale deed for Rs. 5,000 from you in respect of the undermentioned family properties belonging to you for our family in the name of my undivided younger brother Kesavalu Naidu (2nd defendant) on the aforesaid date. If as requested by you you should pay the sale amount at any time within a period of ten years from now, we shall receive the said amount and myself and my younger brother Kesavalu Naidu mentioned above shall reconvey the suit properties to you absolutely by means of a sale-deed after receiving the aforesaid amount." It was further recited that the 1st defendant as family manager had full authority to execute the document. In a suit for specific performance of the agreement to reconvey the suit properties it was contended that the agreement was not binding on the other members of the family of the defendants as it was not justified by any family necessity or benefit.

Held :—The sale and the agreement to reconvey should be considered as parts of the same transaction and they were both executed in fulfilment of a single contract. In such cases the agreement to reconvey need not be justified by family necessity or benefit.

Veeraswami v. *Narayya*, (1949) 1 M.L.J. 97 : (1948) L.R. 75 I.A. 252 : I.L.R. (1949) Mad. 487 (P.C.), distinguished.

Appeal under clause 15 of the Letters Patent against the judgment and decree of Mr. Viswanatha Sastri, J., dated 21st November, 1950 and passed in A.S. No. 287 of 1947 preferred to the High Court against the decree of the District Court of South Arcot, dated 12th March, 1947 and passed in O.S. No. 6 of 1946.

V. C. Veeraraghavan and *S. Thyagarajan* for Appellants.

G. R. Jagadisan and *T. V. Balakrishnan* for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—To decide the only question which has been placed before us in this Letters Patent Appeal against the judgment of Viswanatha Sastri, J., in A.S. No. 287 of 1947, it is sufficient to state the following facts : The defendants are the appellants. The suit was for specific performance of an agreement to recovery the suit properties. Plaintiffs 1 to 3 are brothers, and plaintiffs 4 to 6 are their sons. Defendants 1 and 2 are brothers and defendants 3 and 4, their sons. By a deed of sale dated 9th May, 1937 (Exhibit D-18) executed by the plaintiffs, the suit properties were conveyed to the second defendant. On 14th May, 1937, the first defendant executed in favour of plaintiffs 1 to 3 an agreement of reconveyance (Exhibit P-1) which is the basis of the present suit for specific performance. Tne material part of this agreement runs as follows :

"I have obtained a sale deed for Rs. 5,000 from you in respect of the undermentioned family properties belonging to you for our family in the name of my undivided younger brother Kesavalu Naidu on the aforesaid date. If as requested by you, you should pay the sale amount at any time within a period of 10 years from now, we shall receive the said amount and myseif and my younger brother Kesavalu Naidu mentioned above shall recovery the said properties to you absolutely by means of a sale deed after receiving the above mentioned amount."

It was further recited that the first defendant as family manager had full authority to execute the agreement. Before us, it was not disputed that the suit properties were purchased under Exhibit D-18 for the joint family of the defendants, though the sale deed itself was taken in the name of the second defendant. It was also admitted that the 1st defendant in executing Exhibit P-1 was doing so on behalf of the family as its manager. On these facts, it was contended for the defendants-appellants in the trial Court and before Viswanatha Sastri, J., and the contention was repeated before us, that the agreement for reconveyance executed by the 1st defendant was not binding on the other members of the family, as it was not justified by any family necessity or benefit. The basis of the contention was that the sale and the agreement to reconvey were two independent transactions and as the properties were purchased for the benefit of the family of the defendants, any sale of joint family property by its manager could be binding only if it was for necessity or benefit. The learned Judge, Viswanatha Sastri, J., held that the sale and the agreement to reconvey should be considered as parts of the same transaction and they were both executed in fulfilment of a single contract. He found that the agreement to reconvey was a part of the consideration for the sale. In such cases, it would be impossible to prove necessity or benefit for the agreement to reconvey, standing by itself, and the agreement to reconvey need not be justified by family necessity or benefit any more than the sale to the family. On this reasoning, he

rejected the contention of the defendants. An unreported decision of Govinda Menon, J., in S.A. No. 851 of 1946 was relied upon, but the learned Judge found himself unable to follow it.

Learned Counsel for appellants again pressed before us the contention that the sale and the agreement to reconvey were two different transactions to be judged separately. In support of this contention, he relied strongly on the decision of the Privy Council in *Veeraswami* v. *Narayya*[1], which had also been relied upon by Govinda Menon, J. It is necessary, therefore, to deal with that case at some length. In that case, the appellant and his father sold certain properties to the respondents for Rs. 6,000 and a sale deed was executed on 30th November, 1932. In 1940 the appellant, alleging that when the properties were sold it was verbally agreed that they should be reconveyed if the purchase price was repaid within a period of 5 years, which was later extended for a further 3 years, instituted a suit against the respondents for specific performance of the alleged oral agreement to reconvey. The evidence established that there was such an oral agreement. It was, however, contended that the appellant was precluded by section 92 of the Evidence Act from adducing evidence of such an agreement. Their Lordships of the Judicial Committee overruled that contention on the ground that section 92 of the Evidence Act did not preclude evidence of such an agreement because the agreement did not contradict, vary or subtract from the terms of the sale deed within the meaning of that section ; nor did the agreement add to the terms of the sale deed. The decision was, therefore, on the applicability of section 92 of the Evidence Act to the facts before them. In dealing with the objection based on that section, their Lordships observed that the sale and agreement to reconvey should be treated as separate and independent transactions, that is to say, that the terms of each should be taken separately. The following observations of their Lordships only lead on to the discussion of the only question which fell for decision :

> " In their Lordships' opinion, the correct way of stating the position is to say that the agreement reached covered several matters but that the intention was that each of these should be effected as a separate and independent transaction. There was to be an outright sale and that, upon the happening of a certain event, was to be followed by a reconveyance of what had been sold. The second transaction, by its very nature, premised the previous completion of the first. Both, it is true, may be taken as arranged at the same time and agreement upon one part of the bargain may well have promoted agreement as to the rest, but such considerations do not necessarily affect the final result of the bargaining. The determining factor lies in the ultimate shape of the agreement rather than in the process by which it is reached."

Immediately after these observations, their Lordships proceed to say :

> " Such being the character of the agreement in question, their Lordships find it impossible to hold that it contradicted, varied or subtracted from the terms of the sale deed. On the contrary, it left those terms and the interest passing thereunder to the purchaser entirely unaffected. Can it then be said to have *added* to the terms of the sale deed ? The words ' adding to ', which are part of section 92, must receive their due weight, but in the opinion of their Lordships they do not suffice to exclude the oral agreement relied upon by the appellants."

We fail to see how this decision has any bearing, direct or indirect on the question to be decided by us in this case, whether an agreement to reconvey, which was a part of the arrangement under which the sale deed was executed, should be treated as so distinct and separate from the sale itself as to require necessity or benefit to support it.

We shall now refer to the judgment of Govinda Menon, J., in S.A. No. 851 of 1946. The decision itself does not assist the appellants. The first defendant in the case before him, who was the manager of a joint family, purchased with funds belonging to the joint family certain property, by a sale deed dated 17th May, 1939. On the same day, he executed in favour of the vendor an agreement to reconvey the property for the same consideration, in case demand was made within four years from the date. The vendor brought a suit for specific performance on this agreement of reconveyance. The suit was resisted *inter alia* on the ground that it would

1. (1949) 1 M.L.J. 97 : (1948) L.R. 75 I.A. 252 : I.L.R. (1949) Mad. 487 (P.C.).

not be binding on the other members of the family as it could not be supported by necessity or benefit to the family. The Courts below found that both the sale and the arge.ment to reconvey were parts of the same transaction, and, therefore, the agreement to reconvey was binding on the other members of the family. The learned Judge relied on the decision of the Privy Council in *Veeraswami* v. *Narayya*[1] above mentioned, and held that the two should be treated as different transactions and each had to be considered in its own setting. He then proceeded to say :

> " It might be that part of the bargaining by which the purchase under Exhibit D-1 was effected might be the agreement to reconvey, in which case it could not be said that by Exhibit P-1 no benefit was conferred upon the joint family. This is a matter which depends entirely upon the evidence adduced in the case."

He, therefore, remanded the suit to the Court of first instance for fresh disposal. It is clear that the learned Judge was inclined to hold that if the agreement to reconvey was part of the bargaining which culminated in the sale, then the agreement to reconvey could be supported on the ground of benefit to the family. This view does not certainly help the appellants in view of the evidence in this case, which shows that the agreement to reconvey was part of the bargain. There are, however, certain observations in the course of his judgment with which we are unable to concur, with all deference to the learned Judge. These observations relate to the effect of the Privy Council decision in *Veeraswami* v. *Narayya*[1]. As we have explained above, the only question of law before their Lordships of the Judicial Committee was whether the oral agreement to reconvey could be availed of, having regard to section 92 of the Evidence Act. Their Lordships set out the question thus :—

> " On the wording of this enactment (section 92) the question under discussion comes to this—does the oral agreement as to reconveyance contradict, vary, add to or subtract from the terms of the sale deed ?"

All that their Lordships decided was that the agreement did not offend the provision of section 92. It is in this context that they described the sale and the agreement to reconvey as being separate and independent transactions. Govinda Menon, J., thought that the decision compelled him to hold that this should be the approach for every purpose. But, as we have said, these observations did not materially affect the ultimate decision of the learned Judge, because he was of opinion that if the agreement to reconvey was part of the bargaining by which the purchase was made, then the agreement would be binding on the family. The appellant's contention, therefore, fails.

Learned counsel for the appellants raised another contention, namely, that if the agreement to reconvey executed in favour of plaintiffs 1 to 3 should be treated as an agreement executed in favour of all the members of the family, then it is unenforceable, because there could be no mutuality as three of the members of the plaintiffs' family were minors on the date of the agreement. This contention was admittedly not raised at any time before, and we see no reason why the appellants should be permitted to raise a new point at this late stage.

The Letters Patent Appeal is dismissed with costs.

K.S. *Appeal dismissed.*

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1. (1949) 1 M.L.J. 97 : (1948) L.R. 75 I.A. 252 : I.L.R. (1949) Mad. 487 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE MACK AND MR. JUSTICE KRISHNASWAMI NAYUDU.

The South Indian Co-operative Insurance Society Ltd., Madras .. *Appellants**

v.

V. Bapi Raju .. *Respondent*

Madras Co-operative Societies Act (VI of 1932)—Section 51 (b) and Explanation*—Scope and object of—Claims by and against a registered society—Difference between—" Dispute touching the business of the society "—Proof of—When required.*

Under the Madras Co-operative Societies Act, 1932, if a dispute between a member, a past member etc., and a registered society touches the business of the society, and claim made by a member or any one claiming from him against the society out of such a dispute is compulsorily referable to the Registrar for disposal under section 51 (1) (*d*) of the Madras Co-operative Societies Act.

Section 51 of the Act and the *Explanation* should be taken as a whole in interpreting the provisions of the section. In any dispute touching the business of a registered society, claims by members against the society and by the society against members are referable compulsorily to the Registrar. The effect of the *Explanation* is that where a claim by the society for any debt or demand is made as due to it from members and their nominees, heirs and so on, it is a dispute touching the business of the society and no objection can be taken on the ground that such a claim for any debt or demand does not touch the business, of the society, the object being to stop the society suing in the ordinary Courts to recover any claims by way of debts or demands due to it from members. But the converse of the *Explanation* does not follow . Claims by members or their nominees, heirs or legal representatives against the society are compulsorily referable to the Registrar only if they arise out of a dispute touching the business of the society. In other words the rights of the members of a society to take to the ordinary Courts any claim they make on the society which does not touch the business of the society is not taken away by the Act.

While a society is prohibited from suing its members in the ordinary Courts for any debt or demand due from them as members, the right of such suit by members against the society where the member maintains that it does not touch the business of the society is kept alive.

Per *Krishnaswami Nayudu, J.*—" The *Explanation* to section 51 of the Madras Co-operative Societies Act appears to enlarge the scope of the section itself in so far as a claim by a registered society for any debt or demand due to it from a member, past member or others is concerned, as it is placed in the same category as a dispute touching the business of the society, notwithstanding that it may not have any relation or reference to the authorised business of the society."

Appeal under clause 15 of the Letters Patent, against the Judgment and Order of Mr. Justice Basheer Ahmed Sayeed, dated the 7th April, 1954, and passed in A.A.O. No. 522 of 1952, preferred against the Order of the City Civil Court, Madras dated 30th July, 1952 and made in I.A. No. 1841 of 1952 in O.S. No. 405 of 1952.

K. Subba Rao for Appellants.

G. Balaparameswari Rao and *M. Subramanya Sarma* for Respondent.

The Court delivered the following

JUDGMENTS : *Mack, J.*—This is a Letters Patent Appeal admitted by a learned Bench of this Court against C.M.A. No. 522 of 1952, against an order by Basheer Ahmed Sayeed, J., dismissing an appeal against an order of the learned City Civil Judge, Madras refusing to stay O.S. No. 405 of 1952 under section 34 of the Arbitration Act (X of 1940).

The facts are shortly these. Appellant and defendant in the suit is the South India Co-operative Insurance Society Ltd., Madras. The suit was filed by the plaintiff-respondent as a nominee of an insurance policy taken out with this society by his late brother, Mr. Viyyanna, an advocate who died on 10th April, 1949. The policy was a " double endowment policy " No. 2190 dated 9th April, 1935, under which a sum of Rs. 1,000 was payable if the assured died within a period of fifteen years from the date of the policy. An enhanced sum of Rs. 2,000 would become payable if he survived this period. The policy matured on 8th April, 1950 and the last premium was payable on 9th January, 1950. The society claimed that it was liable to pay, only Rs. 1,000 less arrears of premium for three months. Plaintiff on various grounds sought to recover Rs. 2,000, or in the alternative, refund of the excess of premia paid over and above the sum of Rs. 1,000. One of the grounds

* L.P. Appeal No. 132 of 1954. 7th April, 1955.

set out in the plaint was that this double endowment policy was of the nature of a wagering contract.

The City Civil Judge dismissed an application by the defendant-society under section 34 of the Arbitration Act for stay pending a resolution of the dispute by the Registrar of Co-operative Societies under the Madras Co-operative Societies Act, holding that the present dispute was one which did not touch the business of the Society, within the meaning of section 51 of the Act, and furtheremore, that as there were complicated questions of law involved in this claim he would be inclined to exercise his discretion, presumably under section 34 of Arbitration Act, and retain the suit for disposal in the City Civil Court. In appeal Basheer Ahmed Sayeed, J., held in our opinion, quite rightly, that this dispute was one which touched the business of the Society. But as we understand his judgment, he found great difficulty in bringing this dispute within the scope of section 51 (1), in view of the *Explanation* to the section. He agreed with the difficulties found by the learned City Civil Judge in the *Explanation*, which led also to take this dispute out of the category of those touching the business of the Society.

It is necessary, in order to consider the difficulties attributed to this *Explanation*, to set out the relevant portions of section 51 (1) of the Act :

Section 51 (1) :

"If any dispute touching the business of a registered society, other (than a dispute regarding disciplinary action taken by the society or its committee against a paid servant of the society) arises—

(*a*) among members, past members and persons claiming through members, past members and deceased members, or

(*b*) between a member, past member or person claiming through a member, past member or deceased member and the society, its committee or any officer, agent or servant of the society, or

* * * *

(*d*) between the society and any other registered society,

such dispute shall be referred to the Registrar for decision."

Explanation :

"A claim by a registered society for any debt or demand due to it from a member, past member or the nominee, heir or legal representative of a deceased member, whether such debt or demand be admitted or not, is a dispute touching the business of the society within the meaning of this sub-section."

As we read the judgment of Basheer Ahmed Sayeed, J., he would not have found the slightest difficulty in bringing this dispute within the scope of section 51 (1) and holding that it shall be referred to the Registrar for decision but for the *Explanation*.

In our opinion there can be no doubt, in the first place, that this claim by the nominee of an insured person against this co-operative insurance society for payment of what is due under a policy is a dispute touching the business of this society. Section 51 (1) (*b*) specifically refers to disputes between persons claiming through a member, past member or deceased member of the society. We are unable to accept the view taken of this *Explanation* that it brought only claims by the society for debts or demands due to it from members, past members or their nominees and so on within the scope of a dispute compulsorily referable to the Registrar and excluded claims of a similar nature by the members against a society, which could not therefore be referred to the Registrar for decision under the Act, but which were enforceable only by action in a civil Court. If the *Explanation* were taken away altogether, section 51 (1), would, in our opinion, clearly make disputes, including claims for debts or demands touching the business of the society made either by the society against its members, or by its members or persons claiming through them against the society, compulsorily referable to the Registrar for decision, the only criterion being whether the dispute touched the business of the society.

The view taken by the learned City Civil Judge, confirmed in appeal, appears with respect to be erroneous in its attributing to the *Explanation* a complete exclusion of claims by members for debts and demands against the society from the scope of disputes referable to the Registrar. An *Explanation* to a section in a statute cannot have the effect of vivisecting it in this manner and depriving it of all meaning

and of providing a one way traffic for the reference of claims by the society against members to the Registrar for decision and excluding from such reference claims by members against the society. An *Explanation* to a section in a *statute* has to be interpreted within the scope of what it purports to be, that is something which " explains" the section. An *Explanation* cannot have the effect of destroying the meaning of, or rendering nugatory, a section of law which it seeks to explain. An explanation must be interpreted as something which explains the section, and it may do so, by clarification of some doubt, or by way of an addition or subtraction, but never by way of depriving the section itself of meaning and common sense. We have ourselves found no difficulty at all in interpreting section 51 and the *Explanation* taken as a whole. There can, in our view, be no doubt that in any dispute touching the business of a registered society, claims by members against the society, and by the society against members are referable compulsorily to the Registrar. The effect of the *Explanation* is simply, as it appears to us, this, that when a claim by the society for any debt or demand is made due to it from members, their nominees, heirs and so on, it is a dispute touching the business of the society and no objection can be taken on the ground that such a claim for any debt or demand does not touch the business of the society, the object being to stop the society suing in the ordinary Courts to recover any claims by way of debts or demands due to it from members. But the converse of the *Explanation* does not follow, and claims by members or their nominees, heirs or legal representatives against the society are compulsorily referable to the Registrar only if they arise out of a dispute touching the business of the society. In other words, the right by members of the society to take to the ordinary Courts any claim they make on the society which does not touch the business of the society is not taken away by the Act. Nor can the society oppose such an action in the ordinary civil Courts unless it can satisfy the Court that the dispute between the member and itself touches the business of the society within the meaning of section 51. The intention of the Legislature appears to be, while stopping the society from suing its members for any debts or demands due from them as members, to keep alive the right of suit by members against the society in dispute which a member may maintain does not touch the business of the society, as it is only in this way that serious abuses in the administration of co-operative societies can be checked and controlled.

The learned City Civil Judge was to some extent guided in his conclusion by the reference in Maxwell's Interpretation of Statutes, 7th Edition, page 78, to a line of decisions arising out of the repealed Friendly Societies Act, 1829 which required a reference to arbitration of " every matter in dispute " between a society and any of its members. This was held to be confined to disputes between members, as members, and a breach of covenant by a member to repay a sum borrowed from his society was, therefore, regarded as not falling within the arbitration clause, the dispute being with the member as debtor, not as member. We are here interpreting the language of an enactment of the year 1932. We do not think we can obtain any assistance in English case law which interpreted a provision in an Act of 1829 where the language taken as a whole was quite different. In interpreting the language of statutes we should see in the first instance, before exploring the labyrinthine mazes of ancient case law, whether the language of the section is sufficiently clear and unambiguous to permit a reasonable interpretation in consonance with the objects of the legislation. Any interpretation which destroys the effect of a section rendering it nugatory, if not meaningless, should be avoided unless the language of the section makes such an interpretation inescapable.

The mere fact that section 51 appears in a separate chapter with the caption " Arbitration " will not by itself bring the present dispute within the scope of the Arbitration Act. Such a dispute has to be referred compulsorily to the Registrar for decision under section 51 (*b*) and the Registrar may on receipt of such reference, either decide the dispute himself or transfer it for disposal to any person invested by the State Government with powers in that behalf—and we understand that there is in existence such a panel of empowered persons—or subject to such rules as may be prescribed, refer it for disposal to an arbitrator or arbitrators.

In any event it is only when the Registrar decides to refer the matter for disposal to an arbitrator an arbitration proceeding as such can be held to have commenced. Nor does the Registrar, when he decides a dispute, do so as an arbitrator. We are here seeking to interpret an Act of the year 1932 which has been in existence for more than twenty years and in accordance with which claims by members against a society in disputes touching the business of the society have been referred to the Registrar for disposal. We have no hesitation in expressing our disagreement with respect, with the view taken by the learned City Civil Judge and Basheer Ahmed Sayeed, J., as regards the scope of the *Explanation* to section 51. We hold that if the dispute touches the business of the society, and in the present case there can be no doubt about this—any claim made by a member or anyone claiming from him against the society out of such a dispute,—is compulsorily referable to the Registrar for disposal under section 51 (1) (*d*).

It has next been seriously contended by Mr. Balaparameswari Rao that this Letters Patent Appeal, though admitted by a learned Bench, is not maintainable on two grounds: The first ground is that under section 39 (2) of the Arbitration Act no second appeal shall lie from an order passed in appeal against an order staying or refusing to stay legal proceedings where there is an arbitration agreement. This contention presumes the applicability of sections 34 and 39 (2) of the Arbitration Act to section 51 of the Madras Co-operative Societies Act which provides a special machinery for the determination of disputes between co-operative societies and their members. It is only necessary to refer to section 46 of the Arbitration Act which makes the great bulk of its provisions including sections 34 and 39 applicable to

> " every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder."

Section 51 (1) (*d*) of the Madras Co-operative Societies Act in its statutory and mandatory direction that all disputes coming within the scope of section 51 shall be referred to the Registrar for disposal is clearly inconsistent with sections 34 and 39 of the Arbitration Act. If authority is necessary, reference may be made to *Nanda Kishore* v. *Bally Co-operative Credit Society*[1] which clearly took the view that the provisions of the Arbitration Act would not apply to rules of arbitration provided in the Co-operative Societies Act which were inconsistent with them. There is also another ground on which this argument of maintainability becomes undermined, and that is the inapplicability of section 34 of the Arbitration Act taken by itself to proceedings under section 51 of the Madras Co-operative Societies Act. The Society itself appears to us to have erred in law in asking for stay of this suit under section 34 of the Arbitration Act which has no application. Section 34 clearly invests a Civil Court with a discretion either to stay proceedings or to continue with the suit and it is under the statutory discretion derived from section 34 that both the learned City Civil Judge and Basheer Ahmed Sayeed, J., considered that in view of complicated matters of law they thought were involved, this dispute should be tried by a Civil Court. Section 34, however, is clearly inconsistent with section 51 (1) (*d*) which lays down in mandatory terms that the type of dispute coming within the scope of section 51 shall be referred to the Registrar for decision, giving no discretion in the matter whatsoever to a civil Court. The application for stay under section 34 of the Arbitration Act itself made by the society appears to be incompetent and not maintainable. Nor can this submission by the society to the civil Court's jurisdiction which may be vested in the Civil Court under section 34 clothe it with any discretion to shut out reference of this dispute to the Registrar and take it upon itself to resolve the dispute as in an ordinary suit. I have no hesitation in holding that the application under section 34 itself was therefore non-maintainable. The learned City Civil Judge should have given his attention in the first instance to a finding as regards the maintainability of the suit itself under section 51 of the Madras Co-operative Societies Act. He should now proceed to do so in the light of our observations as regards the scope of the *Explanation* to section 51.

1. A.I.R. 1943 Cal. 255.

A final contention as regards maintainability is that the order of Basheer Ahmed Sayeed, J., is not appealable under clause 15 of the Letters Patent. This is a matter which has been canvassed at great length in a Full Bench decision, *Rangaswami Chettiar and Co.* v. *Iswaramurthy Goundar*[1] to which I was a party. I adhere to the view I took there that in view of the difficulty, if not impossibility of deciding whether an order by a single Judge of this Court would amount to a Judgment under clause 15 of the Letters Patent or not the only criterion that could be applied, pending amended legislation on the point, is whether a learned Bench of this Court has seen fit to admit the appeal on its merits. I took the view there that the appealability should ultimately depend on the order itself, and it would be an extremely difficult matter to separate into rigid categories judgments or orders which are or are not technically appealable. The result is rather an anomalous one, that the application, out of which this appeal arises, under section 34 of the Arbitration Act has been rightly dismissed, not for the reasons given by the learned City Civil Judge but as not maintainable, and that the appeal itself has technically to be dismissed despite the fact that we have reversed the important finding as regards the scope of section 51 of the Madras Co-operative Societies Act. In the circumstances we direct the parties to bear their own costs throughout.

Krishnaswami Nayudu, J.,—I have read the judgment of my learned brother and I agree that the appeal has to be dismissed, though, in substance, the appellant has succeeded and has established that the suit is not maintainable in a civil Court in view of the provisions of section 51 of the Madras Co-operative Societies Act.

The suit is to recover a sum of Rs. 1,218-13-4 with interest and costs. The plaintiff's contention is that on a proper interpretation of the contract of insurance, the defendant-society must pay Rs. 2,000 after the expiry of 15 years from the date of the commencement of the policy that the alternative part of the contract relied upon by the Society, which provides that only Rs. 1000 is payable on death before the expiry of 15 years is void as a wagering contract, but the rest of the contract that the defendant should pay Rs. 2000 after the expiry of 15 years is perfectly valid and binding on the defendant and the plaintiff is in any event entitled to a sum of Rs. 1000 and interest thereon amounting to Rs. 218-13-4. In the alternative the plaintiff seeks to get a refund of the amounts actually paid to the defendant less Rs. 918-7-0 already paid by the defendant. The plaint further proceeds to state that the matter cannot be referred to the arbitration of the Registrar of Co-operative Societies and can be filed in this Court as wagering contracts are not part of the business of the defendant-society and that there is no legal impediment for plaintiff's filing the suit in a civil Court and that the Registrar of Co-operative Societies expressed his opinion even before the plaintiff referred the matter to him for his arbitration.

The real point that requires to be decided is whether the dispute between the parties arising in the suit is a dispute touching the business of the society " between a member, past member or person claiming through a member, past member or deceased member and the society, its committee or any officer, agent or servant of the society " within the meaning of section 51 (1) (*b*) of the Madras Co-operative Societies Act VI of 1932 and therefore it requires to be referred to the Registrar, the civil Court not having jurisdiction to decide the dispute. The suit pertains to a claim made under an insurance policy issued by the defendant, insurance being the authorised business of the defendant-society and there could therefore be no difficulty in holding that the suit claim touches the business of the Society. It is however urged, as pointed out in the plaint, that the term of the contract of insurance as to payment of only Rs. 1,000 if the insured dies before the expiry of the 15 years period is in the nature of a wagering contract, since notwithstanding the receipt by the defendant-society of premiums exceeding Rs. 1000 the liability of the society would be only Rs. 1000 and this is argued to be a term in the nature of a wager, and therefore should be relieved against. This is one of the grounds on which the

1. (1954) 2 M.L.J. 520 (F.B.).

plaintiff supports his claim; but the fact that the validity of the contract or any particular term of the contract is one of the issues arising out of dispute cannot have the effect of making the dispute as one which does not touch the business of the society, that is, which has no manner of reference to the business of the society. Once the claim arises out of the ordinary business of a registered society as in the present case out of the policy of insurance issued by the society, insurance being a part of its business, the application of section 51 is directly attracted and the reference of such dispute has necessarily to be made to the Registrar under the Act.

The meaning of 'dispute touching the business of a registered society' has been the subject of consideration by a Full Bench of our High Court in *Madhava Rao* v. *Surya Rao*[1], where the words "touching the business of a registered society" have been given a wide interpretation. The Full Bench observed at page 346:

"The words 'touching the business of a society' must be given their full import . . . . The word 'touching' does not present much difficulty, as its dictionary meaning is in reference or relation to, respecting, regarding or concerning", thus indicating that the dispute need not directly arise out of the business of the society, but that it is enough that it should have reference or relation to or concern the business of the society. The word 'touching' was clearly not intended to restrict the meaning of the word 'business' it was designed to enlarge its scope. The disputes were not to be restricted to matters arising from and out of the business of the society, but were also extended to matters which are in some way concerned or related to the business of the society. The business has to be that of the society, *i.e.* the corporate activity of the society. What the permissible corporate activities of the society are, have to be gathered from the sections of the Act, the rules framed under the Act and the bye-laws made by the corporation."

Any business that is within the scope of the object of the society would constitute the business of the society and any claim, which has some relation or reference to the business of the society, must be treated as a dispute touching its business and unless the claim or the dispute is one which arises out of a business which is not included in the permitted or authorised activities of the society, the Civil Court can have no jurisdiction. I am in agreement with the view of my learned brother as to the scope of section 51. The view taken that the present dispute is not one which requires to be referred to the Registrar is vitiated by seeking to bring the present dispute within the *Explanation* of section 51, ignoring the provisions of the section itself. Once it is found that the dispute that arises in the suit is one that touches the business of the society, as we have held, section 51 applies and there is no need to rely on the *Explanation*. In order to ascertain whether the particular facts attract the application of a provision in a statute, one has only to see whether the language of the section is applicable to the facts of the case. If the section has in addition an *Explanation*, Courts have to see whether any assistance could be derived from the *Explanation*. An *Explanation* is not intended as a substitute for the original section itself, but it is only to clarify or elucidate any ambiguity or doubt arising in the language of the section. Ordinarily, an *Explanation* does not enlarge the scope of the original section, which it is supposed to explain. But the *Explanation* to section 51 appears to enlarge the scope of the section itself in so far as a claim by a registered society for any debt or demand due to it from a member, past member or other is concerned as it is placed in the same category as a dispute touching the business of the society notwithstanding that it may not have any relation or reference to the authorised business of the society. However, it appears to me that the *Explanation* to section 51 cannot be considered to have been enacted with a view to merely explain and clarify the provision of the original section, but to add to the classes of disputes which may be referred to the Registrar. However, it is not necessary for our present purposes to express any opinion as to whether the subject of the explanation could not have been more appropriately included in the section as a sub-section or enacted as an additional provision. It is sufficient to observe that the *Explanation* could on no account be considered to limit, restrict or curtail the scope of the original section and it is therefore unnecessary to resort to the *Explanation* before considering whether the original section itself is applicable. It appears to me that the judgment appealed against proceeded on the assumption that the *Explanation* in this case was more in the nature of a

1. (1953) 2 M.L.J. 340: I.L.R. (1953) Mad. 1047.

proviso than an explanation, but even in respect of a proviso, where the language of the section is unambiguous and otherwise clear, it cannot have any bearing on the interpretation of the main section itself so as to exclude from it implicitly what is clearly within the scope of its terms. An explanation, however, is different from a proviso, as a proviso excludes, limits or restricts, while an explanation clarifies or explains, the clarification being in respect of matters, which may not be explicit in the original section itself, but whose meaning is implicit. In this case there is no difficulty in holding that the dispute that arose in the suit is one which comes within the scope of the dispute touching the business of the society under section 51 (1) (*b*) of the Act and that therefore it requires to be referred to the Registrar for his decision. The suit becomes therefore not maintainable.

The present appeal, however, has to fail, as the same is not maintainable under section 39 (2) of the Indian Arbitration Act of 1940. A Bench of this Court in *Radhakrishnamurthy* v. *Ethirajulu Chetty & Company*[1], held that an appeal under clause 15 of the Letters Patent against the judgment of a single Judge of the High Court setting aside an order of the City Civil Court under the provisions of section 39 of the Indian Arbitration Act, 1940, is barred by reason of sub-section 2 of the section, though a contrary view was taken by the Lahore High Court in *Han man Chamber of Commerce* v. *Jassa Ram*[2] where the view of our High Court is dissented from. I would prefer to follow the ruling of our High Court as to the application of section 39 (2) to appeals under clause 15 of the Letters Patent. The second appeal contemplated under section 39 (2) means a further appeal and not a second appeal u der section 100 of the Civil Procedure Code.

I.A. No. 1841 of 1952, the petition by the society before the City Civil Court, was filed under section 34 of the Indian Arbitration Act for stay of proceedings in the suit. Appeal A.A.O. No. 522 of 1952 which was heard by our learned brother Basheer Ahmed Sayeed, J., was one laid under section 39 (1) (*v*) of the Act and the present Appeal is under clause 15 of the Letters Patent. In view of the Bench decision, the appeal cannot be sustained. That will be sufficient to dispose of this appeal, and I do not therefore consider it necessary to express any opinion as to whether section 34 of the Indian Arbitration Act is inconsistent with section 51 (1) (*d*) of the Madras Co-operative Societies Act, or as to the application of the Arbitration Act to a reference under section 51 of the Co-operative Societies Act. In view of the fact that I.A. No. 1841 of 1952 in the City Civil Court was expressly laid under section 34 and the appeal against it A.A.O. No. 522 of 1952 being under section 39 (1) (*v*) of the Arbitration Act, the question as to the maintainability of the appeal is covered by the decision of our High Court.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

The Madurai Municipality, through its Commissioner, D. Gnanaolivu .. *Petitioner**

v.

R. Kamakshisundaram Chettiar and another .. *Respondents.*

Madras District Municipalities Act (V of 1920), section 82—Computation of annual rental value of property for the purpose of levying property-tax—Basis of—Fair rent as fixed under the Madras Buildings (Lease and Rent Control) Act, 1949—If conclusive and binding on the Municipality—Claim for refund of tax lawfully levied and collected—If maintainable.

Though the fair rent fixed for a building under the Madras Buildings (Lease and Rent Control) Act, 1949, may and ordinarily should be taken into consideration by the Municipal Authorities in computing the annual value under section 82 of the Madras District Municipalities Act, they are not bound to take such fair rent as necessarily the rent for which the building may reasonably be expected to be let within the meaning of that section.

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1. (1945) 1 M.L.J. 54 : I.L.R. (1945) Mad. 564.
2. A.I.R. 1948 Lah. 64.

* C.R.P. No. 1458 of 1952. 24th March, 1955.

The determination of fair rent under the Rent Control Act is to a certain extent artificial and hypothetical and may not represent the rent at which the premises could reasonably be expected to be let during the particular year of assessment to property-tax. Nor is the contract between the landlord and tenant conclusive in construing the rental of a building.

A statutory restriction on the rent payable by a tenant of a building and the fact that a landlord cannot enforce, as against a tenant, a rent higher than the statutory standard rent in operation at that time, does not operate as a statutory restriction on the rent-earning capacity of the building.

Coimbatore Municipality v. *Govindayyar*, (1953) 1 M.L.J. 128, explained and dissented from.

Gulam Ahmed v. *Bombay Municipality*, A.I.R. 1951 Bom. 320, followed.

Municipal Corporation of the City of Rangoon v. *Surati Bara Bazaar Co., Ltd.*, (1923) I.L.R. 1 Rang. 668 (F.B.), referred.

Corporation of Calcutta v. *Ashutosh*, A.I.R. 1927 Cal. 659, distinguished.

Pop lar Assessment Committee v. *Roberts*, L.R. (1922) 2 A.C. 93 and *Slaytor* v. *Newcastle, etc., Assessment Committee*, L.R. (1926) 1 K.B. 172, referred.

In any event there cannot be a refund of a tax paid under an assessment which has become final and which was not illegal when it was imposed and collected. The fact that fair rent was fixed under the Madras Act XXV of 1949 for a building subsequent to the assessment of tax for a particular year and under the said Act that order of fixation of fair rent operates retrospectively between the landlord and the tenant, does not make the rental value as computed by the Municipality and its collection thereof for the year in question unlawful.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge (II Additional) of Madurai, dated 29th February, 1952, and passed in S.C.S. No. 353 of 1950.

V. Seshadri and *K. S. Ramamurthy* for Petitioner.

R. Gopalaswami Aiyangar for Respondent.

The petition was first heard by Rajagopala Ayyangar, J., who made the following

ORDER.—This is a revision by the Municipality of Madurai and the point arising for consideration in it is whether the petitioner is bound to refund the property-tax collected by it from the 1st respondent on the ground that the assessments were not in conformity with the Act. There is no dispute that the property, which is the subject-matter of the assessment of which the first respondent is the owner, had been leased to a tenant and the property-tax during the half-years now in question was based upon the actual rent then received by him from the tenant. Subsequently an application was filed by the tenant under the Madras Buildings (Lease and Rent Control) Act of 1949 for fixation of fair rent for the premises and the Rent Controller fixed a lesser sum than had been originally paid by the tenant as the fair rent for the premises, and the landlord was also directed to refund the difference between the rent received and the fair rent as fixed. On this the 1st respondent (property-owner) applied to the Municipality for the refund of the excess property-tax paid by him for the previous period on the ground that the assessments were based upon a mistake in the computation of the rental value of the premises. The Municipality refused the demand and the suit was filed for the recovery of this alleged excess assessment. The learned Subordinate Judge has decreed the suit and the Municipality has filed the present revision.

In support of the Judgment of the lower Court, reliance has been placed upon a judgment of Raghava Rao, J., in *Coimbatore Municipality* v. *Govindayyar*[1], where the learned Judge has held that under section 82 of the District Municipalities Act the Municipality is bound to take into account the fair rent fixed by the Rent Controller in arriving at the property-tax to be levied upon the property. On the other hand, there is a decision of a Bench of the Bombay High Court in *Gulam Ahmed* v. *Bombay Municipality*[2], where following a long line of cases in England relating to assessment for rating purposes, it was held that fair rent fixed for the premises under the Rent Control Acts could not be taken into account in the assessment of the property-tax under the Municipal Acts. This decision was brought to the notice of Raghava Rao, J.

1. (1953) 1 M.L.J. 128. 2. A.I.R. 1951 Bom. 320.

I further feel that the judgment of Raghava Rao, J., requires reconsideration in view of certain anomalies which would necessarily arise, if it was held that the Municipal authorities were bound by decisons in the Rent Control Proceedings to which they are not parties. In the first place, if the decision of Raghava Rao, J., were right, a distinction would have to be made between cases where persons are in occupation of their own properties and those where they are let to tenants, for the Rent Control Act does not enable the fixation of fair rent for premises in the owner's own occupation. It can't be that in cases where an owner is in occupation, the basis of the computation of the annual rent would be different from those where the property is let to third parties. Secondly the criterion for the determination of assessing the property-tax is the annual rent for which the property could reasonably be let. If the contention raised on behalf of the 1st respondent is correct, this cannot depend upon whether an application for fixation of fair rent has been made or not. It cannot be that if a tenant notwithstanding that he is entitled to file an application and have his rent reduced continues to pay a higher rent for reasons of his own, the property-tax could be based upon the higher figure but where an application has been made and a lower rent has been fixed as fair rent, the latter should be the basis for the assessment of property-tax. If the argument for the 1st respondent is correct, then the Municipal authorities ought themselves apply the provisions of the Rent Control Act and then determine the reasonable rent which could be derived from the property—a situation which would be anomalous in the extreme which would not support a contention that the decision of a rent controller would be binding on the Municipality. There are also other anomalies and complications. but in view of the order which I propose to pass, I do not consider it necessary to detail all of them.

I am not unaware of the fact that even if the decision of Raghava Rao, J., were accepted, the question whether there could be a refund of a tax paid under an assessment which had become final could be decided independently. But I consider it proper and convenient that both the matters should be decided together.

The question is one which is bound to recur and it is desirable to have an authoritative pronouncement upon it. I consider that the matter should be decided by a Bench. I therefore direct the papers to be placed before the learned Chief Justice for the revision petition being heard by a Bench.

This Petition then came on for final hearing in pursuance of the order of reference before Rajamannar, C.J., and Somasundaram, J.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This revision petition was first heard by Rajagopala Ayyangar, J., who directed it to be heard by a Bench, as he thought it was desirable to have an authoritative pronouncement on the question which arose in the case. The revision petition arose out of a suit brought by the first respondent to recover a sum of Rs. 664-9-5, being the alleged excess amount of property-tax collected by the Madurai Municipality in respect of a house belonging to the plaintiff and the 2nd defendant. The facts necessary for a dispoal of this petition may be briefly stated. For the half-year ending with 30th September, 1947 and subsequent half-years, the Municipality demanded and collected from the plaintiff property-tax based on a rental value calculated on the basis of the rent which was actually being paid by the tenant of the property, namely, Rs. 225 per month. In 1949, the tenant filed an application before the Rent Controller, Madurai, for fixing the fair rent of the house. The Rent Controller fixed the fair rent at Rs. 140 per month. Under the provisions of the Madras Buildings (Lease and Rent Control) Act, the plaintiff as landlord was obliged to refund the rent collected in excess over and above the fair rent fixed from 1tst October, 1946, that is the date on which the Act came into force. The tenant claimed such refund, and the plaintiff was obliged to refund a sum of Rs. 2,635. He thereafter filed the present suit for recovery of the excess amount of property-tax collected from him by the Municipality. The basis of the plaintiff's claim was that as the property tax collected from him was assessed on the rental value as calculated on the amount of rent, actually being then paid,

namely, Rs. 225, now that the fair rent had been fixed at Rs. 140, there should be, in effect, a revision of the assessment, and the Municipality must be deemed to have collected an excess amount of property tax, *i.e.*, more than that to which they were properly entitled. The learned Subordinate Judge decreed the suit. The Municipality has filed the above revision petition.

Section 82 of the Madras District Municipalities Act lays down the method of computation of the annual value of property for the purpose of levying the property-tax. The annual value is deemed to be the gross annual rent at which lands and buildings may reasonably be expected to let from month to month or from year to year, less a deduction in the case of buildings, of ten per cent. of that portion of such annual rent which is attributable to the buildings alone. Schedule IV to the Act contains rules relating to the assessment of the property-tax. Rule 6 says that the value of any land or building for purposes of the property-tax shall be determined by the executive authority. Rule 8 provides for the revision of the assessment books at any time by *inter alia* altering the valuation of any property. Such amendment, when made, shall be deemed to have taken effect on the first day of the half year in which it is made. There is provision for appeal, and rule 28 declares that the assessment or demand of any tax, when no appeal is made, as provided, (and when such an appeal is made, the adjudication of the council thereon) shall be final.

From the above statutory provisions, it is clear (1) that the executive authority has the power to fix the rental value of any premises for the purpose of levy of property-tax, (2) that the value so fixed when entered in the assessment books, is the basis of the levy of the property-tax, (3) that without an amendment of the assessment the tax cannot be altered and (4) that even an amendment has only a limited retrospective operation. Now in this case, it is not pretended that there was any application by the plaintiff for a revision of the entry in the assessment book. There is, therefore, nothing *prima facie* illegal in the levy and collection of the property-tax calculated on the annual rental value as entered in the assessment book.

The contention on behalf of the plaintiff, so far as we are able to gather from learned counsel's argument, is that the Court can interfere with the value fixed by the executive officer when it is computed on a totally wrong principle. Under section 82 (2) of the Act, the annual value shall be deemed to be the gross annual rent at which the building may reasonably be expected to let. The effect of the Rent Controller's decision that Rs. 140 is the fair rent is that that is the rent which the building may reasonably be expected to let. In fact, the landlord will not be entitled to anything more. So such fair rent must form the basis for calculation of the annual value. In support of this contention, learned counsel for the respondent relied upon the judgment of Raghava Rao, J., in *Coimbatore Municipality* v. *Govindayyar*[1]. In that case, the plaintiff was the owner of a house property in Coimbatore. The Coimbatore Municipality fixed the annual value of the building at Rs. 4,440 and levied property-tax on that footing. The plaintiff alleged that the said computation of value was capricious and unreasonable, because the fair rent for the house had been fixed by the District Collector of Coimbatore under the House Rent Control Order at Rs. 150 and on the basis of that rent, the annual rental value, properly computed, would only come to Rs. 1,665. The plaintiff, therefore, claimed a refund of the amount of property-tax collected in excess by the Municipality. The learned Judge held that the suit was competent and that the plaintiff was entitled to the relief sought by him. The learned Judge was of opinion that the order of the Collector fixing the fair rent should have been accepted by the Municipality and the action of the Municipality in disregard of the order was capricious and arbitrary and it must be held that the provisions of the Act had not been complied with, and therefore there was no bar to the suit under the terms of section 354 of the Madras District Municipalities Act. The facts in the present case are slightly different from the facts in that case. In the case before us, the assess-

1. (1953) 1 M.L.J. 128.

ment of the property-tax was not made after the Rent Controller had fixed the fair rent. On the date of the levy and earlier when the rental value was fixed there was no material except the actual rent being paid by the tenant. In the case before Raghava Rao, J., the rental value was apparently fixed after the Collector had fixed the fair rent under the House Rent Control Order. Nevertheless, it must be admitted that the reasoning on which the decision is based does help the respondent in this case.

As indicated by Rajagopala Ayyangar, J., in his order of reference, this petition can be disposed of on the short ground that there cannot be a refund of a tax paid under an assessment which had become final and which was certainly not illegal, when it was imposed and collected. In every one of the cases in which there has been a refund of a tax on the ground that it was illegal, the illegality was present even when the tax was imposed. Now, it cannot be denied that the tax in the present case was perfectly legal when it was imposed and collected. No authority has been brought to our notice in which a refund has been granted of a tax which was proper and legal when it was imposed and paid. That is, why the counsel for the respondent wanted to bring his case under section 72 of the Contract Act. But we are unable to agree with him that that section has any application to this case. This is not a case of money paid under mistake or coercion. Neither the Municipality nor the assessee was under any mistake as to the tax payable, and the tax was voluntarily paid. The contention of the respondent apparently was that because a fair rent was fixed under the Rent Control Order subsequently, and under one of the provisions of that order such fixation operates retrospectively as between the landlord and the tenant. It must be deemed that the rental value fixed by the Municipality for the years now in question was wrongly computed and therefore a larger amount of tax was collected than was lawfully due. It is a well-established principle of law that retrospective operation should be strictly confined to the limits expressly declared or necessarily implied by statute, there cannot be retrospective operation by analogy. The provision under the Rent Control Order and Act which makes the landlord liable to repay the amount of rent collected by him in excess of the fair rent fixed, cannot have general application. The respondent's counsel was unable even to suggest any other legal basis for his claim.

Though this would be enough to dispose of this Civil Revision Petition, we think it is desirable that we should also deal with the other question which has been fully argued and which is of general importance, namely, whether the annual value for the purpose of section 82 of the Madras District Municipalities Act should necessarily and always be computed on the basis of the fair rent for the concerned property as fixed under the Madras House Rent Contról Act. Of course, where there has been no such fixation of fair rent, the question would not arise.

The earliest case cited on this point is that in *The Municipal Corporation of the City of Rangoon* v. *The Surati Bara Bazaar Company, Ltd.*[1]. It was there held by a Full Bench of the Rangoon High Court that in the absence of special circumstances the Corporation of the City of Rangoon must take as its basis of assessment of buildings and land for taxation, the standard rent in those cases in which the standard rent has been fixed by the Rent Controller. Section 80 (2) of the City of Rangoon Municipal Act defined annual value as the gross annual rent for which buildings and land liable to taxation might reasonably be expected to let, from year to year. In arriving at the conclusion that the standard rent fixed by the Controller should from the basis, the learned Chief Justice who delivered the judgment of the Full Bench was largely influenced by the fact that the Rangoon Rent Act made it an offence to take more than the standard rent. The learned Chief Justice observed:

> "The landlord, the standard rent having been fixed by the Controller, could not reasonably expect to get any higher rent for the premises. Did he attempt to do so, he would be guilty of an offence for which he would be liable to a heavy fine ;"

and again at another place :—

1. (1923) I.L.R. 1 Rang. 668.

" It would be an offence for a landlord to accept any rent higher than the rent fixed by the Rent Controller."

His final conclusion was, as already stated, that the Corporation must, in the absence of special circumstances, take as its basis the standard rent, in those cases in which the standard rent had been fixed by the Rent Controller. Under the Madras House Rent Control Act, it would not be an offence for a landlord to accept a rent higher than the rent fixed by the Rent Controller, if the tenant willingly pays such rent. It may be that the landlord cannot demand and exact more, but nothing prevents a willing tenant from paying more than the rent fixed by the Controller. Apart from this distinction, one need not quarrel very much with the final conclusion of the learned Judges that oridnarily the standard rent should be taken as the basis for ascertaining the annual value. It was obviously not their opinion that the standard rent should always be taken as the basis and that otherwise the action of the Corporation would be illegal.

The Full Bench decision of the Calcutta High Court in *Corporation of Calcutta* v. *Ashutosh De*[1], really turned on a special section, namely, section 26 of the Calcutta Rent Act, 1920, which ran thus :—

" During the continuance of this Act the Corporation of Calcutta or any other local authority shall not raise its assessment of any premises above the standard rent on the ground of increase of value."

In the absence of a similar section in the Madras Rent Control Act, that decision furnishes very little assistance.

The identical question before us was fully discussed by a Division Bench of the Bombay High Court in *Gulam Ahmed* v. *Bombay Municipality*[2], where both Indian and English decisions having a bearing on the question were examined. The learned Judge came to the conclusion that in arriving at the rateable value, for purposes of section 154 (1), City of Bombay Municipal Act, 1888, of property to which the Bombay Rent Control Act, 1942, applied, the maximum value to be assigned to the property need not be limited to the maximum standard rent of the property. Section 154 (1) of the Bombay Municipal Act corresponds to section 82 of the Madras District Municipalities Act. The learned Judges followed the decision of the House of Lords in *Poplar Assessment Committee* v. *Roberts*[3].

In *Poplar Assessment Committee* v. *Roberts*[3], it was held that in arriving at the valuation for the purposes of the Valuation (Metropolis) Act, 1869, of a hereditament to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied, the maxium gross value to be assigned to that hereditament was not limited to the standard rent, together with the additions thereto permitted by the latter Act. Section 4 of the Valuation (Metropolis) Act, 1869, defined "gross value" as the "annual rent which a tenant might reasonably be expected, taking one year with another, to pay for a hereditament...." and "rateable value" was defined as "the gross value after deducting therefrom the probable annual cost of repairs and insurance and other expenses as aforesaid." This definition was considered to be in *pari materia* with the definition of net annual value in the Parochial Assessment Act, 1836, which was in the following terms :—

" The rent at which the hereditament might reasonably be expected to let from year to year."

Lord Herschell, L.C., in *London County Council* v. *Erith Church Wardens*,[4] said :—

"The annual rent which a tenant might reasonably be expected, taking one year with another to pay for a hereditament is the same thing as the rent at which the same might reasonably be expected to let from year to year."

It follows, therefore, that the decision of the House of Lords in *Poplar Assessment Committee* v. *Roberts*[3], directly applies to the present case. Lord Buckmaster observed:

" Just as the tenant is hypothetical so also is the rent ; it is only used as a standard which must be examined without regard to the actual limitation of the rent paid by virtue of covenant as between

1. A.I.R. 1927 Cal. 659.
2. A.I.R. 1951 Bom. 320.
3. L.R. (1922) 2 A.C. 93.
4. L.R. (1893) A.C. 562 at 588.

landlord and tenant, and also, as I regard it, to statutory restrictions that may be imposed upon its receipt. From the earliest time it is the inhabitant who has to be taxed. It is in respect of his occupation that the rate is levied, and the standard in the Act is nothing but a means of finding out what the value of that occupation is for the purposes of assessment. In my opinion, the rent that the tenant might reasonably be expected to pay is the rent which, apart from all conditions affecting or limiting its receipt in the hands of the landlord, would be regarded as a reasonable rent for the tenant who occupied under the conditions which the statute of 1869 imposes."

Lord Parmoor fully analyses the fundamental distinction between the occupation value on which rating depends and the actual rent which denotes the liability between owner and tenant. After citing Blackburn, J.'s dictum that no statutory restrictions on the profit-earning or rent-earning capacity of the hereditament must be taken into consideration, the noble Lord proceeded to say :—

"The question, however, remains whether a restriction on rent under the Rent (Restriction) Act, 1920, can be regarded as a statutory restriction on the value to an occupier of the profit-earning or rent-earning capacity of the 'Cobden's Head.' Ordinary rent is not a restriction on the profit-earning or rent-earning capacity of an hereditament in the hands of an occupier and has never been so regarded. I am unable to see in what way a statutory restriction on rent payable from a tenant can operate as a statutory restriction on the profit-earning or rent-earning capacity of the 'Cobden's Head', or how the value to an occupier is affected or controlled by the fact, that a landlord cannot enforce, as against a tenant, a rent higher than the statutory standard rent in operation at the time."

In Ryde on "Rating" (8th Edition) the principles laid down in *Poplar Assessment Committee* v. *Roberts*[1], are thus summarized :—

"This decision involves the position (1) that 'the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament' may be something more than can be recovered from any tenant under a general Act applying to that hereditament, and may include something which, if any tenant has paid, he is entitled to recover ; and (2) that in ascertaining what that rent is, no regard may be had to the landlord (whether actual or hypothetical), or to any restrictions which may fetter him as a party to the bargain by which that rent is fixed."

In a later case in *Slaytor* v. *Newcastle-upon-Tyne Assessment Committee*[2], Bankers, L.J., interpreted this decision as laying down that the contract between landlord and tenant is not conclusive in considering what is the gross estimated rental of a rateable hereditament.

Instances can easily be imagined in which there may be a fair rent fixed by the Rent Controller which would not at all represent the annual value calculated on the basis of the rent for which the building may be expected to let. Indeed, the landlord and the tenant can even contrive to have the fair rent fixed at a low figure for the very purpose of obtaining decrease in the property-tax. There is also the further fact that in fixing the fair rent, the Rent Controller is compelled to follow the provisions of the Rent Control Act, under which the fair rent is made to depend upon certain factors, for example, the prevailing rates of rent in the locality for the same or similar accommodation in similar circumstances during the twelve months prior to 1st April, 1940. A perusal of section 4 of the recent Rent Control Act would show that the determination of the fair rent is to a certain extent artificial and hypothetical and may not represent the rent at which the premises could reasonably be expected to be let during the year of assessment to property tax. With respect, we follow the ruling of the Bombay High Court in *Gulam Ahmad* v. *Bombay Municipality*[3], and hold that though the fair rent fixed under the House Rent Control Act may, and ordinarily should be taken into consideration by the Municipal authorities in computing the annual value under section 82, they are not bound to take such fair rent as necessarily the rent for which the premises may reasonably be expected to be let, within the meaning of section 82 of the Madras District Municipalities Act.

There is no reason evident in this case that the annual value fixed by the Municipality for the assessment years in question was grossly unreasonable or arbitrary. The tax calculated on such annual value would, therefore, be proper and lawful.

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1. L.R. (1922) 2 A.C. 93.
2. L.R. (1926) 1 K.B. 172.
3. A.I.R. 1951 Bom. 320.

The plaintiff is not entitled to any relief by way of refund of any portion of such tax.

The Civil Revision Petition is allowed, and the suit is dismissed with costs throughout.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Anjaneya Motor Transport by Partner S. Srinivasan .. *Appellant**

v.

The State of Madras represented by the Secretary to the Government of Madras, and another .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 57 (4)—Scope—Application for variation of permit by extending a route—Notification of, issued under section 57 (3)—Representation submitted beyond the time prescribed—Party making such representation if entitled to notice of or hearing in revision or appeal against order rejecting the application.

Section 57 (3) of the Motor Vehicles Act makes provision for the interested public being notified when an application for the grant or variation of a permit is made to the Transport Authority. Section 57 (4) provides the limitations. If an operator or a person interested does not take steps in time, he has no right to be heard before orders are passed and that is the effect of section 57 (4). When an appeal or revision is filed, though there is no statutory provision in that regard the principles of natural justice require that notice should be given to those who were parties to the proceedings. But merely because a person files a representation out of time, he does not become in any sense a party to the proceedings entitled to notice of and hearing of the revision or appeal. The knowledge of the appellate or revisional authority as to the existence of a person whose rights may be affected has really no bearing upon the right of such person to notice. If the authority (the Government) had the power to pass an order (under its revisional jurisdiction) such an order could not be held to be vitiated by the caption given to it (purporting to be an appeal.)

Writ Appeal under clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Rajagopalan, dated 10th January, 1955 and made in W.P.No. 720 of 1954, presented to the High Court for issue of a writ of *certiorari* calling for the records in G.O.No. 3096, dated 18th October, 1954, Home Department, Government of Madras and for quashing the said order.

W.A. No. 3 of 1955.

B. V. Viswanatha Ayyar for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) and *K. Bhashyam* for Respondents.

W. A. No. 4 of 1955.

T. Raghavan for Petitioner.

The Special Government Pleader (*V. V. Rhghavan*) and *T. R. Srinivasan* for Respondents.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—These are appeals from the judgment of Rajagopalan, J., dismissing the application by the two appellants for the issue of a writ of *certiorari* to quash an order of the Government setting aside the order of the Transport authority under the provisions of the Motor Vehicles Act.

The second respondent in both the appeals, N. S. Motor Service Salem, had permits for two buses on the route Hosur to Salem. This operator applied on 11th March, 1953, for the variation of the conditions of the permits for these two buses to enable them to be run beyond Salem up to Perundurai. The appellants before us are also operators running their buses in the route from Salem to Perundurai. This application for variation was dealt with by the Central Road Traffic Board, and under rule 208 (*b*) of the Rules framed under the Motor Vehicles Act, the procedure applicable to an application for permit prescribed for applications for

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* W. Appeals Nos. 3 and 4 of 1955. 23rd February, 1955.

variations also. The Board accordingly issued a notification under section 57 (3) of the Act on 31st October, 1953, allowing time till 20th November, 1953, for the filing of any representations to be considered by them. No representations in writing satisfying the requirements of section 57 (3) of the Act were received by the Central Road Traffic Board within the time limited. The appellants however submitted representations out of time. But as under section 57 (4) these could not be considered by the Central Road Traffic Road the application for variation was treated as unopposed. The Assistant Secretary of the Central Road Traffic Board who had authority delegated to him under the rules framed under the Motor Vehicles Act considered the 2nd respondent's application and passed an order rejecting the variation applied for. The 2nd respondent thereupon filed an appeal to the Government and the latter by their order dated, 18th October, 1954, set aside the order of the Central Road Traffic Board and granted the variation sought. The two appellants thereupon filed petitions under Articles 226 of the Constitution (W.P. No. 720 and 721 of 1954) for the issue of a writ of certiorari to quash the order of the Government granting the variation to the N.S. Motor Services, Salem.

The grounds upon which the order of the Government was challenged before the learned Judge were twofold. (1) The Government had no jurisdiction to entertain the appeal by the 2nd respondent because under the Motor Vehicles Act no appeal lay against an order rejecting an application for variation of the conditions of permit. (2) Even if the Government had jurisdiction to interfere with the order of the Central Road Traffic Board, the exercise of that jurisdiction was vitiated by the failure of the Government to give notice to the petitioners (appellants here) before they passed an order which affected them adversely. The learned Judge proceeded upon the footing that no appeal lay to the Government but as it was admitted that the Government had revisional jurisdiction under section 64-A of the Motor Vehicles Act, there was no insuperable objection in sustaining the validity of the order passed by the Government. The learned Judge also held that as the petitioners before him had not filed representations in time, they had no right to be heard by the Government and that consequently there was no violation of the principles of natural justice in not issuing notice to them before interfering with the order of the Central Road Traffic Board. On this reasoning, the learned Judge dismissed the two writ petitions.

Mr. T.M. Krishnaswami Aiyar, learned counsel for the appeallants, urged that the decision of the learned Judge was wrong on both the points. We shall deal with the two points separately. The first was that the appellants were persons who would be adversely affected by any order for variation in favour of the 2nd respondent and that the principles of natural justice required that notice should be given to them before an order passed in their favour by the Central Road Traffic Board was interfered with. There is no dispute that the Central Road Traffic Board observed the proper procedure in dealing with the application for variation. The notification was published under section 57 (3) which runs in these terms.

"57 (3) : On receipt of an application for a stage carriage permit or a public carrier's permit, the Regional Transport Authority shall make the application available for inspection at the office of the Authority and shall publish the application or the substance thereof in the prescribed manner together with a notice of the date before which representations in connection therewith may be submitted and the date, not being less than thirty days from such publication, on which, and the time and place at which, the application and any representations received will be considered."

The date within which representations by objections would be considered was fixed as 20th November, 1953, and it is admitted that the appellants did not file any objections or make any representations within that date. Section 57 (4) deals with the cases where no such representations have been received. It runs thus :

"57 (4) : No representation in connection with an application referred to in sub-section (3) shall be considered by the Regional Transport Authority unless it is made in writing before the appointed date and unless a copy thereof is furnished simultaneously to the applicant by the person making such representation."

The argument is that on the language of section 57 (4) the disability of having representations or objections being considered is confined to the original authority

but that when any appeal or revision is filed from the order of the authority acting under section 57 (3), the inhibition imposed by section 57 (4) does not apply and that persons, who would be adversely affected by any order in appeal or revision, have a right to be heard as to why the order passed by the original authority should not be confirmed. In this connection reliance is placed on the decision of a Bench of this Court in *Nadar Transports* v. *State of Madras*[1], consisting of Satyanarayana Rao and Rajagopalan, JJ. The following observations of Satyanarayana Rao, J., who delivered the judgment of the Bench at page 365 are particularly relied upon :

"The restriction in section 57 (4) that no representations should be considered by the Regional Transport Authority is confined in our opinion to the hearing before the Regional Transport Authority, and it does not extend to the appellate authority."

From this it is argued that the appellants should be treated as parties to whom notice ought to have been issued and that any order passed without notice to them would be vitiated as contravening the principle of *nudi alteram partem*. The learned Judge in the judgment under appeal has explained this decision to which he was himself a party and we agree with him in his construction of this passage as not supporting the contention of the appellants. The learned Judges in that case were interpreting the provisions of section 64 (*f*) of the Motor Vehicles Act and they held that a person who had not filed any representations within the time limited under section 57 (3) before the original authority could still be treated as a person opposing the grant of a permit entitled to file an appeal under section 64 (*f*) of the Act. In the present case we are not concerned with such a situation. It will be time enough to consider when the point does arise, whether section 64 (*f*) was really intended to vary the effect of section 57 (4) in regard to appeals or whether it had reference to the persons and authorities referred to in section 50 of the Act.

In this connection learned counsel for the appellants urged the analogy of proceedings in Civil cases where even though a party is *ex parte* at the trial but the judgment or decree is in his favour, notice has to be issued to him by an appellate or revisional Court before such judgment or decree is vacated or interfered with to his prejudice. In our opinion, the entire argument of the learned counsel proceeds on a misapprehension of the nature of the proceedings under the Motor Vehicles Act. There is here no *lis* between the parties so that in a sense there are no parties at all except the applicant. The Transport Authority has to consider whether in the public interest the application that is made to it could be granted or not. There might be other persons providing transport facilities in such an area who might be adversely affected by such an order and who are entitled to make representations that in public interest the application need not or should not, be granted. Section 57 (3) makes provision for the interested public being notified and section 57 (4) provides the limitations. If an operator or a person interested does not take steps in time, he has no right to be heard before orders are passed and that is the effect of section 57 (4). But merely because a person files a representation out of time, he does not become in any sense a party to the proceeding. When an appeal or a revision if filed though there is no statutory provision in that regard the principles of natural justice require that notice should be given to those who were parties to the proceedings. But it is contended by Mr. Krishnaswami Ayyar, learned counsel for the appellants, that such a notice should be given not merely to those who in a sense have made themselves parties to the proceedings by filing representations within the time limited by section 57 (3) but to all those who would be adversely affected by the order. To a question by us, as to whether if this view were accepted, any logical distinction could be drawn between persons who had filed objections out of time and other parties who though equally interested had notified any representations, as regards the necessity for notice and hearing, Mr. Krishnaswami Ayyar stated that no such distinction could be drawn. According to him it was the duty of the appellate or revisional authority to make an enquiry as to the persons likely to be affected by any order which they might pass and deal with the appeal or revision before it after notice to and hearing such parties. In other words, the argu-

1. (1952) 2 M.L.J. 361.

ment is that the duty cast upon the appellate or revisional authority is more extensive than even that laid down by section 57 (3). In his attempt to circumscribe the scope of section 57 (4) to the original authority, learned counsel is really attempting to enact provision similar to section 57 (3) at each stage of an appeal or a revision which is certainly not warranted by any rule of construction.

The next contention of learned counsel for the appellants was that even if there was no obligation upon the Government to issue notice and hear all parties who might be adversely affected, there was an obligation to notify and hear *those who to their knowledge* would be adversely affected by their order and that as, in the present case, the very order of the Central Road Traffic Board showed that the appellants had objected to the variation, though out of time, the Government had knowledge of their interests and that in these circumstances the order passed by the Government was vitiated as contravening the principles of natural justice. We are, however, unable to appreciate this argument because the knowledge of the revisional or appellate authority as to the existence of a person whose rights may be affected has really no bearing upon the right of such person to notice. One thing is clear, that if a person is entitled to notice because he has become so to speak statutorily a party to the proceeding by filing representation within the time limited by section 57 (3) he is entitled to notice and hearing whether the Government have knowledge of his existence or not. It therefore logically follows that the knowledge of his existence or appellate or revisional authority does not determine the right of party to notice or hearing but the latter condition is really dependent upon whether he is a party to the proceeding who would be adversely affected by the order.

In this connection reliance is placed upon the decision in *Pankaj Kumar* v. *Commissioner, Burdwan Division*[1] and of an unreported decision of a Bench of this Court holding that though the Motor Vehicles Act does not in terms provide for the issue of a notice and hearing by an appellate or revisional authority, the principles of natural justice require this and that in their absence an order passed by it would be quashed. But these decisions do not really bear upon the question as to whether the appellants are the persons who are entitled to the notice under the Motor Vehicles Act.

We have therefore no hesitation in rejecting the contention that the order of the Government is vitiated for want of notice to the appellants.

The other contention that was urged was that no appeal lay to the Government against the order of the Central Road Traffic Board passed through its Secretary refusing the variation, and that the order of the Government did not disclose that their revisional jurisdiction was invoked or that they intended to exercise such revisional powers. We do not consider that there is much substance in this objection because if the authority had the power to pass the order such an order could not be held to be vitiated by the caption given to it.

The appeals fail and are dismissed with costs in one. Advocate's fee Rs. 100.

K.S. *Appeals dismissed.*

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1. A.I.R. 1953 Cal. 587.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice,* AND MR. JUSTICE SOMASUNDARAM.

V. V. Iyer, Proprietor of Ensign Engineering Corporation, Madras .. *Appellant**

v.

The Official Assignee of Madras .. *Respondent.*

Presidency Towns Insolvency Act (III of 1909), section 56—Application to declare a payment by a debtor a fraudulent preference—Question whether the person to whom payment was made was really a creditor.

On an application purporting to be under section 56 of the Presidency Towns Insolvency Act the Court is not called upon to ascertain whether the alleged payment was made to one who was not really a creditor. If that be the case of the Official Assignee and the Official Assignee wants to claim relief on behalf the creditors on that basis, he may have his remedy by recourse to other proceedings, but an application under section 56 is not the proper remedy.

On appeal from the order of the Hon'ble Mr. Justice Ramaswami Gounder, dated 28th September, 1953 and made in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 121 of 1953 in I. P. No. 39 of 1951.

N. Panchapakesa Aiyar for Appellant.

V. Thyagarajan and *M. Chockalingam* for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the judgment of Ramaswami Gounder, J., allowing an application taken out by the Official Assignee in I.P. No. 39 of 1921 to declare the payment of Rs. 9,600 by the insolvent, M. S. Subramaniam, to the appellant as void against the Official Assignee under section 56 of the Presidency Towns Insolvency Act and to direct him to pay that amount to the Official Assignee. The insolvent and his brother, since deceased, one M. S. Venkataramaan, were carrying on business under the name and style of Well Wasman & Co., Madras. On a creditor's petition, dated 30th April, 1951, M. S. Subramaniam was adjudged insolvent on 30th July, 1951. It is common ground that the insolvent paid to the appellant in all a sum of Rs. 9,600, the payments which went to make this sum being made on three days, 26th February, 1951, 2nd March, 1951 and 3rd April, 1951. The only question is whether the payment of these sums amounted to fraudulent preference. The learned Judge was inclined to hold that there was no genuine liability of the insolvent to the appellant. But even assuming that there was liability, the payments were in fraudulent preference. The learned Judge, therefore, directed the appellant to pay to the Official Assignee the said sum of Rs. 9,600 with interest as 6% per annum from the date of the order.

Learned counsel for the appellant at the outset contended that having regard to the pleadings it was not permissible to the learned Judge to go into the question whether any amount was actually due by the insolvent to the appellant. We agree with him that on this application purporting to be under section 56 of the Presidency Towns Insolvency Act the Court is not called upon to ascertain whether the alleged payment was made to one who was not really a creditor. If that be the case of the Official Assignee and the Official Assignee wants to claim relief on behalf of the creditors on that basis, he may have his remedy by recourse to other proceedings, but an application under section 56 of the Act is not the proper remedy, We shall, therefore, for the purpose of this appeal, assume that the appellant was a creditor of the insolvent, and that the amounts paid to the appellants were paid towards the liability of the insolvent to him.

The only question then is whether these payments amount to a fraudulent preference. Whether a particular payment to a particular creditor in preference

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* O.S. Appeal No. 25 of 1954. 11th March, 1955.

to other creditors amounts to fraudulent preference or not is essentially a question of fact. No single circumstance by itself will generally be conclusive on the question.

It is the cumulative effect of several circumstances that will determine this question. In the present case, we start with the admitted fact that the insolvent's schedule disclosed creditors to whom a total amount of above Rs. 38,000 was due. We have also the fact that the only assets available for unsecured creditors would not exceed Rs. 400. There is the further fact that excepting the appellant no other creditor was paid any amount by the debtor at or about the time. The appellant is related to the insolvent. Comment was made on the degree of relationship, and it was contended by learned counsel for the appellant that they were far too distantly related to justify any adverse inference being drawn from the relationship. The fact remains, however, that the appellant was a relation of the insolvent, whereas other creditors presumably were not. This circumstance is not entirely without significance.

Something was said about the onus of proof. But in a case like this, where evidence has been adduced both by the Official Assignee and by the appellant, all that the Court has to do is to draw an inference from the several facts and circumstances emerging from the evidence. This is not one of those cases where the finding would entirely depend upon the onus of proof.

The evidence does not disclose any compelling reason why the insolvent should have preferred the appellant to other creditors. The absence of such a compelling reason itself would be proof of a fraudulent preference. The insolvent, examined by the Official Assignee, stated that the reason why he made these payments was because the appellant had demanded payment by registered letters and he thought that he should pay at once to save his reputation. This is obviously a wrong statement, for it is not pretended that the appellant sent any registered letters to the insolvent demanding payment. The appellant stated that he had demanded payment by three letters written by him from Bombay, dated 20th February, 1951, 25th February, 1951 and 26th March, 1951. The learned Judge was not inclined to believe this assertion of the appellant. If the insolvent and the appellant were sailing together, there would be no difficulty in manufacturing any number of letters like this. The fact that these letters were addressed by the appellant to the insolvent might have been proved by entries in the appellant's despatch registers, but they were not filed. There is no other independent evidence that these letters were actually addressed by the appellant to the insolvent. At the hearing before the learned Judge, it was also sought to be made out that the insolvent made these payments in the hope of obtaining further amounts of credit from the appellant. In our opinion, this is in the nature of an afterthought, and there is nothing in the evidence to show that the appellant was ready and willing to advance further amounts.

One of the payments made by the insolvent to the appellant was on 2nd March, 1951. The amount paid was Rs. 4,000. There is evidence which we accept, which conclusively proves that on 2nd March, 1951, an identical sum of Rs. 4,000 was paid by P. W. 1, Krishnan to the insolvent, towards the price of three Petter engines. Ex. P-2 is the receipt passed by the insolvent for the said amount. It is obvious that it was this amount of Rs. 4,000 which was paid over by the insolvent to the appellant. Taking the above and the other material circumstances into consideration, we have no hesitation in accepting the finding of the learned Judge that the payments, assuming they were made towards a genuine liability of the insolvent were in the nature of a fraudulent preference falling within section 56 of the Presidency Towns Insolvency Act.

The appeal is dismissed with costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMASUNDARAM.

Krishna Thevar and others .. *Petitioners**

v.

The State of Madras and others .. *Respondents.*

Criminal Procedure Code (V of 1898), section 146—Applicability—Finding that both parties were entitled to joint possession and dropping of proceedings under section 145—Order as to attachment and appointment of Receiver of the property on ground of likelihood of breach of peace continuing, not sustainable—Proper procedure.

Where it is found that both the parties were in joint possession and so proceedings under section 145, Criminal Procedure Code, are dropped section 146 does not apply and an order attaching the subject of dispute and appointing the Revenue Inspector as Receiver (on the ground that likelihood of breach of peace still continued) is unsustainable. If breach of the peace is likely to occur it is for the Police to take such action as it thinks fit against the parties under section 107 or section 144 as the case may be.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Executive First Class Magistrate of Ramanathapuram, dated 8th October, 1954 and passed in M.C. No. 19 of 1954.

T. S. Vaidyanatha Ayyar for the Petitioner.

The Public Prosecutor on behalf of the State.

U. Somasundaram for Respondents.

The Court made the following

ORDER.—This is a revision by *A* party against an order passed by the Executive First Class Magistrate, Ramanathapuram, in S. 145 proceedings, *A* party came with a petition that they are entitled to the exclusive right of fishing in Illanjamboor tank situated in Illanjamboor village in Mudukulathur taluk. The *B* party who belong to Veerambal village claimed joint right of fishing in the said tank. After taking the evidence the Magistrate found that the contention of the *B* party was correct and that the *B* party was entitled to joint possession and enjoyment of the right of fishery in the abovesaid tank. After finding that, he dropped the proceedings under section 145. But as the Magistrate was of opinion that the likelihood of the breach of the peace still continued, he had the fishery right attached under section 146 and appointed the Revenue Inspector, Mudukulathur, as receiver. It is this portion of the order that is objected to by the petitioners and the respondents join them in that prayer. In short both the petitioners and the respondents dispute the correctness of this order, namely, attaching the subject of dispute and appointing the Revenue Inspector as Receiver. It is obvious that section 146 cannot apply to the facts of this case. That will apply only when he decides that none of the parties was in possession as of right or when he is unable to satisfy himself as to which of them was then in such possession. But here he finds that both of them were in possession and it has been held that section 145 proceedings do not apply to cases where there is joint possession. The Magistrate was therefore right in dropping the proceedings under section 145. But then as section 146 does not apply, the order as to attachment and appointment of Receiver is unsustainable and is therefore set aside. If breach of the peace is likely to occur it is for the Police to take such action as it thinks fit against the parties under section 107 or 144 as the case may be. The petition is therefore allowed with the above observations.

K.S. —— *Petition allowed.*

* Cr.R.C. No. 51 of 1955. 15th April, 1955.
Cr.R.P. No. 49 of 1955.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MACK AND MR. JUSTICE KRISHNASWAMI NAYUDU.

Ambalathil Assainar .. *Appellant**

Penal Code (*XLV of* 1860), *section* 300, Exception 5—*Applicability—Conditions necessary for.*

The accused who was in desperate poverty (and thrown out on the streets without a roof to shelter them) and his wife had an argument as to what they should do and the accused tried to persuade her to go to her mother's house. The wife refused to go back to her mother's house and said that if the accused insisted it was better that she was killed. After asking her two or three times if she did not want to live the accused cut her with a penknife and killed her. In the circumstances

Held: This is not the type of consent which is contemplated by *Exception* 5 to section 300 of the Penal Code. This exception applies to cases where a person takes the life of another at his or her request and with unequivocal consent which does not involve the choice of alternatives to which the person taking the life more or less has driven the person.

In re *Kanaga Kosavan*, I.L.R. (1954) Mad. 504 and *Nainamuth* v. *Emperor* 1939 M.W.N. (Cr.) 172 *doubted.*

Appeal against the Order of the Court of Session of the North Malabar Division in Case No. 27 of the Calendar for 1954, on 6th December, 1954.

Jacob A. Chakramakal, Advocate, *amicus curiae* for Accused Appellant.

R. Santhanam, for the Public Prosecutor on behalf of the State.

The Judgment of the Court was delivered by

Mack, J.—The appellant, a Mopla, has been found guilty under section 302, Indian Penal Code, of the murder of his wife Pathu, aged 25, on 20th August, 1954, some time between 9-30 P.M. and 11-45 P.M., and sentenced to transportation for life by the learned Sessions Judge of North Malabar.

The facts of this case are very tragic, the murder being founded really on desperate poverty, the evidence showing no unchastity or even any suspicion of it on the part of this wife. The body was found on the bench of an aided elementary school in Badagara at 7 A.M. the following morning by a school teacher, P.W. 1, with ghastly wounds on her neck which have been proved to have been caused by a small pen-knife M.O. 9. There was an incised wound 8" x 4" x 3" across and around portion of the neck cutting the muscles, veins, arteries, nerves and trachea. There was another wound 10" x 5" x 2½" from the middle of the neck to the left side cutting all structures. There were also two comparatively minor incised wounds.

The accused was arrested on 26th August, 1954, by the Sub-Inspector, P.W. 24, on the road near Badagara Railway Station. He had in his possession a pen-knife M.O. 9 and a dhoti M.O. 10 on which, however, no human bloodstains were found. On 4th September, 1954, he made a confession, Exhibit P.-6, before a Magistrate which we have no hesitation in holding to have been voluntarily made in which he confessed to killing his wife under extraordinary circumstances pleading that he did so with her consent.

The evidence shows that the accused lived with his wife in the house of P.W. 4 on a rent of Rs. 3 a month which had gone into arrears. According to P.W. 4 the accused and his wife used to quarrel mainly because the former did not bring home anything for food. A few days before the murder, on Perunal day, there was a quarrel between the husband and wife. When he enquired, Pathu complained that the accused did not bring anything for food even on Perunal day and that after quarrelling the accused beat her. P.W. 4, then warned them that as they were in arrears for three months they must quit the house if they created disturbances of that kind. The accused said that he would leave the house on the following Friday, that is, about a week later, and, in due course, on the day of the murder, surrendered the key of the portion he was occupying at about 8-30 P.M. and went away with Pathu taking their younger child with them. In his confession Exhibit P. 6, the accused said that after being given notice by

* Criminal Appeal No. 20 of 1955. 19th April, 1955.

P.W. 4, the elder child was sent to his father's house and after leaving P.W. 4's house he went with his wife and tried to persuade her to go to her mother's house. As they were coming near the school it began to rain heavily, and, it would appear they had an argument as to what they should do. Pathu refused to go back to her mother's house and said that if the accused insisted it was better that she was killed. In Exhibit P. 6, the accused said that he asked her two or three times whether she did not wish to live and she told him that she did not want to do so. He then described how he took his pen-knife and cut her with it on the neck. She struggled and when he realised that she would make a noise he thrust a cloth into her month. After life became extinct he took away his child and went to his father's house. He stuck to this confession in the committing Court but resiled from it in the Sessions Court where he took refuge in complete ignorance as to how his wife came by her death.

There can be no doubt at all that it was the appellant that killed his wife after both left the house of P.W. 4. They were seen by a witness P.W. 8 going together very near the school at about 9-30 P.M. Another witness P.W. 9, saw the accused returning along with the child from the direction of the school at about 11-45 P.M. The confession voluntarily made and adhered to in the committing Court lays at rest any doubt as regards guilt of the accused who undoubtedly cut his wife's throat. Pathu's body was described in the post-mortem certificate as emaciated. A pawn broker, P.W. 21, deposed to the accused selling trifling ornaments usually worn by Muslim women of the value not exceeding Rs. 3, a few months before this tragedy. There can be no doubt that this family was living in a desperate state of poverty as a result of the accused being unable to find any source of livelihood.

The only point for consideration is the plea raised by Mr. Chakramakal that the effence is not murder under *Exception* 5 to section 300, Indian Penal Code and that Pathu suffered death in this case with her own consent. The learned Sessions Judge quite rightly rejected this plea on the ground that such consent must be given unconditionally and without any reservation.

Mr. Santhanam for the Public Prosecutor has drawn our attention to two decisions, In re: *Kanaga Kosavan*,[1] and *Nainamuthu* v. *Emperor*,[2] in which this *Exception* was applied and the offence reduced to section 304, Indian Penal Code, with however the sentence of transportation for life imposed. The former case was that of a man who killed his concubine whom he persuaded to go to her village saying that they had gone about 5 or 6 days in search of a house but found none. But, she lay down and refused to get up. He tried to persuade her to go on the ground that he was being scandalised also by his association with her. But she refused, took the knife out of his waist, put it into his hand and asked him to kill her. He accordingly cut her neck with the knife. The second case also concerned the killing of a concubine by her paramour. In the confession he made he stated that on the night in question, after some talk she declared that she would sever her connection with him and go away, and, in the alternative, she suggested that both of them might commit suicide. In the morning he killed her at the place where her body was found. With great respect to the judgments in these two cases, it appears to us in the first case the women did not give her unqualified assent to her life being taken away as, in our view, *Exception* 5 to section 300, Indian Penal Code, requires. In the second case the consent given by the woman was for her life to be taken simultaneously with the man's: she gave no consent to be killed by the man who then was to continue life on this earth. In the present case also, although the wife, taking the confession at its face value, flatly refused to go back to her mother and said that if her husband insisted on her doing so she would rather be killed, this, as it appears to us, is not the type of consent

1. I.L.R. 1954 Mad. 504.
2. 1939 M.W.N. (Cr.) 172.

which is contemplated by *Exception* 5 to section 300, Indian Penal Code. This *Exception*, again with respect to the two decisions we have referred to, applies to cases where a person takes the life of another at his or her request and with unequivocal consent which does not involve the choice of alternatives to which the person taking the life more or less has driven the person. We think that the learned Sessions Judge, on the facts of this case has quite rightly declined to apply *Exception* 5 to the facts. The case is undoubtedly a pathetic and a tragic one.

In the matter of sentence, we can only leave it to the Government to commute the sentence in this case, and we cannot lay down law out of charitable consideration which undoubtedly weighed with three of the assessors who rather extraordinarily held on the cogent evidence in this case that the accused was not guilty of any offence. The Appeal is dismissed.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE RAMASWAMI GOUNDER.

Shenbagavalli Ammal .. *Petitioner* *

v.

Dhanalakshmi Ammal and others .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *sections* 9 *and* 12-*B—Revisional power of District Court as regards orders in execution.*

Section 12-B of the Madras Buildings (Lease and Rent Control Act seeks to confer revisional powers on the High Court in respect of an authority functioning in the Presidency-town and in the District Court in respect of an authority functioning in a District, in regard to both the classes of authorities, *viz.*, the one empowered by section 9 of the Act to execute an order and the other an appellate authority empowered under section 12. This is the natural meaning to be given to the expression as used in section 12-B. The section enables the District Court to call for and examine the records relating to any order passed or proceeding taken under this Act and these words are comprehensive enough to take in execution proceedings.

Quaere : Whether the District Court can entertain a revision from an order in execution where the executing Court is also the District Court in the absence of a District Munsif's or Subordinate Judge's Court under section 9 (ii) (*c*).

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Tirunelveli, dated the 11th day of November, 1952 and made in M. C. No. 15 of 1951, against the order of the Court of the District Munsif of Tirunelveli in E. A. No. 426 of 1951 in E. P. No. 251 of 1951 (H. R. C. No. 149 of 1948, Rent Controller, Tirunelveli).

S. Ramachandra Aiyar for Petitioner.

R. Ramamurthy Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This is a Revision filed against the order of the District Judge of Tirunelveli declining to exercise his revisional powers under section 12-B of the Buildings (Lease and Rent Control) Act in respect of execution proceedings taken by the landlord to enforce an eviction order. He filed an application E. A. No. 426 of 1951 before the District Munsif, Tirunelveli, under Order 21, rule 98 of the Code of Civil Procedure to remove the obstruction of the respondents and deliver possession of the house. The eviction order was obtained only against the first respondent and the other respondents 2 to 4 were impleaded as obstructors. The learned District Munsif held that those respondents were in possession of the house in their own account and dismissed the petition. As against that order a revision was taken to the District Judge. But the learned District Judge held

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* C.R.P. No. 157 of 1953. 7th July, 1955.

that the revisional powers can be exercised only by the High Court and directed the return of the papers to be presented to the High Court, if so advised. It is against that order the present Revision is filed.

The only question therefore that was debated in this Revision was whether under section 12-B of the Act the District Judge has or has no revisional powers in respect of execution proceedings taken to enforce the eviction order. It was contended for the petitioner that the District Judge has got such revisional powers, whereas the learned counsel for the respondent maintained that the view expressed by the learned District Judge was correct. It will be seen that under section 7 of the Act the Rent Controller has to pass the order of eviction, under the circumstances enumerated in that section. Section 12 provides for appeals against such orders and it is left to the State Government to confer on such officers and authorities as they think fit the powers of appellate authorities for the purpose of the Act. Section 9 provides for execution of the orders of eviction. In the city of Madras such orders have to be executed by the Principal Judge of the City Civil Court and elsewhere by the District Munsiff or if there is no such District Munsiff by the Subordinate Judge or if there is no such District Munsiff or Subordinate Judge then by the District Judge having jurisdiction. Thus it will be seen that sufficient provisions are made in the Act for appeals against the eviction orders as well as for execution of such orders, under sections 9 and 12 of the Act. Then comes section 12-B which provides for revisional powers being exercised by the High Court and by the District Court. That section runs thus:

"The High Court, in the case of an authority empowered by section 9 to execute an order, or of an appellate authority empowered under section 12, and functioning in the Presidency-town and the District Court concerned in the case of any such authority so empowered and functioning in a district, may, at any time, on the application of any aggrieved party, call for and examine the records relating to any order passed or proceeding taken under this Act by such authority for the purpose of satisfying itself as to the legality, regularity or propriety of such order or proceeding, and may pass such order in reference thereto as it thinks fit."

The contention of the respondent's learned counsel is that the expression "and functioning in the Presidency-town" governs only "an appellate authority empowered under section 12" and not "an authority empowered by section 9", that is to say, the revisional powers are given to the High Court in the case of authority empowered by section 9 to execute the order, whether that authority functions in the Presidency-town or in a District and also in respect of authority empowered under section 12 and functioning in the Presidency-town. His further contention is that the District Court has revisional powers in the case of an authority "so empowered and functioning in a district" which according to the learned counsel means "empowered under section 12 and functioning in the district" that is to say, the revisional powers of the District Court are confined only to orders passed in appeal by any authority empowered under section 12. The contention means that in respect of execution orders passed by any authority in a District, the District Judge has no revisional powers and that in such cases the powers are conferred only upon the High Court. In fact it was that view which prevailed with the learned District Judge who refused to interfere in this matter. On the other hand, the contention for the petitioner is that the expression "and functioning in the Presidency-town" occurring in the section governs not only "an appellate authority empowered under section 12" but also "an authority empowered by section 9 to execute an order". It will be seen that after "section 12" there is a comma, and I am unable to find any reason why the expression "and functioning in the Presidency-town" should be construed as having reference only to "an appellate authority empowered under section 12". The further contention of the learned counsel for the respondent is that in the expression "any such authority so empowered and functioning in a district" the words "such authority" can have reference only to the authority empowered under section 12. There is again no warrant for this interpretation. His only argu-

ment was that the expression "of an appellate authority empowered under section 12, and functioning in the Presidency-town" and the expression "any such authority so empowered and functioning in a district have a striking similarity in their collocation of words, so that the District Court's revisional power must be confined only to an appellate authority empowered under section 12 and functioning in a District, and does not extend to the authority empowered under section 9. I am not impressed with this line of reasoning. It seems to me that the expression "and functioning in the Presidency-town" clearly refers to both classes of authorities, and so does the expression "any such authority so empowered and functioning in a district." In my view, section 12-B seeks to confer revisional powers on the High Court in respect of an authority functioning in the Presidency-town and on the District Court in respect of an authority functioning in a District, in regard to both the classes of authorities, *viz.*, the one empowered by section 9 to execute an order and the other an appellate authority empowered under section 12. That appears to me to be the natural meaning to be given to the expressions used in section 12-B. But the learned counsel for the respondent pointed out that section 9, clause (ii), sub-clause (*c*) provides that if there is no such District Munsiff or Subordinate Judge, the eviction order has to be executed by the District Judge having jurisdiction and contended that if the District Judge should have revisional powers even in execution proceedings, in a district where there is no District Munsiff or Subordinate Judge, then the District Judge will be the executing Court and there will be no revisional authority under section 12-B. He contended that that position would be anomalous and inconsistent with the proviso to that clause which states "that an order passed in execution under this section shall not be subject to an appeal, but shall be subject to revision under section 12-B." So far as our State is concerned it may be safely asserted that the contingency of there being no District Munsiff or Subordinate Judge in a District would never arise. But if it should arise, the position would be that the powers of execution as well as powers of revision would be merged in one and the same Court, with the result that in such cases the District Judge will not exercise revisional powers over his own orders passed in execution. That provision merely states "shall be subject to revision under section 12-B and that section obviously means that where the executing Court is the District Court there will be no revision under that section. That situation, which may never happen, need not prevent us from giving a natural interpretation to the language of section 12-B of the Act. Further the section enables the District Court to call for and examine the records relating to "any order passed or proceeding taken under this Act", and those words are comprehensive enough to take in execution proceedings.

There has been no decision of our Court on this point. But my attention was drawn to a precedent in S.R. No. 4403, wherein this question was raised by the office, and Balakrishna Ayyar, J., held that that view was correct and directed the return of the C. R. P. for presentation to the District Court.

I therefore consider that the refusal of the learned District Judge to exercise his jurisdiction was unjustified. So this Revision is allowed and his order is set aside and the case remitted to his file for a proper disposal. In the circumstances, there will be no order as to the costs of this Revision Petition.

R.M. *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

Ponnambath Koomulli Gopalan Nambiar .. *Petitioner**

v.

Varisya Kuniyil Katankotan Krishnan Nambiar .. *Respondent.*

Civil Procedure Code (V of 1908), section 48—Applicability to execution of decrees of village Courts.

There is no provision in the Village Courts Act making the Code of Civil Procedure or any part of it applicable to proceedings under the Village Courts Act. If follows therefore that section 48 of the Code as such does not apply to the execution of a village Court decree. The Village Courts Act provides for execution of a village Court decree by two classes of Courts, namely a village Court itself and the Court of the District Munsiff to which it is transmitted or to which it is withdrawn.

A decree of a village Court is a decree of a Civil Court, though no doubt that of a Special Court with limited powers. There are provisions in the Village Courts Act for execution of the decrees passed by a village Court by that Court itself.

Difference between a decree of such a Court and an award of a Registrar under the Co-operative Societies Act or an order under the Religious Endowments Act which are not capable of execution by themselves but only by a transferee Court pointed out. When a decree passed by one Court is transferred to another Court for execution the law of limitation applicable to a petition for execution is the law applicable to a decree of the Court which passed the decree and not the law applicable to a decree passed by the transferee Court. The fact that the Court to which the decree has been transferred is a Court, the decree of which will be governed by section 48 of the Code of Civil Procedure, would not make any difference.

The fact that a decree of a village Court is transferred to a District Munsiff's Court for execution would not have the effect of making section 48 of the Code of Civil Procedure applicable to the execution petition. The Indian Limitation Act applies to proceedings in a village Court. The Law of Limitation applicable to village Court decrees is governed by that Act alone.

Sri Krishna Doss v. *Alumbu Ammal,* (1900) 21 M.L.J. 777: I.L.R. 36 Mad. 108.

Gopalaswami Mudaliar v. *Thiagarajaswami Devasthanam,* (1950) 1 M.L.J. 437.

Tincowrie Dawn v. *Debendra Nath,* (1898) I.L.R. 17 Cal. 491.

Ranganandham v. *Ponnacharamma,* A.I.R. 1942 Pat. 128, referred.

Subba Rao v. *Calicut Co-operative Urban Bank, Ltd.,* (1939) 1 M.L.J. 695.

Subba Rao v. *Calicut Co-operative Urban Bank, Ltd., Calicut,* (1940) 1 M.L.J. 268, explained.

Lakshmindra Thirtha Swamiar v. *H. R. E. Board, Madras,* (1934) 65 M.L.J. 364: I.L.R. 56 Mad. 712.

H. R. E. Board, Madras v. *Shirur Mutt,* (1934) I.L.R. 58 Mad. 760: 68 M.L.J. 200 distinguished.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of North Malabar, dated 12th March, 1952 and made in A. S. No. 751 of 1951 preferred against the order of the Court of the District Munsiff of Tellicherry, dated 4th September, 1951 and made in R. E. P. No. 220 of 1951 in Suit No. 56 of 1951, Kacheri Iringannoor Panchayat Court.

V. P. Gopalan Nambiar for Petitioner.

A. Achuthan Nambiar for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This Revision Petition involves a question of some importance on which no direct authority was cited to us. A decree was passed by a Panchayat Court on 20th November, 1937. That decree was transferred to the Court of the Additional District Munsiff of Tellicherry for execution. There

*C.R.P. No. 1870 of 1952. 22nd April, 1955.

were several execution applications, and on 28th June, 1951, the execution petition out of which this revision petition arises was filed. It is common ground that the petition was not barred under Article 182 of Schedule I of the Limitation Act. But objection was taken by the judgment-debtor that the petition was barred by reason of section 48 of the Code of Civil Procedure. The learned District Munsiff overruled the objection, holding that section 48 of the Code of Civil Procedure did not apply. There was an appeal to the District Judge, who confirmed the decision of the District Munsiff. It is to revise this order of the learned District Judge that the above Civil Revision Petition was filed. This petition came up before me, sitting alone, and as counsel represented that the question arising in this case had not been directly dealt with in any decision, I directed the petition to be posted before a Division Bench.

Before dealing with the contentions raised and the decisions cited before us, it is necessary to refer to the material provisions of the Madras Village Courts Act relating to the execution of the decree passed by the village Courts.

Chapter VI of the Madras Village Courts Act deals with the execution of a decree passed by a village Court. Section 48 provides that the decree shall be executed by the village Court which passed it or by a village Court or District Munsiff to whom it is sent for execution under the provisions thereinafter mentioned. Except when the execution is by a District Munsiff's Court, no judgment-debtor may be arrested and no immovable property attached in execution of a decree of a village Court. (Section 51.) The village Court may attach any moveable property within its jurisdiction belonging to the judgment-debtor (Section 52.) There are provisions laying down the procedure to be adopted in bringing the property attached to sale and in the conduct of the sale and delivery of the property sold in auction to the purchaser. Then comes section 66, which provides for the transmission of a decree of a village Court to the District Munsiff for execution. That section is in the following terms:—

"66 (1) Any decree passed by a village Court may on the application of the decree-holder, be transmitted for execution to the District Munsiff who may,

(*a*) execute the decree as if it were a decree passed by himself; or

(*b*) transmit it for execution to the Court of any other village within his jurisdiction in which the defendant is represented to have movable property; or

(*c*) transmit it to the Court of any other District Munsiff within whose jurisdiction the defendant is represented to reside or to have property.

2. The District Munsiff to whom a decree has been transmitted under clause (*c*) of sub-section (1) may execute the decree as if it were a decree passed by himself or transmit it for execution to the Court of any village within his jurisdiction in which the defendant is represented to have movable property.

3. The village Court to which the decree is transmitted under clause (*b*) or sub-section (1) or sub-section (2) shall proceed as if the decree was passed by himself."

Even without an application, it is competent to the District Munsiff to withdraw the execution of any decree from a village Court, and to execute it himself, as if it were a decree passed by himself. (Section 67.) Section 67-A expressly prohibits an appeal from any order by a District Munsiff relating to the attachment or sale of moveable property in execution of any village Court decree. Section 71 which occurs in the Miscellaneous Chapter provides for the substitution of a deceased decree-holder by his legal representative, and likewise, section 72 for the execution of the decree against the legal representative of a deceased judgment-debtor. It is necessary to refer only to one other general section, and that is section 20 which says that the provisions of the Indian Limitation Act shall apply to suits and applications under the Act.

The question is whether section 48 of the Code of Civil Procedure applies to the execution of a decree of a village Court. There is no provision in the

Village Courts Act making the Civil Procedure Code or any part of it applicable to proceedings under the Village Courts Act. There are several decisions based on this omission. Vide *Krishna Chetty* v. *Narayanappa*,[1] *Lingier* v. *Ramakrishnier*,[2] *Subba Rao* v. *Narasiah*,[3] and *Sankaran Nair* v. *Atchuthan*.[4] It follows, therefore, that section 48 of the Code as such does not apply to the execution of a village Court decree. The Village Courts Act provides for execution of a village Court decree by two classes of Courts, namely, a village Court and the Court of the District Munsiff to which it is transmitted or to which it is withdrawn. It is conceded that section 48 would not apply to an execution petition filed before a village Court for execution of its decree. When such a decree is transferred to the Court of a District Munsiff, is there a difference? Does the fact that petition for execution of decrees passed by the District Munsiff are governed by section 48 of the Code of Civil Procedure have the result of extending that provision to petitions for execution of village Court's decrees transferred to the District Munsiff's Court either under section 66 or 67 of the Act? Mr. Gopalan Nambiar contended that it would and relied upon certain decisions to which we shall refer. In *Lakshmindra Tirtha Swamiar* v. *H. R. E. Board, Madras*,[5] the effect of section 70 of the Madras Hindu Religious Endowments Act had to be considered. The material words of that section were:—

> "The Court shall, on the application of the President of the Board or committee, recover the amount as if a decree had been passed for the amount by the Court against the religious endowment concerned."

It was held that the words "as if a decree had been passed" in the section attracted the whole procedure in execution and with it the right of appeal provided under section 47 of the Code against an order passed by the Civil Court in proceedings to recover the amount of contribution levied by the Board. No question arose in that case as to the applicability of section 48 of the Code. The decision is, therefore, not of any help in this case. In *Hindu Religious Endowments Board, Madras* v. *The Shirur Mutt*,[6] the same provision of the Madras Hindu Religious Endowments Act had to be considered. It was held that an application under that section for the recovery of the amount of contribution levied by the Board was governed by Article 182 of the Indian Limitation Act. Here again, the applicability of section 48 of the Code did not fall to be considered. The learned Judges followed the decision of the Calcutta High Court in *Chaitram Sagarmull* v. *Hardwari Mull and Company*,[7] which was also cited by Mr. Gopalan Nambiar. It was there held by Rankin, C.J. and Mitter, J., that an application for execution of an award made under the Indian Arbitration Act which had been filed in a chartered High Court was governed by Article 183 of the Indian Limitation Act. The relevant section was section 15 of the Indian Arbitration Act of 1899, the terms of which were:—

> "An award on a submission on being filed in the Court in accordance with the foregoing provisions, shall......be enforceable as if it were a decree of the Court."

Here too, it was not necessary to deal with section 48 of the Code. By far the strongest reliance was placed by Mr. Gopalan Nambiar on the decision of this Court in *Subba Rao* v. *Calicut Co-operative Urban Bank, Ltd., Calicut*.[8] There the learned Judges had to consider rule 17 (7) (*c*) of the Madras Co-operative Societies Act, 1912, which provided that on application to the Civil Court having jurisdiction over the subject-matter of the decision or award, the Court shall enforce the decision or award of the Registrar of Co-operative Societies as if

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1. (1938) 1 M.L.J. 229.
2. (1933) 65 M.L.J. 795.
3. (1940) 1 M.L.J. 220.
4. (1923) 44 M.L.J. 643 : I.L.R. 46 Mad. 734.
5. (1934) 65 M.L.J. 364 : I.L.R. 56 Mad. 712.
6. (1934) 68 M.L.J. 200: I.L.R. 58 Mad. 760
7. (1927) I.L.R. 55 Cal. 499.
8. (1940) 1 M.L.J. 268.

it were a final decree of the Court. It was held that an application for the execution of such an award was governed by Article 182 of the Limitation Act. This decision is in line with the other decisions above referred to and was not concerned with section 48 of the Code. There are, however certain observations of the learned Chief Justice regarding the applicability of section 48 of the Code. The learned Chief Justice said:—

"It is conceded by the learned Advocate for the appellant, as it must be, that an award under the Co-operative Societies Act attracts all the provisions of the Code of Civil Procedure in the matter of execution. If it attracts all the provisions of the Code with regard to execution it must in our opinion of necessity attract the provisions of the Limitation Act which apply to the execution of decrees. The award when it is filed has to be executed as a decree of the Court and in effect it becomes a decree of the Court. As the provisions of the Code of Civil Procedure admittedly apply, the provisions of section 48 of the Code must apply. Section 48 provides that a decree shall run for a period of twelve years, provided of course, that steps in execution are taken at intervals of not more than three years as required by Article 182 of the Limitation Act. If section 48 applies it follows that the appropriate Article is 182 and not Article 181. If Article 182 did not apply but Article 181 did, there would be a conflict as Article 181 fixes a period of three years and section 48 a period of twelve years."

Before we deal with the above observations of the learned Chief Justice, we shall briefly deal with the decisions above mentioned. There is one important point of distinction between those cases and the present case. In those cases, there was no question of a decree of a Court capable of execution in that Court being transferred to another Court. Those cases related to the enforcement of the orders of special tribunals or administrative bodies or private awards. In *Lakshmindra Tirtha Swamiar v. H. R. E. Board, Madras*,[1] and *H. R. E. Board, Madras* v. *The Shirur Mutt*,[2] the Civil Court was called upon to recover an amount levied by an administrative body like the Hindu Religious Endowments Board. The Board itself could never recover the amount in execution. In *Subba Rao* v. *Calicut Co-operative Urban Bank, Ltd., Calicut*,[3] the award of the Registrar of Co-operative Societies cannot be considered in law to be a decree of Civil Court. In *Chaitram Sagermull* v. *Hardwari Mull and Company*.[4] an award had to be enforced, it was filed in the High Court and had to be executed as a decree of that Court. A decree passed by the village Court stands on quite a different footing from an order of the Endowments Board or an award of the Registrar of Co-operative Societies or an award under the Arbitration Act. It is a decree of a civil Court, no doubt a special Court with limited powers, but nevertheless a civil Court. There are provisions in the Village Courts Act for execution of the decrees passed by a village Court by that Court itself. Indeed, there is a whole chapter relating to the execution by the village Court itself. In our opinion, therefore, the decisions above cited have no bearing on the question which we have to decide in this case, which relates to the transfer of a decree of one Court to another Court for execution. The above observations of the learned Chief Justice were really not necessary for a disposal of the case before the learned Judges, as is evident from the judgment of Venkataramana Rao, J. In *Subba Rao* v. *Calicut Co-operative Urban Bank, Ltd.*,[5] the Letters Patent Appeal against which was before the learned Judges the only question there was whether Article 181 applied or Article 182 applied. It is not necessary for this case to decide whether section 48 of the Code would apply to an application for the enforcement of an award made under the Madras Co-operative Societies Act. When such a question arises, the above observations of the learned Chief Justice may have to be reconsidered.

1. (1934) 65 M.L.J. 364 : I.L.R. 56 Mad. 712.
2. (1934) 68 M.L.J. 200 : I.L.R. 58 Mad. 760.
3. (1940) 1 M.L.J. 268.
4. (1927) I.L.R. 55 Cal. 499.
5. (1939) 1 M.L.J. 695.

There is clear authority in this Court and in other Courts for the position that when a decree passed by one Court is transferred to another Court for execution the Law of Limitation applicable to a petition for execution is the law applicable to a decree of the Court which passed the decree and not the law applicable to a decree passed by the transferee Court. This principle was enunciated in an early case of the Calcutta High Court in *Tincowrie Dawn* v. *Debendro Nath Mookerjee*.[1] In the words of Wilson, J. :—

"The law depends not on the character of the Court which executes the decree, but of the Court which passed it, though the manner of execution is that of the Court which executes the decree."

In *Jogemaya Dass* v. *Thackomoni Dassi*,[2] a decree was obtained in the Court of a Subordinate Judge and it was transferred to the High Court for execution. It was held following the ruling in *Tincowrie Dawn v. Debendro Nath Mookerjee*,[1] that the period of limitation for the execution of such a decree would not be the period applicable to decrees of the High Court, but would be the period governing applications for execution of decrees passed by Courts in the mofussil. As Trevelyan, J., said :—

"The law of limitation is not altered by the transfer of the proceedings in execution. The decree does not become a decree of the High Court, although it may have to be enforced in the same manner as decrees of the High Court......The 'manner' of execution refers to the procedure under which the execution is to be had, and has no reference to the limitation. It simply applies the High Court machinery to the execution of the decree."

In *Sri Krishna Doss* v. *Alumbu Ammal*,[3] this principle was followed. It was there held by Sundara Ayyar and Ayling, JJ., that although a decree may be transferred by the Court which passed it, to another Court, for execution, the law of limitation applicable for its execution is that applicable to the decrees of the former Court, *i.e.*, of the Court which passed them. The anomalous consequences of following a different rule was pointed out by the learned Judges. There a decree of the Presidency Small Cause Court, Madras, was transferred for execution to the City Civil Court. Section 48 of the Code is not applicable to decrees of the Presidency Small Cause Court but it is to decrees of the City Civil Court. It was held that an application for execution presented to the City Civil Court more than twelve years after the passing of the decree by the Small Cause Court was not barred by reason of section 48 of the Code of Civil Procedure. This decision was approved by a Full Bench of this Court in *Gopalaswami Mudaliar* v. *Thiagarajaswami Devasthanam*.[4] It was there expressly laid down that section 48 was not applicable to a decree of the Court of Small Causes. The fact that the Court to which the decree has been transferred was a Court, the decrees of which would be governed by section 48 of the Code of Civil Procedure, would not make any difference. We find the same principle followed in *Ranganandham* v. *Pannacharamma*.[5] In our opinion, this principle would equally apply to this case. Under section 20 the Indian Limitation Act applies to proceedings in a village Court. That would be the law of limitation applicable to village Court decrees. The fact that a decree of a village Court is transferred to a District Munsiff's Court for execution would not have the effect of making a different rule of limitation applicable. We hold therefore that section 48 of the Code of Civil Procedure would not apply to the execution petition in this case.

The Civil Revision Petition is dismissed. No costs.

R.M. ——— *Petition dismissed*

1. (1890) I.L.R. 17 Cal. 491.
2. (1896) I.L.R. 24 Cal. 473.
3. (1911) 21 M.L.J. 777 : I.L.R. 36 Mad. 108.
4. (1950) 1 M.L.J. 437.
5. A.I.R. 1942 Pat. 128.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAJAGOPALAN.

B. M. Amina Umma .. *Petitioner.**

v.

The Income-Tax Officer, Kozhikode .. *Respondent.*

Income Tax Act (XI of 1922), *section* 16 (3) (a) (*ii*)—*Constitutional validity—Government of India Act,* 1935, *section* 100 *and Entry* 54 *of Federal Legislative list—Scope—If offends fundamental rights guaranteed by the Constitution of India* (1950), *Articles* 14 *and* 19 (g).

Section 16 (3) (*a*) (ii) of the Income-tax Act (XI of 1922) inserted by the Amending Act (IV of 1937) was well within the legislative power conferred on the Central Government by Entry 54 of the Federal List read with section 100 of the Government of India Act, 1935. What the impugned provision taxes is income, the income of the minor.

Taxing legislation is also controlled by the Fundamental Rights guaranteed by the Constitution of India, 1950. But the impugned provision does not in any way prohibit or even interfere with the right of either the assessee or his minor son to carry on any occupation, trade or business.

It is only a parent who is himself or herself a partner in a firm to the benefits of which partnership that individual's minor child is admitted, that is taxed. The income of the adult children of such an individual cannot obviously fall within the purview of the impugned provision and there can be no question of admitting such adult children to the benefits of the partnership as minor children. The income of the minor children admitted to the benefits of the partnership of which neither parent is a partner also falls outside the purview of section 16 (3) (*a*) (ii) of the Income-tax Act. Such a classification is not unreasonable and will not offend Article 14 of the Constitution of India (1950). The reasonableness or otherwise of a classification has to be decided with reference to all the circumstances of the case including the social and economic structure prevalent in the area where the taxing statute is in operation. Within the class that falls within the purview of section 16 (3) (*a*) (ii) of the Income-tax Act there is no inequality in the operation of the taxing provision. The classification being reasonable, there is no denial of equal protection of the laws within the meaning of Article 14 of the Constitution.

Petition under Article 226 of the Constitution of India praying that the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of assessment of the petitioner, dated 28th February, 1953 in F. No. 599-a/1952-53, passed by the Income-tax officer, Kozhikode, and to quash the same.

K. Rajah Ayyar, B. Pocker and *G. Maheswaran* for Petitioner.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—These are applications under article 226 of the Constitution for issue of writs of prohibition directing the Income-tax officer to desist from continuing the assessment proceedings against the petitioner under the Income-tax Act for the assessment years 1952-53 and 1953-54.

The petitioner is the widow of Haji K. M. Ahmed Kutty. He had a twelve annas' share in the partnership which consisted of himself and one Abdulla Ahmed Kutty who died on 5th July, 1950. His heirs were his two wives, three minor children by the first wife (the petitioner) and two minor children by the second wife. The partnership was reconstituted on 25th December, 1950 with three partners, the petitioner, Abdulla and Khader Kutti, brother of the petitioner. The three minor children of the petitioner were admitted to the benefits of that partnership with a total of eight annas' share between them. The petitioner was entitled to a four annas' share. This partnership also was registered under section 26-A of the Income-tax Act. After determining the income of the firm for the assessment year 1952-53, and after apportioning it between the sharers under section 23 (5) of the Income-tax Act, the Income-tax officer assessed the petitioner to tax on her

* W.P. Nos. 726 and 867 of 1953. 16th March, 1954.

income and also that of her three minor children under the provisions of section 16 (3) (*a*) (ii) of the Income-tax Act. It was on the same basis that he proposed to assess the petitioner for the assessment year 1953-54 also, but that assessment had not been completed when the petitioner filed these petitions in this Court for the issue of writs of prohibition. The petitioner challenged the validity of the proceedings before the Income-tax officer on the ground that section 16 (3) of the Income-tax Act was *ultra vires* the Central Legislature.

Section 16 (3) (*a*) (ii) of the Income-tax Act which was inserted by the Amending Act IV of 1937 runs :

> "In computing the total income of any individual for the purpose of assessment, there shall be included—
>
> (i) so much of the income of a wife or minor child of such individual as arises directly or indirectly—
>
> (ii) from the admission of the minor to the benefits of partnership in a firm of, which such individual is a partner ; "

The validity of this section (hereinafter referred to as the impugned provision) was challenged on the following grounds :—

(i) it was beyond the legislative powers of the Central Legislature conferred on it by entry 54 of list 1 of Schedule VII of the Government of India Act, 1935 ; (ii) even if the provision was *intra vires* when enacted in 1937, it offended the fundamental rights guaranteed under articles 14 and 19 (*g*) of the Constitution and was therefore unenforceable against the petitioner in the relevant assessment years.

Though the petitioner challenged the validity of the whole of section 16 (3) of the Income-tax Act, it is only the validity of the second sub-clause of section 16 (3) (*a*) that directly arises for determination in the proceedings before us. That question of legislative competence will have to be determined primarily on the basis of the language of the Government of India Act, entry 54 of list 1 read with section 100 of the Government of India Act. Section 100 (1) ran :

> "Notwithstanding anything in the two succeeding sub-sections, the Federal Legislature has and a Provincial Legislature has not power to make laws with respect to any of the matters enumerated in list 1 in the seventh Schedule to this Act (hereinafter called the Federal Legislative List)."

Entry 54 of that list ran :

> "Taxes on income other than agricultural income."

That entry is identical with item 82 in list 1 of the seventh schedule to the Constitution of India.

Section 16 (3) (*a*) (ii) of the Income-tax Act authorises the inclusion in the income of an individual for the purposes of assessment so much of the income of his or her minor child as arises directly or indirectly from the admission of that minor child to the benefit of partnership in a firm of which such individual is a partner. It is only the income that is assessed. Section 16 (3) (*a*) recognises that the income is that of the minor child, that is, it recognises the legal right of the minor child to that income. For a limited purpose of assessment of that income to income-tax, that income of the minor is included in the income of the minor child's parent, provided the other requirements of section 16 (3) (*a*) (ii) of the Income-tax Act are satisfied.

The contention of Sri Rajah Ayyar, the learned Counsel for the petitioner, was that entry 54 in the Federal Legislative List of the Government of India Act, 1935, did not confer on the Legislature any legislative power to tax *A* on the income of *B*, that is, in this case, to tax the petitioner on the income of her minor children. Acceptance of that contention means that entry 54 would have to be read or at least interpreted as "tax on income of the person assessed to the tax". Does entry 54 read with section 100 of the Government of India Act, 1935, necessarily carry with it such a limitation is the question for determination. It was a rule of

construction repeatedly laid down by Courts in India and in England that Chagla, C.J. restated when he observed in *J. N. Duggan* v. *Commissioner of Income-tax, Bombay*[1]:

"It is well settled by now that a large and liberal interpretation must be placed upon all entries in the Seventh Schedule of the Government of India Act, and that the widest import and significance must be given to the language used by Parliament in these various entries. It must not be forgotten that the Legislature created by the Government of India Act was a sovereign Legislature within its own sphere, and that, when a topic was assigned to a particular Legislature in respect of which it would legislate, then all possible powers with regard to that topic must be attributed to that Legislature."

It is equally well settled that if legislative practice is to be invoked to aid the construction of any statutory provision of the Government of India Act, 1935, it is the legislative practice of the Parliament of the United Kingdom that is relevant.

Before we discuss this question further, we shall refer to the cases cited before us on this aspect of the case.

Sri Rajah Ayyar relied very strongly on the passage in *Hoeper* v. *Tax Commission*[2] :

"We have no doubt that, because of the fundamental conceptions which underlie our system' any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment. That which is not in fact the tax payer's income cannot be made such by calling it income."

In Weaver on Constitutional Law at page 531, the learned author observed :

"An income-tax is one based directly on one's income emoluments and profits, gross or net, or upon a person in accordance with his income, emoluments or profits."

At page 532, the learned author observed :

"The word 'Income' has been given a variety of meanings in the different statutes. In general it means the true increase in the amount of wealth which comes to a person during a stated period of time.......... It is based on the conception that additional property has come to the taxpayer out of the Government. It imports an actual gain and increase of wealth in hand."

Quite apart from the question whether the principles that underlie the American legislation on Income-tax can decide the question at issue before us, the legislative competence of the Central Legislature (in India), it should be clear that the invalidity of the Wisconsin Statute was rested in *Hoeper's case*[2], not on total absence of legislative powers but on the ground that in exercising that power of legislation, the Legislature transgressed the constitutional limits of *due process* and *equal protection* of laws guaranteed by the American Constitution. Neither of these limitations was imposed on the Indian Legislature by the Government of India Act of 1935. We shall consider later whether the impugned statutory provision offends any of the provisions of our Constitution. *Hoeper's case*[2] may not be of any direct assistance in deciding the limits of legislative authority conferred on the Indian Legislature by entry 54 of the Federal Legislative list read with section 100 of the Government of India Act. The Wisconsin Legislature could exercise sovereign authority which the Indian Legislature could not claim to the same extent ; only the exercise of that sovereign power by the Wisconsin Legislature was subjected to the constitutional safeguards prescribed by the Constitution of that state and by the Constitution of the United States.

In *United States* v. *Baltimore and Ohio R. R. Co.*[3], the Court observed :

"A tax is understood to be a charge, a pecuniary burden for the support of Government. Of all burdens imposed upon mankind, that of grinding taxation is the most cruel. It is not taxation that Government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the Government from his own gains and of his own property".

These remarks again have to be understood in the context of the questions at issue in that case, which was made clear by a later passage at the same page.

1. I.L.R. (1953) Bom. 446 (452)
2. (1931) 76 L. Ed. 248 (251)
3. (1873) 21 L. Ed. 597.

"There is no dispute about the general rules of law applicable to this subject. The power of taxation by the Federal Government upon the subjects and in the manner prescribed by the Act we are considering is undoubted. There are, however, certain departments which are excepted from the general power".

And the Court pointed out that the Congress had not the power by the Internal Revenue Laws, to tax property belonging to the States or to municipal corporations. The learned Judge continued :

"The right of the States to administer their own affairs through their legislative executive and judicial departments, in their own manner through their own agencies, is conceded by the 'uniform decisions of this Court and by the practice of the Federal Government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal Government".

The decision of the Court in that case was that the tax on interest bonds imposed by the 122nd section of the Internal Revenue Act of 1864, as amended by that of 1886, was a tax upon the income of the creditor or stockholder, and not a tax upon the corporation, and further that the Congress did not intend, by the internal Revenue Laws, to tax the property belonging to the states or to municipal corporations. No more than *Hoeper's case*[1], can this be of any direct assistance to us in deciding the question of the ambit of the legislative power conferred on the Indian Legislature by entry 54 read with section 100 of the Government of India Act, 1935.

In *Williams* v. *Singer. Pool* v. *Royal Exchange Assurance*[2], the provisions to be interpreted were those of a Statute of the Parliament of the United Kingdom, whose sovereignty in the legislative field recognised no constitutional limits. Therefore that case again may not be an authority for the position, which the learned Counsel for the petitioner sought to substantiate.

The next case to which our attention was drawn by Sri Rajah Ayyar was *The Patiala State Bank*, In the matter of[3]. At pages 396-397, after pointing out that the Ruler of the Patiala State could not be regarded as a "person" within British India, Beaumont, C.J. observed :

"I think that, properly considered, income-tax is a tax on a person in relation to his income. The tax is not imposed on income generally; it is imposed on the income of a person natural or artificial as defined in section 3. The assessment has to be made against a person, and the tax has to be collected from the assessee. The tax is not made a charge on the income upon which it is levied, and I think, broadly speaking, it is accurate to say that income-tax is a tax imposed upon a person in relation to his income."

It was with reference to section 65 of the Government of India Act, 1919, that he validity of the provision impugned in that case had to be decided. The relevant portion of section 65 ran :

"The Indian legislature has power to make laws for all persons, for all Courts and for all places and things within British India".

After discussing the true nature of the Income-tax, Beaumont, C.J. upheld the validity of the legislation in that case. He observed :

"But, in my opinion, that does not mean that legislation as to income-tax can never be regarded as Legislation as to a thing in British India within the meaning of section 65 of the Government of India Act. In my opinion, a tax on income accruing or arising or received in British India by a person resident outside British India is legislation relating to some thing, *i.e.*, certain income, in British India, and, therefore, to my mind, it falls within the very wide and general words of section 65. In my judgment, therefore, Act III of 1926 is *intra vires* the Government of India."

The learned Chief Justice thus made it clear that the ambit of legislative authority conferred by the Government of India Act, 1919, was not limited by the fact that the Income-tax was not a tax on a person resident in British India. Though

1. (1931) 76 L. Ed. 248.
2. (1921) I. A. C. 65.
3. I. L. R. (1941) Bom. 391.

the wording of section 65 of the Government of India Act, 1919, is certainly not the same as that of section 100 of the Government of India Act, 1935, with which entry 54 of list 1 has to be read, we are unable to see anything in entry 54 itself to limit the legislative field not merely to tax on persons but further to limit the scope of tax only on the income of the person assessed.

In *J. N. Duggan* v. *Commissioner of Income-tax, Bombay*[1], Chagla, C.J. observed at page 451 :

> "There is one further distinction between entry 54 and entry 55 to which attention may be drawn. Entry 54 does not indicate whose income may be taxed by the Central Legislature. No limitation is placed upon the power of the Legislature as to the person who should be taxed in respect of his income."

We respectfully agree with that view of the scope of entry 54.

How wide was the scope of the legislative power in relation to the income-tax was indicated by the Supreme Court in the unreported decision, *Commissioner of Income-tax* v. *Bhogilal Laharchand*[2].

> "The term 'Deemed' brings within the net of chargeability income not actually accruing but which is supposed notionally to have accrued. It involves a number of concepts. By statutory fiction income which can in no sense be said to accrue at all may be considered as so accruing. Similarly the fiction may relate to the place, the person or be in respect of the year of taxability".

When such is the content of legislative power, we are unable to hold that the Legislature had no power to enact the impugned provision to lay a tax liability on the minor child's income on the parent.

In *Commissioner of E.P.T., Madras* v. *Jivaraj Topun & Sons*[3], the learned Judges quoted with approval a passage from the judgment of Viscount Finlay in *John Smith and Son* v. *Moore*[4].

> "But though for this purpose the business is treated as continuous, the essential incidence of the tax is upon the person by whom it is conducted at the time in question. Just as a rate is imposed upon the occupant in respect of the house, so income-tax and super-tax are imposed upon individuals in respect of the business. The yield of the business during any particular period depends upon the amount of profit which is got from it by the person carrying it on for the time being, and this must, largely depend upon his personal qualities. The profits are not earned by the business, they are earned by the person who carried it on."

This passage brings out in sharp relief the basis of taxation and the incidence of the tax.

The incidence of the tax, whether it is the immediate and apparent incidence, or whether it is the ultimate or real economic incidence, does not in our opinion limit the taxing power given to the Central Legislature by entry 54 of list 1. All that entry 54 requires is that the tax must be a tax on income other than agricultural income. The impugned provision in section 16 (3) (*a*) (ii) of the Income-tax Act provides only for a tax on income. It does not cease to be a tax on income either in form or in substance, though it provides for the incidence of the tax not on the person whose income is assessed by tax, but on another. In this case that incidence of the tax on the minor child's income falls under the Statute on a parent of that minor.

The learned Counsel for the petitioner urged that such a provision is opposed to the true concept of income-tax which is essentially a tax on the income of the person assessed. We are unable to accept this contention. Professor Willis in his Constitutional Law observes at pages 693-694 :

> "These cases, however, do not make the income-tax a personal tax, because they can be levied on persons because of citizenship or nationality, though they are not domiciled within a country. It has been suggested, therefore, that an income-tax is *sui juris* and should be put in a separate class as a composite tax........... In interpreting the Sixteenth Amendment the Supreme Court seemed to take the position that an income-tax has now been made an indirect tax and an excise tax."

1. I.L.R. (1953) Bom. 446 (451).
2. (1950) Civil Appeal No. 160 of 1950.
3. (1951) 2 M.L.J. 172 : 20 I.T.R. 143.
4. (1924) 12 Tax Cases 266 (285) (P.C.).

There is therefore nothing in the fundamental concepts of income-tax even as understood in America, to prevent the imposition of the immediate and apparent incidence of the tax on a person other than the person whose income is to be assessed.

Such a concept is well-recognised by the legislative practice in the United Kingdom, the most familiar instance being the liability imposed by the Income-tax laws of England on the husband for the tax payable on the income of his wife living with him. It is not necessary to consider in detail now the evolution of the rights of married women in England. Our investigation is quite limited in its scope. Under the English Income-tax law, the income assessed is that of the wife, but the incidence falls upon the husband under certain circumstances, the main requirement being that the husband and wife should live together. As we have already pointed out, such statutory incidence, in addition to being conistent with legislative practice in England is also not inconsistent with any of the fundamental concepts of Income-tax law either as understood in America or in England.

In our opinion, section 16 (3) (*a*) (ii) of the Income-tax Act was well within the legislative power conferred on the Central Legislature by entry 54 read with section 100 of the Government of India Act, 1935. It is not even necessary to have recourse to the enlarging provision of section 100 " with respect to any of the matters enumerated in list 1 " to reach this conclusion. As we have pointed out, what the impugned provision taxes is income, the income of the minor.

The next question is whether the impugned provision contravenes any of the fundamental rights guaranteed by our Constitution. It is well settled that taxing legislation is also controlled by the Fundamental Rights guaranteed in Part III of the Constitution.

The contention of the learned Counsel for the petitioner that the impugned provision offends Article 19 (*g*) of the Constitution, is easiest disposed of. What Article 19 (*g*) provides for is the right of a citizen " to practise any profession or to carry on any occupation, trade or business." The impugned provision does not in any way prohibit or even interfere with the right of either the petitioner or the minor to practise any profession or to carry on any occupation, trade or business. What the impugned provision has done is to tax the income of the partnership business which the petitioner is left free to carry on and to the benefits of which partnership the minors are entitled. These rights are in no way affected by the taxing Statute.

The further question is whether the impugned provision contravenes the equal protection of the laws guaranteed by article 14 of the Constitution. It is true the incidence of the tax under the impugned provision does not fall alike on all parents having minor children. The defence to the charge of denial of equal protection of the law is reasonable classification. Whether that test has been satisfied by the impugned provision is the real question for determination. That test was restated by the Supreme Court in *State of Bombay* v. *F. N. Balsara*[1] :

> " The principle (of equal protection) does not take away from the state the power of classifying persons for legitimate purposes.
>
> While reasonable classification is permissible, such classification must be based upon some real and substantial distinction bearing reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis."

Professor Willis observes at pages 587-588 of his Constitutional Law:

> " The Supreme Court permits a wider discretion in classification under the power of taxation, if possible, than it does under the police power. One reason for this undoubtedly is the urgent need for revenue by the various governmental agencies. A state does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods, and even rates for taxation if it does so reasonably. The Constitution does not say how cases shall be decided.

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1. (1951) 2 M.L.J. 141 : (1951) S. C. R. 682 : 1951 S.C.J. 478 (S.C.).

All it says is that the States shall not deny to any persons within their jurisdiction the equal protection of the laws. It does not say when persons are within the jurisdiction of a State, nor what are equal laws. As a consequence the Supreme Court decides cases as it thinks they ought to be decided with no other mandate than one to decide. The Supreme Court has been practical and has permitted a very wide latitude in classification for taxation."

At page 593 the learned author observed :

"A frequent classification for taxation is a personal classification, persons may be put, in different classes and some persons taxed and others not taxed. If there is a reason for taxing those put in any class, and if those within the class are treated alike, there is no violation of the equality clause."

These principles can well govern the interpretation of article 14 of our Constitution by our Courts.

To the discussion of the case-law on the subject in *Syed Mohamed & Co.* v. *State of Madras*[1] there is little that we need add at this stage.

What is the classification which underlies the impugned provision has to be considered before we apply the test whether such classification has been based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained by the impugned provision. As we pointed out before, it is only a limited class of persons that come within the purview of section 16 (3) (*a*) (ii) of the Income-tax Act. It is only a parent who is himself or herself a partner in a firm to the benefits of which partnership that individual's minor child is admitted, that is taxed. The income of the adult children of such an individual cannot obviously fall within the purview of the impugned provision and there can be no question of admitting such adult children to the benefits of the partnership as minor children. The income of the minor children admitted to the benefits of the partnership of which neither parent is a partner also falls outside the purview of section 16 (3) (*a*) (ii).

Is this classification based upon some real and substantial distinction bearing a reasonable and just relation to the objects sought to be attained by Act IV of 1937, which incorporated the impugned provision in the Indian Income-tax Act is the next question. Act IV of 1937 was to give effect to the recommendations of the Income-tax Enquiry Commissioners, 1936, which were accepted by the Government and the Legislature. That has been extracted at page 659 of A. C. Sampath Ayyangar's Indian Income-tax Act, Vol. II, Fourth Edition :

"There is a growing and serious tendency to avoid taxation by the admission of minor children to the benefits of partnership in the father's business. Moreover, the admission is, as a rule, merely nominal, but being supported by entries in the firm's books, the income-tax officer is rarely in a position to prove that the alleged participation in the benefits of partnership is unreal. There is the genuine case which is intended to be relieved by the Income-tax (Second Amendment) Act, 1933, and the question arises as to the nature and extent of the restriction, which will exclude from relief only the case in which a father is attempting to obtain an allowance for what is, in effect, merely the cost of maintenance of his children. We suggest that the income of a minor should be deemed to be the income of the father, (*i*) if it arises from the benefits of partnership in a business in which the father is a partner or (*ii*) if, being the income of a minor other than a married daughter, it is derived from assets transferred directly or indirectly to the minor by his or her father or mother, and(*iii*) if it is derived from assets apportioned to him in the partition of a Hindu undivided family".

Much the same was said in the Statement of Objects and Reasons, which it is permissible for a Court to look into, to find out what is the objective of any given Statute passed by the Legislature.

In effect the statutory provision as it was finally enacted in section 16 (3) (*a*) (ii) went even a little beyond what was he declared objective in the Statement of Objects and Reasons. But that does not affect the question, was the classification which underlay the impugned provision reasonable? What the Income-tax Enquiry Commissioners wanted to provide for was a case, where the assets are apportioned in a partition of a Hindu undivided family, which is not quite that of a partition effected among the heirs of a Mohammadan. But as pointed out by Rottschaefer in his Constitutional Law at page 667 :

"It is generally held that an issue under the equal protection clause must be decided in respect of the general classification rather than by the chance incidence of the tax upon particular

1. (1952) 2 M.L.J. 598 (607 to 609).

tax payers. A classification that is in general reasonable does not become invalid as applied to a particular class merely because it might effect an unreasonable result therein."

That was also the view adopted in *Hoeper's case*[1] based upon the earlier decision in *Purity Extract & T. Co.* v. *Lynch*[2] :

"..........where the Legislature........makes a classification reasonable in itself, its power so to do is not to be denied simply because some innocent article comes within the prescribed class."

That the incidence of the taxation provided for by the impugned provision falls in the case before us on the petitioner to whom the minor children owe nothing is not therefore by itself enough to rule out the classification as unreasonable or as having no reasonable and just relation to the object of the Amending Act IV of 1937.

As pointed out by Holmes, J. in *Hoeper's case*[1], no doubt in a dissenting judgment,

" Taxation may consider not only command over but actual enjoyment of the property taxed."

That was a proposition of law well acccepted in America. If the basis of the classification under which the parent became liable for the tax on his minor child's income out of the firm of which he was a partner and to the benefits of which partnership the minor child was admitted was either command or actual enjoyment of the property of the minor as capital of that firm, it is difficult to hold that such a classification is unreasonable, all the more so when, what the impugned provision was designed to get at was evasion of tax liability though the capital of the business, income of which business was taxed, was in reality contributed by the parent himself.

The contention of the learned Counsel for the petitioner was that the classification in this case was not reasonable but arbitrary and that contention he sought to support by the observations in *Hoeper's case*[1] and also the observations in *Schlesinger* v. *Wisconsin*[3] and *Heiner* v. *Donnan*[4]. *Schlesinger's case*[3] was referrred to in *Hoeper's case*[1] and both were referred to in *Heiner's case*[4]. We think it is enough if we examine the scope of the decision in *Hoeper's case*[1]. What was held in *Hoeper's case*[1] was that a husband cannot, consistently with the *due process* and the *equal protection* clauses of the Fourteenth Amendment, be taxed by a State on the combined total of his and his wife's incomes as shown by separate returns, where her income is her separate property and, by reason of the tax being graduated, its amount exceeded the sum of the taxes which would have been due had their separate incomes been separately assessed. Roberts, J., who delivered the judgment of the Court pointed out at some length the position of a married woman and her rights in Wisconsin States after which he observed :

" We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a State to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment."

It is not on the basis of any violation of due process of law or the violation of equal protection of law that the question at issue has to be considered. But it must be remembered that the decision in *Hoeper's case*[1] was that the impugned Act also vitiated the *equal protection* of laws clause.

As we understand the decision in *Hoeper's case*[1] that Court did not intend to lay down as a proposition of law universal in its scope and applicable at all times under all circumstances and to all States even within the United States, that under no circumstances could a husband be taxed on the wife's income. Nor can that decision be treated as authority for universal application that under no circumstance could any State in America tax *A* on the income of *B*. The reasonableness or otherwise of a classification has to be decided with reference to all the circumstances of the case including the social and economic structure prevalent in the area where the taxing Statute is in operation. Once again we have to refer to the declared objects of Act IV of 1937 which were (1) to prevent a parent screening his own real income by the expedient of transferring legal title to it to his minor

1. (1931) 76 L. Ed. 248.
2. (1912) 57 L. Ed. 184.
3. (1926) 70 L. Ed. 557.
4. (1931) 76 L. Ed. 772.

child and (2) to tax where the pre-existing ownership became distinct ownership on partition in a Hindu undivided family. An attempt to prevent by legislation an evasion of just tax liability and the necessary classification to give effect to that object cannot, in our view, be termed unreasonable. Judged either by the circumstances in our country that prevailed when the amending Act IV of 1937 was passed or by the circumstances that continue to prevail even now, we are unable to hold that the classification is either unreasonable or that it had no just and reasonable relation to the object of the Act. The case before us cannot be disposed of merely as an attempt to take one person's property to discharge another person's liability. We are unable to see any real justification to extend the principles laid down in *Hoeper's case*[1], to the case before us and to hold that though in effect, that is, in the immediate incidence, the petitioner is made liable for the tax on the income of her minor child, the classification of such persons for purpose of taxation is unreasonable and violates Article 14 of our Constitution. It cannot of course, be gainsaid that, within the class that falls within the purview of section 16 (3) (*a*) (ii), there is no inequality in the operation of the taxing provision. The classification being reasonable, there is no denial of equal protection of the laws within the meaning of Article 14 of our Constitution.

These petitions fail and are dismissed with costs in one Writ Petition No. 867 of 1953. Counsel's fee Rs. 250.

K.S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK AND MR. JUSTICE KRISHNASWAMI NAYUDU.

Chitrapu Subbayyamma .. *Petitioner**

v.

Chitrapu Buchi Venkayya and others .. *Respondents.*

Practice—Leave to appeal to Supreme Court—Leave granted to one party—If leave could be withheld from others—Each appeal—If should be separately certified as fit. [*Constitution of India, Art.* 133].

Per *Mack, J.*—When leave is granted to one party to appeal to the Supreme Court against any decree, leave cannot be withheld from other parties seeking to appeal from the same decree, although it may be that had they individually applied for leave, their applications would have been rightly dismissed for failure to comply with the requirements of Article 133 (1) (*a*) or (*b*) of the Constitution of India. This category of cases can be brought within the scope of Article 133 (1) (*c*) of the Constitution as being fit cases for appeal to the Supreme Court by reason of one party to the appeal having been granted leave. In such cases it is not necessary that the High Court should certify that each appeal sought to be filed against the appellate decree involves a separate substantial question of law.

Per *Krishnaswami Nayudu, J.*—Where there is scope for the contention that there is a common question in controversy which would be applicable to the entire case, it will be inequitable to grant leave in respect of a portion of the subject-matter and refuse it in respect of the remaining part and in such cases nothing would prevent the Court from treating the case as a fit one for appeal to the Supreme Court under Article 133 (1) (*c*) of the Constitution. But it cannot be laid down as a general proposition of law that in all cases when leave is granted to one of the parties to the appeal to the Supreme Court, the other parties also are entitled to leave as a matter of course, even though their applications could not be entertained under Article 133 (1) (*a*) and (*b*) of the Constitution.

Petitions under sections 109 and 110 of the Code of Civil Procedure and Article 133 (1) (*a*) and (*b*) of the Constitution of India, praying that the High Court will be pleased to grant leave to the petitioners to appeal to the Supreme Court of India against the judgment and decree of the High Court, dated 15th April, 1953, in Appeal Suit No. 491 (Original Suit No. 20 of 1947, Sub-Court, Amalapuram).

K. Bhimasankaram for Petitioner.

P. Somasundaram, *G. Chandrasekhara Sastry* and *N. Bapiraju* for Respondents.

The Orders of the Court was delivered by

Mack, J.—These are three petitions for leave to appeal to the Supreme Court against our judgment and decree in Appeal Suit Nos. 31 and 491 of 1949. The

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1. (1931) 76 L. ed. 248.

* S.C.C.M.P. Nos. 10920, 12347 and 13117 of 1953. 22nd March, 1954.

suit under appeal was one for partition in which the six sons of the late Chitrapu Venkatachelam Pantulu, who was Public Prosecutor and Government Pleader of East Godavari district for many years, were each given by the Subordinate Judge, a one-sixth share in plaint items 1 to 40. The suit was filed by the four younger sons and was resisted by the eldest son, the first defendant, who claimed the properties as his self-acquisitions. In appeals from this decree, we confirmed the partition decree as regards items 1 to 25 and allowed the appeal of the first defendant and his wife, the third defendant, as regards items 26 to 40, which, we held, were their self-acquisitions or separate property.

In Civil Miscellaneous Petition No. 12347 of 1953, plaintiffs seek leave to appeal as regards items 26 to 40. The value of these items is admittedly more than Rs. 20,000. As it is a reversing judgment as regards these items, they are entitled to and are granted leave to appeal.

In Civil Miscellaneous Petition No. 13117 of 1953, the first defendant seeks leave to appeal as regards the finding that items 1 to 24 are liable to partition. The value of these items is admittedly in excess of Rs. 20,000 but as regards them, our judgment confirmed the finding of the trial Court.

In Civil Miscellaneous Petition No. 10920 of 1953, the third defendant, who is the wife of the first defendant, seeks leave to appeal only as regards item 25, which she claimed as her separate property. In appeal, her right to four other items 26 to 29 were upheld in reversal of the Subordinate Judge's decree. As regards items 26 to 29, plaintiffs are entitled to appeal and it is necessary for the third defendant to appear in the appeal to the Supreme Court and defend her rights as regards those items. Item 25 by itself is admittedly less than Rs. 20,000 in value and the finding of the Subordinate Judge that this item was liable to partition was confirmed in appeal.

The point arises whether we should give leave to the first defendant and the third defendant also to appeal to the Supreme Court. We have been referred to a number of decisions of this Court on the scope of Article 133 of the Constitution but no decision has been placed before us in which, where one party, who has satisfied the financial and other requirements of Article 133 (1) (*a*) so far as his appeal is concerned, has been granted leave, which has however been refused to the other parties to the same decree who are not so qualified. We have been referred to the Full Bench decision *Subba Rao* v. *Chelamayya*[1], which, in view of conflicts of decisions of Division Benches, answered the following question referred to a Full Bench :

"Whether an appeal will lie as of right to the Supreme Court from any judgment, decree or final order of the High Court if the decree of the first Court is modified in favour of the applicant, but in other respects confirmed and if the requirements of the pecuniary valuation are satisfied, but no substantial question of law is involved."

I have carefully perused that decision, which does not directly answer the question we have to decide, as regards which we have heard lengthy arguments. In that case, leave had not been granted to one party to the decree entitled to it as of right, and it was not a case of another party to the same decree also seeking leave to appeal. There are several observations in the judgment of Rajamannar, C.J., which lend strong support to the position that, as the plaintiffs have been granted leave as of right to appeal; it is a fit case under Article 133 (1) (*c*) of the Constitution for granting leave to the first defendant and the third defendant also to appeal. As observed by Rajamannar, C.J. :

"...........It is well-established that an appeal to the Privy Council (Supreme Court) can only be filed against a judgment and decree of this Court. Even though only a portion of the judgment or decree is challenged, nevertheless the appeal is against the judgment and decree."

There was a reference in that decision to the observations of Viscount Dunedin in *Jowad Hussain* v. *Gendan Singh*[2], to the following effect :—

1. (1952) 2 M.L.J. 365 : I.L.R. (1953) Mad. 1 (F.B.).

2. (1926) 51 M.L.J. 781 : L.R. 53 I.A. 197 : I.L.R. 6 Pat. 24 (P.C.).

"The appellant's counsel strenuously urged that the appeal was not against the decree, but only against the items in the decree. This is a complete misunderstanding. An appeal must be against a decree as pronounced. It may be rested on an argument directed to special items, but the appeal itself must be against the decree, and the decree alone."

In answering the question referred to them, the learned Full Bench emphasised that a matter in controversy cannot be split up or analysed or dissected into component parts or arbitrary divisions, and that the true test will be to determine the nature of the dispute or controversy.

In the case before us, the plaintiffs briefly claimed items 1 to 40 in the suit as joint family property liable to partition. The first defendant claimed most of the items as his self-acquisitions, and his wife, the third defendant, some items, as her separate property. In *Aisha Begum* v. *Kundan Jan*[1], it was held that in two inter-connected appeals, disposed of in separate judgments, if leave to appeal to the Privy Council was granted to one party, leave should also be granted to the other because the position of the party is likely to be imperilled if no such leave were granted to them.

We have been referred to the Full Bench decision *Gangadara* v. *Subramania*[2], to which Rajamannar, J., (as he then was) was a party. That was a case under section 110, Civil Procedure Code, in which some defendants in an appeal to the Privy Council sought to challenge the validity of the claim of the plaintiff with regard to ten out of eleven items of property. The decree of the High Court varied the decree of the trial Court in respect of four of the items. It was held that the High Court's decree being one of variation and not of affirmance, the petitioners were entitled as of right to a certificate. Mr. Bhimasankaram for the first defendant, on the basis of this judgment, argues that the present appellate decree is not one of affirmance but of variation, and that this being so, the first defendant is entitled as of right to a certificate to appeal, the value of the subject-matter of items, which he seeks to challenge in appeal being more than Rs. 20,000. I would prefer to base the grant of leave to the first defendant and the third defendant on the ground that the plaintiffs have been on their application granted leave to appeal as a statutory right, which cannot be denied to them. I find it extremely difficult to see how an appeal before the Supreme Court can be compartmentalised, bisected or trisected with defendants 1 and 3 precluded, though compelled to appear there and defend the rights they have been granted in the appeal, from a full argument in the case they are called upon to meet. It seems to me unreasonable and impracticable to confine a party defending an appeal to one particular finding in his favour, which if he succeeds inupholding may also have the effect of giving him some further relief denied to him in the appeal. As I see it, when leave is granted to one party to appeal to the Supreme Court against any decree, leave cannot be withheld from other parties seeking to appeal from the same decree, although it may be that, had they individually applied for leave, their applications would have been rightly dismissed for failure to comply with the requirements of Article 133 (1) (*a*) or (*b*). I would bring this category of cases within the scope of Article 133 (1) (*c*) as being made fit cases for appeal to the Supreme Court by reason of one party to the appeal having been granted leave. In such a case, it is not necessary that the High Court should certify that each appeal sought to be filed against the appellate decree involves a separate substantial question of law.

Krishnaswami Nayudu, J.—I have perused the order of my learned brother, and, while I am in agreement with him that leave should be granted in all the three petitions, I prefer to give my own reasons in support.

In so far as Civil Miscellaneous Petition No. 12347 of 1953 is concerned, the plaintiffs are entitled to leave as they satisfy the requirements of Article 133 of the Constitution.

As regards Civil Miscellaneous Petition No. 13117 of 1953, the first defendant seeks leave to appeal in respect of items 1 to 24 ,which have been held to be joint

1. I.L.R. (1946) All. 221.
2. (1946) 2 M.L.J. 69 : I.L.R. (1947) Mad. 6 (F.B.).

family properties by the trial Court and confirmed by us in appeal. Though the value of these items is not less than Rs. 20,000, our judgment affirms the decision of the Court below, and as such, the first defendant would not be entitled as of right to leave, unless we certify that the appeal involves some substantial question of law. I am unable to find any substantial question of law arising in his appeal. However, in view of the decisions in *Gangadara* v. *Subramania*[1] and *Subba Rao* v. *Chelamayya*[2], the first defendant should also be granted leave, as our judgment is not completely one of affirmance, but a variation of the trial Court's decree.

But, as regards the third defendant's petition (Civil Miscellaneous Petition No. 10920 of 1953) she seeks leave to appeal only as regards item 25, which she claimed along with items 26 to 34 as her separate properties. She is the wife of the first defendant and the Court below rejected her claim to all the items and held that they were also joint family properties. But, in appeal, we upheld her right to items 26 to 34 in reversal of the decree of the lower Court and rejected her contentions so far as item 25 was concerned, the same having been held to be one of the joint family properties. The plaintiffs have been granted leave to appeal against our decision in so far as items 26 to 34 are concerned. The question is whether the third defendant should be granted leave in respect of item 25, the value of which is admittedly less than Rs. 20,000. The position therefore in so far as the third defendant is concerned, is that the value of the subject-matter of the appeal is less than Rs. 20,000 and our judgment affirms the decision of the Court below. In such circumstances, she would be entitled to leave only if the appeal involves some substantial question of law, or when the case is fit one for appeal to the Superme Court under clause (1) (*c*) of Article 133. No substantial question of law is involved in respect of this appeal relating to item 25 and unless one could bring it under Article 133 (1) (*c*), she is not entitled to the grant of leave.

The question that arose for decision in the suit and in the appeal was whether items 1 to 40, which originally formed part of the estate of the father of plaintiffs 1 to 4 and the first defendant and subsequently acquired in the name of the first second and third defendants, were joint family properties. The common questions in controversy are whether the purchases of these properties were with joint family funds and whether the sales in the names of the first, second and third defendants were benami for the joint family. In the present case, leave has been granted to both the plaintiffs and the first defendant and in so far as the third defendant is concerned, her right to items 26 to 34 were upheld in appeal by us, and it is now open to the plaintiffs to have the correctness of that decision tested in the Supreme Court in view of our granting leave to the plaintiffs. The case of the third defendant in respect of items 26 to 34 as well as item 25 is that they are her properties having been purchased in her name with her funds, the plaintiffs' contention being that they were purchased benami in her name with joint family funds and for the benefit of the joint family. Though a distinction may be made between the acquisition of item 25 and the acquisition of items 26 to 34, the common question pertaining to all the items is as to the benami nature of these transactions. In that view, it becomes necessary having given leave to the plaintiffs in respect of some of the items, that leave should also be granted to third defendant in so far as item 25 is concerned. The only provision under which this leave could be supported is clause (1) (*c*) of Article 133, namely, that it is a fit case for appeal to the Supreme Court.

I am aware of the view taken by the Privy Council and other Courts that clause (1) (*c*) is intended to meet special cases, as for example, those in which the point in dispute is not measurable by money, though it may be of great public or private importance, and, as observed by Lord Buckmaster in *Radha Krishna Ayyar* v. *Swaminatha Ayyar*[3].

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1. (1946) 2 M.L.J. 69 : I.L.R. (1947) Mad. 6 (F.B.).
2. (1952) 2 M.L.J. 365 : I.L.R. (1953) Mad. 1 (F.B.).
3. (1920) 40 M.L.J. 229 : L.R. 48 I.A. 31 : I.L.R. 44 Mad. 293 (P.C.).

"............cases in which it is impossible to define in money value the exact character of the dispute; there are questions, as for example, those relating to religious rights and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money."

But, where, as in the present case, there is scope for the contention that there is a common question in controversy, which would be applicable to the entire case, it will be inequitable to grant leave in respect of a portion of the subject-matter and refuse it in respect of the remaining part, and in such cases nothing would prevent the Court from treating the case as a fit one for appeal to the Supreme Court under clause (1) (*c*) of Article 133. But it cannot be laid down as a general proposition of law that in all cases, when leave is granted to one of the parties to appeal to the Supreme Court, the other parties also are entitled to leave as a matter of course, even though their applications could not be entertained under Article 133, clause (1), sub-clauses (*a*) and (*b*). Otherwise, a party, who has no right to a certificate under Article 133 would become entitled to file cross-objections to the appellate decree in the form of an appeal to the Supreme Court, though there is no specific provision to that effect either under Article 133 of the Constitution or under section 109 or 110 the Civil Procedure Code.

R.M. —— *Leave granted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

R. Subramania Iyer .. *Applicant**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922)—Assessee declaring in deed of partnership that he is entering into the partnership as manager of undivided Hindu family (of himself and his minor son)—Sufficiency to impress on the share in the business with character of joint family property irrespective of whether the capital contributed was his self acquisition.

S, the assessee, quarrelled with his father and came out of the family in or about April, 1944. With some moneys given to him by his father after the separation, and by his mother, *S* started a concern in September, 1944, in partnership with one *R*. This was wound up on the 31st March, 1947 and a new firm came into being on and from the 1st April, 1947, with *R* and his son holding a quarter share each and the assessee *S* and his wife holding the other one-fourth share each. *S* contributed a capital of Rs. 350 and his wife Rs. 600 while *R* and his son did not make any contribution of capital. A partnership deed was entered into in respect of this firm on the 20th April, 1947 and *S*, the assessee, was described as "representing his undivided family hereinafter called the party of the second part". That undivided family consisted only of the assessee and a minor son who was born in April, 1944. On a question whether the share of the business was joint family property,

Held: There was nothing to prevent the assessee from impressing upon any self-acquired property belonging to him the character of joint family property. No formalities are necessary in order to bring this about and the only question is one of intention on the part of the owner of the separate property to abandon his separate rights and invest it with the character of joint family property. The declaration in the partnership deed is unambiguous in its terms and is to the effect that the assessee was entering into the partnership as the manager of the undivided family (of the assessee and his minor son).

The profits of the business must be treated as having been received by *S* as the manager of a undivided Hindu family.

Case Referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench 'B', under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939), in 66 R.A. No. 598 of 1951-52 (I.T.A. No. 24 of 1950-51—Assessment year 1948-49—S.T.A. No. 361 of 1949-50 on the file of the Appellate Commissioner of Income-tax 'A' Range, Madras, G.I. No. 101-S/48-49, Additional Income-tax Officer, Circle I Madras City District) on its file for decision on the following question of law, *viz.* :—

* Case Referred No. 29 of 1952.
C.M.P. No. 8322 of 1952.

11th April, 1955.

"In the absence of any other evidence, is the recital in the partnership deed of the 20th April, 1947, in respect of the General Commercial Distributors enough for drawing the inference that the moneys invested by the assessee in the businesses carried on by him, came out of funds belonging to the undivided family consisting of the assessee and his minor son?"

C.M.P. No. 8322 *of* 1952: Petition praying that in the circumstances stated therein, the High Court will be pleased to direct the Income-tax Appellate Tribunal, Madras 'B' Bench, to state a case and refer the following questions arising from the Order in R.A. No. 598 of 1951-52 (I.T.A. No. 24 of 1950-51—Assessment year 1948-49) on the file of the said Income-tax Appellate Tribunal, Madras Bench 'B', namely:—

"(i) Whether in the circumstances of this case, the Appellate Tribunal exceeded its jurisdiction and acted against law in going behind the undisputed facts before the Income-tax Authorities below;

(ii) Whether in the circumstances of this case the sum of Rs. 1,600 given to the assessee by his father is joint family property in the hands of the assessee;

(iii) Whether in the circumstances of this case, the share and the share income in General Commercial Distributors is impressed with the character of joint family property of the assessee and his son;

(iv) Whether in the circumstances of this case on a proper construction of the partnership deed of General Commercial Distributors, the assessee was a partner thereof as representing his joint family;

(v) Whether in the circumstances of this case the share income in General Commercial Distributors returned by the assessee as belonging to the joint family, is that of the joint family and not that of the assessee individually;

(vi) Whether in the circumstances of this case, the share income of Lakshmi Ammal in General Commercial Distributors is illegally added in the assessment of the assessee."

S. Krishnamachariar for Applicant.

C. S. Rama Rao Sahib for Respondent in both.

The Order of the Court was pronounced by

Rajagopala Ayyangar, J.—The question referred to us, for decision under section 66 (1) of the Income-tax Act, is:

"In the absence of any other evidence, is the recital in the partnership deed of the 20th April, 1947, in respect of the General Commercial Distributors enough for drawing the inference that the moneys invested by the assessee in the business carried on by him, came out of funds belonging to the undivided family consisting of the assessee and his minor son."

The facts giving rise to the reference may be shortly stated. Subramania Ayyar, the assessee, quarrelled with his father and came out of the family in or about April, 1944. With some moneys given to him by his father after the separation, and by his mother, he started a concern called the General Commercial Corporation in September, 1944. The partners in this concern were Subramania Ayyar and one M. S. Ramamoorthy Ayyar. This was wound up on the 31st March, 1947, and a new firm called the General Commercial Distributors came into being on and from the 1st April, 1947, with M. S. Ramamoorthy Ayyar and his son, one Sundaram Ayyar, holding a quarter share each and the assessee Subramania Ayyar and his wife Lakshmi Ammal holding the other one-fourth share each. Subramania Ayyar contributed a capital of Rs. 350 and his wife Rs. 600 while Ramamoorthy Ayyar and his son did not make any contribution of capital. A partnership deed was entered into in respect of this firm on the 20th April, 1947 and this Subramania Ayyar, the assessee, was described as "representing his undivided family hereinafter called the party of the second part". It might be mentioned that the undivided family at this date consisted only of the assessee and a minor son who was born in April, 1944. For the assessment year 1948-49 the assessee submitted two returns, one as an individual wherein he returned an income of Rs. 50 being sitting fee, received as a Director, and another return as the manager of the joint family and in this capacity he returned the fourth share of the income which he got from the Gene[illegible]ial Distributors. The Income-tax Officer refused to accept these retu[illegible]d the income returned as the manager of the undivided Hindu fam[illegible]e income of Subramania Ayyar, the in-

dividual assessee. The assessee was ca
as the manager of an undivided Hindu
explanation consisted of two parts. Tl
had been contributed by him as his sh
Distributors was ancestral property wh
father. The second was that the decla
nership deed of April, 1947, in which h
the joint undivided Hindu family, was
character of a joint family business, sucl
of a Hindu undivided family. The Ir
put forward by the assessee as regards tl
obtained by him and he was of the op
a portion of the gifts from the assessee'
acquired property in his hands. Deali
tained in the recital in the partnership
held that this was not sufficient to cor
undivided Hindu family. The assessee
Commissioner who rejected the appeal
on further appeal.

In our opinion it is not open to th
finding reached by the Income-tax Ai
source from which the assessee was ab
case that this represented his ancestral
leaves for consideration the other point
in the partnership deed. Under the Hi
property to exist in order that there m
son undoubtedly constitute members o
started with no ancestral nucleus or othe
to prevent the assessee from impressing
to him the character of joint family
order to bring this about and the only
the owner of the separate property to
with the character of joint family pro
sought to be deduced from the condu
ambiguity and for difference of opinic
of the owner of the separate property t
Tribunal, the inference that the chara
upon the separate property follows, unle
tion or if it represents merely a future i
sent case the declaration is unambiguo
assessee was entering into the partnersh
family. The tribunal makes a passir
the undivided Hindu family referred to
the joint family consisting of the assesse
contradiction of the fact narrated by th
out that the assessee had quarrelled witl
come out of the family. In the circums
family in the deed of partnership must
minor son. The tribunal did not an
beside the declaration in order to impi
the character of joint family property.
which was brought into existence by a
is not merely a question of something
effect has been given to the intentions
cumstances the assessee must be held
by him from the General Commercia
manager of the undivided Hindu fam
answer to the reference therefore is tha

out of the funds belonging to the undivided Hindu
:e and his minor son, the recital in the deed of part-
.t that the partnership has functioned is sufficient to
: share of the profits was received by the assessee as
Hindu family. The assessee is entitled to his costs.

: Since R.C. No. 29 of 1952 has been disposed o i
see, counsel for the petitioner represents no further
this stage. C.M.P. No. 8322 of 1952 is dismissed.

Reference answered in favour of the assessee.

·URT OF JUDICATURE AT MADRAS.

RAJAGOPALAN AND MR. JUSTICE BALAKRISHNA.

hettiar .. *Appellant**

hettiar .. *Respondent.*

:on 7 (iv) (b) and Suits Valuation Act, section 8—Suit for partition ent of the plaintiff's right to put an arbitrary valuation—Valuation for :titled to amend the plaint solely with a view to reduce his liability to pay or jurisdiction conforms to the real value of the plaintiff's share.

tion 12 (2)—Power of Court under—Appellate Court—If can direct the plaint in appeal from a decree of the Original Side of the High Court— 1.

Act lays down that in suits under the several categories of the .d according to the amount at which the relief sought is valued peal and it provides that the plaintiff in all such suits shall state it is valued. The Court could not reject the valuation made by n if such a valuation is proved to be not *bona fide*, but arbitrary.

24 M.L.J. 233 (F.B.); *Arunachalam Chetty* v. *Rangaswami Pillai*, 38 Mad. 922 (F.B.); *Narayana* v. *Periyappan*, (1938) 2 031 (F.B.), referred.

ssession, suing for partition and possession of his share of certain rtition that he claims both for purposes of jurisdiction and com- laintiff in such a case is entitled to value the relief for purposes of the Court-fees Act, he could value the relief as he liked. ·aluation both for jurisdiction and Court-fees as per section 8 of

ig under section 7 (*iv*) (*b*) of the Court-fees Act for purposes of luation in the plaint. Where a plaintiff under a misapprehen- not value specifically the relief of partition under section 7 (*iv*) it, but has specified a valuation for purposes of jurisdiction the alue put by the plaintiff for purposes of Court-fees also and the › change that valuation for the purpose of Court-fee in the

ı.I.R. 1926 Mad. 591, *Chhatarpali* v. *Kalap Dei*, (1931) I.L.R. *a Singh*, A.I.R. 1938 Lah. 647, referred.

r purposes of Court-fee can be founded on section 7 (*iv*) of the utory right of an arbitrary valuation for purposes of Court-fee

ır purposes of Court-fees under section 7 (*iv*) of the Court-fees ould also govern jurisdiction under section 8 of the Suits Valua- amendment in the exercise of its discretion, to enable a plaintiff ırt-fees which he would otherwise be liable to pay. The Court m the plaintiff furnished for the purposes of jurisdiction would Court-fee. Therefore where the plaintiff did not separately -fee, he must be deemed to have valued the relief at the same or the purpose of jurisdiction and the valuation cannot be per- :e stage.

Appeal No. of 1953) & 25th January, 1955.

The provisions of section 12 (2) of the Court-fees Act is applicable also to appeals presented to the Appellate Side of the High Court from a decree of the High Court passed in the exercise of its Original Jurisdiction in view of the language of Order 2, rule 1 of the High Court Fees Rules. The Appellate Court can direct the payment of the deficit Court-fee, if any, on the plaint, if it is found that the valuation adopted for purpose of Court-fee at that stage was wrong.

Quaere.—Has a plaintiff, who has once valued the relief claimed by him or is deemed to have valued the relief for the purpose of Court-fee payable under section 7 (iv) (*b*) of the Court-fees Act no right to change that valuation at any stage even by amendment of the plaint?

Appeal sought to be preferred against the judgment and decree of the Hon'ble Mr. Justice Ramaswami Goundar, dated 22nd September, 1953 and passed in exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 311 of 1951.

R. Gopalaswami Aiyangar for Appellant.

The Assistant Government Pleader (*K. Veeraswami*) for State.

V. Tyagarajan and *T. Venkatachari* for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The plaintiff whose claim for a half share of the properties in the possession of the defendant and for recovery of possession thereof was dismissed, appealed. In paragraph 33 of the plaint the plaintiff valued the suit for purposes of jurisdiction at Rs. 15 lakhs and Rs. 1,000, Rs. 15 lakhs represented the value of the half share in the properties the plaintiff claimed and Rs. 1,000 was the figure at which the plaintiff valued the relief of accounts he sought in addition to the share. The plaintiff did not value separately for purpose of Court-fee the claim to a half share in the properties, as he paid the fixed Court-fee on that relief under Schedule II, Article 17-B of Court-fees Act.

By its order dated 28th April, 1954, this Court decided that Court-fees should be paid on the memorandum of appeal, not under Article 17-B of Schedule II of the Court-fees Act but under section 7 (iv) (*b*) of the Court-Fees Act, and the Court directed the plaintiff to value the relief he claimed in the memorandum of appeal on that basis. The plaintiff thereupon valued the relief for the share he claimed in the properties at Rs. 50,000. When objections was taken to the valuation offered by the plaintiff he filed C.M.P. No. 9335 of 1954 for permission to amend paragraph 33 of the plaint by substituting Rs. 50,000 for Rs. 15 lakhs as the valuation for purposes of jurisdiction.

We are of opinion that the amendment sought by the plaintiff in C.M.P. No. 9335 of 1954 should not be allowed, and we shall set out our reasons later in this order. The question how the memorandum of appeal should be valued for the purpose of Court-fee, will therefore be decided with reference to the averments in the plaint as they stood.

Section 7 (iv) of the Court-fees Act itself lays down that in suits under the several categories of section 7 (iv) the Court-fees should be paid according to the amount at which the relief sought is valued in the plaint or memorandum of appeal, and the further provision is that in all such suits the plaintiff shall state the amount at which the plaintiff values the relief sought. We need not concern ourselves with the provision which applies only to suits coming within the scope of sub-clause (*c*) of section 7 (iv) of the Court-fees Act.

In *Ramayya* v. *Ramaswami*[1], a Full Bench of this Court laid down that the Court could not reject the valuation made by the plaintiff in a suit under S. 7 (iv) even if such valuation was proved to be not *bona fide* but an arbitrary valuation. These principles were reaffirmed by two other Full Benches in *Arunachalam Chetty* v. *Rangaswami Pillai*[2] and *Narayana* v. *Periappan*[3].

It can therefore be taken as settled law that in a suit that has to be valued for purposes of Court-fee under section 7 (iv) (*b*) of the Court-fees Act the plaintiff may value the relief at his own figure.

1. (1912) 24 M.L.J. 233 (F.B.).
2. (1914) 28 M.L.J. 118 : I.L.R. 38 Mad. 922 (F.B.).
3. (1938) 2 M.L.J. 557 ; I.L.R. (1938) Mad. 1031 at 1035.

Had the plaintiff valued the relief for purposes of Court-fee under section 7 (iv) (*b*) of the Court-fees Act, the Court could not have refused to accept that valuation even if it was arbitrary; and the same valuation would have prevailed when the plaintiff had to pay Court-fee on the memorandum of appeal. But in this case the plaintiff did not specifically value the relief of partition in the plaint as he originally presented it; he only furnished a valuation for the purpose of jurisdiction, and that the valuation was Rs. 15 lakhs.

That the valuation of the relief falling under section 7 (iv) (*b*) of the Court-fees Act for purposes of appeal should be the same as the valuation in the plaint cannot now admit of any dispute. In *Narayanan* v. *Periappan*[1], the learned Chief Justice laid down at page 1039:

"In our opinion the scheme of the Act in this respect is to allow a plaintiff to value his relief at the figure he chooses, but it does not allow him to change that valuation. He is allowed to value for the purpose of the litigation and when he has done so his valuation governs the forum of trial and of appeal. There is no objection to an appellant abandoning on appeal a portion of the relief claimed in the lower Court or saying that he does not claim relief beyond the figure corresponding to the value of the stamp, but unless he does this we are of opinion that he is bound by the valuation fixed by himself at the commencement of the litigation."

As we pointed out, the plaintiff only specified the valuation for the purpose of jurisdiction but he did not specify the valuation for the purpose of Court-fee in the plaint. The question is, with the valuation for the purpose of jurisdiction specified at Rs. 15 lakhs in the plaint, could the plaintiff be permitted to value the relief under section 7 (iv) (*b*) of the Court-fees Act in the memorandum of appeal alone at Rs. 50,000. If, despite the fact, that the plaintiff did not specifically value the relief of partition under section 7 (iv) (*b*) of the Court-fees Act in the plaint, the valuation for the purpose of jurisdiction as specified in the plaint, Rs. 15 lakhs should be deemed to be the valuation put by the plaintiff himself for the relief to be valued under section 7 (iv) (*b*) of the Act, then obviously the plaintiff could not be permitted to change that valuation for the purpose of Court-fee in his memorandum of appeal.

In *Annapurnayya* v. *Nagaratnamma*[2], the suit was for the appointment of a receiver and for an injunction to restrain the defendant, a widow, from wasting her estate. The plaintiff valued that suit for the purpose of jurisdiction at Rs. 10,000 and paid a Court-fee of Rs. 100 on the assumption that he was at liberty to put his own value on the suit for the purpose of Court-fee. The learned Judge held that the relief had to be valued under section 7 (iv) (*c*) of the Court-fees Act. After pointing out that Order VII, rule 1, Civil Procedure Code, required that the plaint should specify the valuation for the purpose of jurisdiction as well as for the purpose of Court-fee, Jackson, J., observed:

"It is not contemplated that the subject-matter shall be given two values, one purely arbitrary and fanciful for the purposes of jurisdiction and one in strict conformity to the real value for the purposes of Court-fees........Therefore when a plaint contains a valuation for purposes of jurisdiction, it is a natural assumption that the same valuation would apply if it were necessary to have a valuation for an *ad valorem* Court-fee."

The learned Judge further observed:—

"If the plaintiff had entered as his value for jurisdiction Rs. 10,000 and his value for *ad valorem* Court-fee, say Rs. 5,000. Following the ruling in *Sailendranath Mitra* v. *Ramcharan Pal*[3], the Court, no doubt, would take Rs. 5,000 as the value for purposes of jurisdiction. But if the plaintiff enters as his value for jurisdiction Rs. 10,000 and owing to his misreading of the Court-fees Act omits an *ad valorem* valuation altogether, considering that the two valuations must be the same, the Court is justified in assuming that Rs. 10,000 would also be the *ad valorem* valuation."

We respectfully agree with these observations. Similar views were expressed by King, J., in *Chhatarapali* v. *Kalap Dei*[4] and by Beckett, J., in *Beli Ram* v. *Dasondha Singh*[5].

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1. (1938) 2 M.L.J. 557 : I.L.R. (1938) Mad. 1031.
2. A.I.R. 1926 Mad. 591.
3. A.I.R. 1927 Cal. 84.
4. (1931) I.L.R. 54 All. 232.
5. A.I.R. 1938 Lah. 647.

The plaintiff, as we stated valued the claim for partition for purposes of jurisdiction at Rs. 15 lakhs. The details of valuation of groups of items of properties were also specified, and at no stage did the learned counsel for the plaintiff-appellant urge that that valuation was wrong or needed revision in any particular. The cash and the firm's assets themselves were valued at Rs. 20 lakhs of which the plaintiff claimed a half share, Rs. 10 lakhs. There was no attempt to deny that the valuation the plaintiff put on the immovable properties was their real market value. So the jurisdictional value the plaintiff furnished represented the real value of the share which the plaintiff claimed. What, however, is more important is that the plaintiff did not separately specify the valuation for the purpose of Court-fee. Whether he could have in the circumstances of this case furnished an arbitrary valuation for the purpose of Court-fee wholly unrelated to the itemised valuation he gave for the purpose of jurisdiction with reference to the real value of the properties does not really arise for determination. He did not furnish separate valuation for the purpose of Court-fee. Under an impression, which has now been held to be mistaken by this Court, the plaintiff paid Court-fee under Schedule II, Article 17-B of the Court-fees Act; but that in no way helps the plaintiff. The Court will have to assume that the valuation the plaintiff furnished for the purpose of jurisdiction, which was consistent with the real value of the property, would have been the value for the purpose of Court-fee, had the plaintiff correctly valued the relief for the purpose of Court-fee unde section 7 (iv) (*b*) of the Court-fees Act. In effect, though the plaintiff did not separately value the relief for the purpose of Court-fee, he must be deemed to have valued it at the same figure at which he valued the relief for the purpose of jurisdiction, that is Rs. 15 lakhs. That, of course, applies to the plaint. Since as we have already pointed out, the valuation for the purpose of Court-fee payable on the memorandum of appeal in such a case as this could not differ from the valuation of the plaint for the purpose of Court fee, we have to hold that the plaintiff should value the relief that falls in this case under section 7 (iv) (*b*) of the Court-fees Act at Rs. 15 lakhs.

The learned counsel for the plaintiff-appellant referred to section 7 (iv) of the Court-fees Act which required valuation of the reliefs sought in the "plaint or memorandum of appeal" and contended that as we are now concerned only with the valuation in the memorandum of appeal, the plaintiff would be entitled to exercise the right conferred upon him by section 7 (iv) of the Act and put his own valuation on the relief that fell within the scope of section 7 (iv) (*b*) of the Court-fees Act whatefer the plaintiff might have done or failed to do in the plaint. That contention will have to be negatived. A similar contention was repelled by the Full Bench in *Narayanan* v. *Periappan*[1].

We shall now set out the reasons for our refusal to permit the plaintiff to amend the plaint at this stage. It should be remembered that even at this stage what the plaintiff seeks is not an amendment of the plaint to furnish the plaintiff's valuation of the relief falling within the scope of section 7 (iv) (*b*) of the Court-fees Act. The plaintiff wants to amend the plaint to revise the jurisdictional value and put it at Rs. 50,000 instead of Rs. 15 lakhs, specified in the plaint. That, of course, could be consistent only with the consciousness of a liability on the part of the plaintiff to value the relief under section 7 (iv) (*b*) of the Court-fees Act in conformity with the valuation of the properties for the purpose of jurisdiction. The learned Government Pleader relied upon the passage at page 1038 in *Narayanan* v. *Periappan*[1] which has already been extracted above in support of his contention, that once the plaintiff has valued the relief or is deemed to have valued the relief for the purpose of Court-fee payable under section 7 (iv) (*b*) of the Court-fees Act, he has no right at all to change that valuation at any stage even by an amendment of the plaint. That was not the question before the Full Bench. We do not propose to decide that question. We would prefer to rest our decision to refuse the amendment of the plaint at this stage on a much narrower basis. The question to which

1. (1938) 2 M.L.J. 557 : I.L.R. (1938) Mad. 1031.

we propose to address ourselves is whether we should exercise our discretion, assuming without deciding it that we have jurisdiction to order amendment of the plaint.

In *Arogya Udayan* v. *Appachi Rowthen*[1], an amendment of the plaint which would result in ousting the jurisdiction of the Court to which the plaint had been presented was held not permissible. In the present case, of course, no question of jurisdiction arises, because whether the valuation for the purpose of jurisiction is Rs. 15 lakhs as originally recorded in the plaint or Rs. 50,000 which the plaintiff now wants to adopt, the forum would have remained the same. The real reason for the amendment the plaintiff now seeks is obviously his desire to reduce his liability to pay Court-fee which would, but for the amendment, be payable on the memorandum of appeal.

Even after the proposed amendment the details of the valuation of the properties mentioned in the plaint remain unaltered, and it is not the case of the plaintiff that any of thse details was wrong. Section 8 of the Suits Valuation Act requires that in a case like this to which section 7 (iv) (*b*) of the Court-fees Act applies, the valuation for purposes of computation of Court-fees and the valuation for jurisdiction should be the same. A right of arbitrary valuation for purposes of Court-fee can be founded on section 7 (iv) of the Court-fees Act. There is no statutory right of an arbitrary valuation for purposes of jurisdiction alone. If it is an arbitrary right of valuation for purposes of jurisdiction that the plaintiff seeks by the amendment, such an amendment should not be allowed; property properly valued at 30 lakhs cannot be permitted to be valued at fifty thousands by an amendment only for purposes of jurisdiction.

No doubt, if a plaintiff values his claim for purposes of Court-fees under section 7 (iv) of the Court-fees Act, that valuation even if it is arbitrary, would also govern jurisdiction under S. 8 of the Suits Valuation Act. But in this case the plaintiff does not seek any specific amendment of the plaint to furnish valuation at his choice, for purposes of Court-fees under section 7 (iv) of the Court-fees Act. If however, the plaintiff seeks the amendment of valuation for purposes of jurisdiction only to enable him to treat that valuation as an implied valuation in the plaint for computation of the Court-fees under section 7 (iv) (*b*) of the Court-fees Act, we do not think we should in the exercise of our discretion, allow an amendment, and at this stage, merely to enable the plaintiff to reduce the liability to pay the Court-fee which he would otherwise be liable to pay on the memorandum of appeal. C.M.P. No. 9335 of 1954 is dismissed.

The position may thus be summed up. The plaintiff had to value the relief of partition that he claimed both for purposes of jurisdiction and computation of Court-fees. Since the Court-fee payable by the plaintiff had to be computed under section 7 (iv) (*b*) of the Court-fees Act, he could value the relief as he liked, but he was bound to adopt the same valuation both for jurisdiction and Court-fees. The plaintiff failed to value the relief separately for computation of the Court-fee, and it was only for jurisdiction that he valued the relief at 15 lakhs of rupees in the plaint. The Court had to assume that was also the plaintiff's valuation for computation of the Court-fee under section 7 (iv) (*b*). It was on that valuation that Court-fee had to be paid on the memorandum of appeal presented by the plaintiff.

The only valuation, which, in the circumstances of this case, the plaintiff could adopt for purposes of the Court-fee payable on the memorandum of appeal was 15 lakhs of rupees; and that is the valuation, which, in our opinion, he ought to furnish to carry out the directions this Court gave the plaintiff in its order dated 28th April, 1954, *Sathappa Chettiar*, In re.[2] Court-fee should be paid on that basis on the memorandum of appeal on or before 4th July, 1955.

S.R. No. 55247 of 1953.—We reserved for separate consideration the correctness of the contention of the learned Government Pleader, that we should exercise the powers vested in an appellate Court by section 12 (2) of the Court-fees Act and direct the plaintiff to pay the deficit Court-fee on the plaint as well.

1. (1901) 12 M.L.J. 35: I.L.R. 25 Mad. 543. 2. (1954) 2 M.L.J. 400.

It should be remembered a fixed Court-fee of Rs. 100 was paid under Article 17-B of Schedule II of the Court-fees Act. By its order dated 28th April, 1954, *Sathappa Chettiar, In re*[1] this Court held that the relief of partition should have been valued for the purpose of Court-fee under section 7 (iv) (*b*) of the Court-fees Act. In our order pronounced to-day we have held that Court-fee should be paid on the memorandum of appeal on a valuation of Rs. 15 lakhs under section 7 (iv) (*b*) of the Court-fees Act. That decision itself was based on the averments in the plaint and from what we have already stated it should follow that the same Court-fee should have been paid on the plaint.

The question left for decision is, whether section 12 (2) of the Court-fees Act is applicable to correct any inadequacy of Court-fees paid on a plaint presented to this Court in the exercise of its original jurisdiction. The Court-fees Act itself does not specifically apply any of the provisions of Chapter III of that Act to the High Court. The learned counsel for the plaintiff-appellant contended that section 12 (2) of the Court-fees Act could not be invoked by this Court to correct any deficiency in the Court-fee paid on a plaint presented to this Court on its original side.

The payment of Court-fees on plaints presented to this Court on its original side and on a memorandum of appeal against a decision in such a suit is regulated by the High Court Fees Rules, 1933. The relevant portion of Order 2, rule 1 of the High Court Fees Rules runs :—

> "To every document including memoranda of appeals, the Registrar shall apply as far as may be, the law for the time being in force relating to Court-fees. As regards the scale of such fees, the manner of levy of such fees, the refund of such fees and in every other respect in the manner and to the extent that it is applicable to similar documents filed in original proceedings in a District Court and for appeals from decrees and orders of a District Court."

After enumerating the scale of fees, the manner of levy of such fees, the revision of such fees, the rules provide that in every other respect also the provisions of the Court-fees Act should be applied and that, the learned Government pleader contended, made the provision of section 12 (2) of the Act applicable also to a case of an appeal presented from a decree of this court passed in the exercise of its original jurisdiction. We accept that contention as correct. The validity of the High Court Fees Rules was upheld by this Court in *Seshadri* v. *Province of Madras*[2].

In *Nemichand* v. *Edward Mills Company, Ltd.*[3], the scope of section 5 and that of secti n 12 of the Court-fees Act were explained. It may not, however, be necessary to examine this aspect of the question further, because this Court has already pointed out in its order, dated 28th April, 1954, that the decision of Krishnaswami Nayudu, J., that the correct Court-fees had been paid on the plaint was not a decision under section 5 of the Court-fees Act. That decision was no bar to the determination of the basis on which the memorandum of appeal should be valued ; and in our opinion, it constitutes no bar either to the application of section 12 (2) of the Court-fees Act to the plaint at this stage.

We therefore hold under section 12 (2) of the Court-fees Act that the defecit Court-fee computed under section 7 (iv) (*b*) of the Court-fees Act on the valuation of Rs. 15 lakhs furnished by the plaintiff himself should be paid on or before 4th July, 1955.

R.M. *C.M.P. dismissed : S. R. allowed.*

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1. (1954) 2 M.L.J. 400.
2. (1954) 1 M.L.J. 206.
3. (1952) S.C.J. 674 (S.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK AND MR. JUSTICE KRISHNASWAMI NAYUDU.

R. M. N. Ramanathan Chettiar .. *Appellant**

v.

Narayanan Chettiar minor and others .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 16 (*b*)—*Scope and effect of—Suit for partition of joint family property partly in India and partly abroad—Jurisdiction of Court—Extent of.*

Private International law—Jurisdiction of Courts over foreign property—Suit for accounts as regards foreign property—If maintainable—Practice—Suit for partition of joint family property—Relief as regards foreign property—Jurisdiction of Indian Courts—Nature of action.

Under section 16 (*b*) of the Civil Procedure Code a suit for the partition of immovable property shall be instituted in the Court within the local limits of whose jurisdiction the property is situated. There is, however, an important proviso that a suit to obtain relief respecting immovable property held by the defendant may, where the relief sought can be entirely obtained through his personal obedience be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

That a Court has no jurisdiction to entertain an action for the determination of the title to, or the right to the possession of, any immovable property situate in foreign territory is now well established and followed in Indian case law though its precise scope is still open to some doubt. This rule is subject to an exception on the ground either of (*a*) a contract between the parties to the action; or (*b*) an equity between such parties in cases where the parties themselves are within the Court's jurisdiction. It by no means follows, therefore, that all property having a foreign origin is outside the jurisdiction of the Indian Court all for purposes. Dicey's "Conflict of Laws", 6th Edition, page 141, ref.

A partition suit cannot be put into the category of an action either *in personam* or *in rem*. It is a curious mixture of both kinds of actions, involving as it does, change in character of title of property from joint family ownership to individual ownership, liability to account for joint family immovables, jewels and money, and also in some cases, liability of the *kartha* or managing member to account and bring into the family hotchpot joint family moneys which he has fraudulently secreted to his own advantage, the setting aside of alienations and so on.

In a case of this kind an Indian Court would, as a Court of conscience, be operating primarily *in personam* and not *in rem*. It is not doing anything by way of determination of title to property situated out of India. Nor is it actually partitioning such property by metes and bounds. It is merely calling upon the defendant who lives within its jurisdiction to account as managing member of his joint family for all the joint family property, no matter where it is situated and in what part of the world. Such a decree for an account has Court sanction behind it as it can be enforced against the managing member who resides and has property within the jurisdiction of that Court.

Per *Mack, J.*—The resources and powers of a Court which has jurisdiction over a manager of a joint family in control and possession of property situated both in India and abroad are sufficiently wide so as to enable it to do justice and equity as between the members of a family without encroaching on the jurisdiction of any foreign Courts.

Per *Krishnaswami Nayudu, J.*—Neither under section 16 (*b*) of the Code of Civil Procedure nor under the rules of private international law has Indian Courts jurisdiction to entertain a suit for partition of immovable properties situate outside India, especially where the partible nature of such properties is disputed. It has no jurisdiction even to declare that the said properties are partible joint family properties; nor has it power to take such properties into its calculation in adjusting the equities between the parties. But in such a suit the plaintiffs could ask for an account of those properties and claim their share of the income.

The principle is well established that the Courts have power, in the exercise of personal jurisdiction, to enforce the performance of contracts and trusts though relating to immoveable situate in foreign land.

Apart from law, on principles of general equity the liability to account arises out of an implied agency of the one who is in possession for the others, either on the basis of tenancy or on equitable considerations. A co-owner cannot therefore escape liability to account to his other co-owners.

Appeal against the Decree of the Court of Subordinate Judge of Sivaganga, dated 13th September, 1950, and passed in Original Suit No. 80 of 1949.

M. S. Venkatarama Ayyar and *T. V. Balakrishnan* for Appellant.

A. Sundaram Ayyar for Respondent.

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*Appeal No. 745 of 1954. 1st March, 1955.

The Judgment of the Court was delivered by

Mack, J.—This case is a concrete instance of the considerable difficulty experienced by members of a coparcenary owning property both in India and Ceylon and also it may be, Malaya or Burma, in obtaining relief as against the managing member in possession and control of all the property. In this case the plaintiffs are minor sons suing their own father by their mother as guardian for partition, which has been found to be in their interests, the father having neglected his wife and children and having been found by the trial Court to have been spending large sums out of the joint family estate on evil living, leaving his own wife and children destitute without making proper provision for their maintenance. The learned Subordinate Judge granted partition of the joint family property in India, being of course unable to direct a partition of the substantial property in Ceylon in B, B-1 and C schedules as being for this purpose outside the jurisdiction of the Indian Courts. I am in complete agreement with my learned brother that the Subordinate Judge was correct in law in however directing an account to be taken of the income from all the Ceylon property though this can only be done from the date of severance of status. The first defendant divided from his brother, the second defendant, by a registered partition deed Exhibit B-1, dated 12th November, 1947 and there can be no doubt that the subject-matter of the partition suit under appeal is all joint family property.

Under section 16 (*b*) of the Civil Procedure Code a suit for the partition of immovable property shall be instituted in the Court within the local limits of whose jurisdiction the property is situated. There is, however, an important proviso that a suit to obtain relief respecting immovable property held by the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain. I would in connection with this type of suit against a manager by a member of the family emphasise the clause in this proviso " where the relief sought can be entirely obtained through his personal obedience ". In the present case the first defendant is a resident of India, was served in India, and submitted to the jurisdiction of the Subordinate Judge of Sivaganga. As it appears to me, it is a case where the relief sought by the plaintiffs can be entirely obtained through his personal obedience in respect of the entire joint family property whether situated in India or abroad.

Rule 20 in Dicey's Conflict of Laws, 6th Edition, page 141, is to the effect that a Court has no jurisdiction to entertain an action for the determination of the title to, or the right to the possession of, any immovable situate in foreign territory is now well established and followed in Indian case law, though its precise scope is still open, as Dicey himself observed, to some doubt. This rule is subject to an exception on the ground either of (*a*) a contract between the parties to the action ; or (*b*) an equity between such parties in cases where the parties themselves, as in the present case, are within the Court's jurisdiction. It by no means follows, therefore, that all property having a foreign origin is outside the jurisdiction of a British Court for all purposes. This has been laid down in *Kashinath* v. *Anant*[1], in which Jenkins, C.J., reproduced the dictum of Lord Selborne in *Ewing* v. *Orr Ewing*[2], quoted by my learned brother in his judgment. The effect of that decision was that the jurisdiction of the Courts in India should be governed and ascertained by the same principles except so far as they may be at variance with legislative enactment.

Now an action for partition of joint family property within a Hindu coparcenary is one unknown to any other system of law and even in countries where a large number of Hindus live and claim to be governed by their own personal laws, this type of suit both in its novelty, in its complexity, and its somewhat alarming com-

1. (1899) I. L. R. 24 Bom. 407. 2. L. R. (1813) 9 A. C. 34 at 40.

prehensiveness poses a most difficult question for Courts in other countries to answer. In the assumption of jurisdiction outside India in this type of suit we can find therefore no direct precedent or guidance in English Law. We have to evolve our own law and practice. A partition suit cannot be put into the category of an action either *in personam* or *in rem*. It is a curious mixture of both kinds of actions, involving as it does, change in character of title of property from joint family ownership to individual ownership, liability to account for joint family movables, jewels and money, and also in some cases, liability of the *kartha* or managing member to account and bring into the family hotchpot joint family moneys which he has fraudulently secreted to his own advantage, the setting aside of alienations and so on.

A few days ago my learned brother and I dealt with an appeal, C.M.A. No. 532 of 1951, in which a plaintiff in a partition suit which was not against his father, was appointed receiver for the purpose of filing suits in Ceylon to recover joint family property against the first defendant. He filed more than seven suits for partition of several estates situated all in Ceylon. They were all dismissed for misjoinder of causes of action by a District Court and an appeal also was dismissed by the Supreme Court in a brief judgment. The litigation expenses amounted to over Rs. 11,000 with no result in Ceylon. Now as it appears to me, it would be an extremely difficult matter for the mother as guardian of the two minor plaintiffs to institute suits in Ceylon either for an account or for partition of the properties situated there. They may not in fact want actual partition by metes and bounds of any Ceylon property without even a probability of their ever going and residing in Ceylon. All that they may desire is a valuation of the entire joint family estate and payment to them of their shares of its value in money. To deprive them even of the decree they have obtained against the first defendant for an account of all Ceylon properties and give them only a partition decree for properties actually situated in India would make their condition pitiable and drive them unnecessarily into wasteful litigation in a foreign country and would put a premium on dishonest evasion and obstructive repudiation of his responsibilities and liabilities by the first defendant. I have no hesitation in holding that in a case of this kind an Indian Court would, as a Court of conscience, be operating primarily *in personam* and not *in rem*. It is not doing anything by way of determination of title to property situated out of India. Nor is it actually partitioning such property by metes and bounds. It is merely calling upon the defendant who lives within its jurisdiction to account as managing member of his joint family for all the joint family property, no matter where it is situated and in what part of the world. Such a decree for an account has the Court sanction behind it as it can be enforced against the managing member who resides and has property within the jurisdiction of the Court. The *kartha* or managing member of a joint Hindu family, once notice of severance of status is given, in consequence of which a suit for partition is filed, becomes liable to account as a person occupying a fiduciary position of trust and responsibility. The Court having jurisdiction to try a partition suit and within whose jurisdiction the members of the coparcenary reside and own other property has ample powers to compel the manager to make a full and complete disclosure of all joint family property, and if there are grounds for thinking that he has failed to do so, to take such measures as may be necessary by the appointment of commissioners to verify his statement. I am unable myself to see any legal impediment in the way of the Court, although it may not have jurisdiction to partition a joint family immovable property abroad, having it valued on the application of other coparceners who may not desire to have it divided by metes and bounds and their shares separated and given to them, which in the great majority of cases would be utterly impracticable and profitless, but only to have credited in the partition suit their share of this asset in money. If the managing member or *kartha* objects to this course, the Court would, I consider, have powers to direct him to sell that asset and make the proceeds available for distribution in the family. I do not propose to attempt to exhaust the remedies that a Court in India can resort to in a partition suit in order to do justice and equity as between the parties without permitting the *kartha* or managing member

to put the maximum difficulties in the way of the coparcener seeking relief against him. All that I would say is that the resources and powers of a Court which has jurisdiction over a manager of a joint family in control and possession of property situated both in India and abroad are sufficiently wide so as to enable it to do justice and equity as between the members of a family without encroaching on the jurisdiction of any foreign Courts.

Krishnaswami Nayudu, J.—The appellant is the father of minor plaintiffs 1 and 2, and the appeal arises out of a suit for partition of joint family properties instituted on behalf of the minor plaintiffs against the appellant as the 1st defendant and two others. Defendants 1 and 2 are brothers. The 3rd defendant is their mother. There was a division between the brothers, defendants 1 and 2, on 5th November, 1947 and the suit is in respect of properties that were allotted to the 1st defendant at the partition and certain other properties which are alleged to be trust properties in respect of which directions are asked for in the suit. The relief for partition was opposed mainly on the ground that the partition was not beneficial to the interest of the minors, which contention was repelled by the learned Subordinate Judge and a decree for partition was passed.

The appeal confines itself to the consideration of two questions : (1) as to the decree relating to the properties described in schedule B-1 of the plaint, which are trust properties, and (2) as to the 1st defendant's liability to account in respect of properties situated outside the jurisdiction of the Court and in a foreign territory, namely, Ceylon.

A half a share in a large estate in Ceylon valued at Rs. 20,000 in 1939 was endowed by the father of defendants 1 and 2 Narayanan Chettiar to a Vinayagar temple in Keelapoongudi village, Sivaganga taluk, under a deed of trust executed on 14th February, 1939, Exhibit B-2. Under the deed, an absolute endowment of the property to the temple is effected and the sole power of management of the temple and its funds was reserved by the father in himself during his lifetime and after his death the direction is that the two sons, defendants 1 and 2, shall have the right of succession to the said trust and they are appointed as trustees to manage the trust after his death and it is only after the lifetime of defendants 1 and 2 that the succession to the management of the trust is vested in their heirs. As regards the endowment itself, the net income of the property is to be utilised towards the daily worship of the deity and the balance of the income for the general progress and development of the temple.

There is therefore an absolute dedication of the property to the temple and the members of the family including the plaintiffs are not entitled to any beneficial interest inasmuch as even the surplus of the income has been set apart for the purpose of the temple. The only right which the plaintiffs could claim is the right to manage, which right could accrue only after the lifetime of both the 1st and 2nd defendants. As such, they have no present right to interfere with the properties by virtue of their being members of the family. Though the property was family property prior to its dedication, after its dedication it ceased to belong to the family and as such it is not competent to give any directions as regards the corpus or the income of the property in the suit for partition. The plaintiffs included this item of property in the suit since the property was endowed for running a religious endowment of a Pillayar Koil and a Samadhi Mutt in Keelapoongudi and the reason for the inclusion is stated in the plaint to be that suitable arrangements have to be made as to rotation or otherwise regarding the management of the trust between plaintiffs 1 and 2 and defendants 1 and 2, who are hereditary trustees. The prayer is in similar terms and the plaintiffs prayed that suitable arrangements be made for future management of the trust and B-1 schedule property to the extent of the Honourable Court's jurisdiction. It is unnecessary to examine in this connection the contention that since the property is situated in Ceylon, no direction of any sort could be given. Without going into this question, which, however, would arise in dealing with the second of the contentions raised in this appeal, the appeal on this point could be disposed of on other and surer grounds.

The learned Subordinate Judge took the view that the appointment as trustee is a benefit which the 1st defendant should share with the members of his joint family, that the trust is a private trust and that the minor plaintiffs are therefore entitled to joint management of the trust properties along with the 1st defendant, and therefore he considered it necessary to issue certain directions and he ordered an account to be taken of the management of the trust properties to find out whether the 1st defendant had properly accounted for all the income and moneys and to find out the extent of the misappropriation or misuse, if any. This direction is obviously beyond the scope of the suit, as there was no allegation of mismanagement and misappropriation of trust funds in the plaint and the plaintiffs only required that suitable arrangements had to be made for their being associated in the management along with the 1st defendant. The Subordinate Judge's view of the nature of the interest which the 1st defendant had under the trust deed and the rights of the plaintiffs in relation to the trust are misconceived. There is no benefit conferred on the 1st defendant, which he should share with the other members of the family; nor was there any evidence to show that it is a private trust; nor, on the terms of the document, could the plaintiffs claim any right to present management. The devolution of the trusteeship has been provided in clear terms under the document and it is only after the lifetime of both the 1st and 2nd defendants that the plaintiffs could have any hand in the management of the trust. That contingency not having arisen, the plaintiffs have no present right to the management of the trust. The suit in relation to the trust properties is entirely misconceived and the direction given by the learned Subordinate Judge cannot therefore be supported. It was sought to be argued that the temple is a private temple, about which there is absolutely no evidence, and it was also suggested that the 1st defendant has been utilising the income for his own purposes and that the charities have not been properly conducted. If the plaintiffs are able to establish these contentions, the remedy is always open to them to take the matter before the Hindu Religious and Charitable Endowment Board for necessary action. But, in view of the clear terms of the trust deed, no relief could be granted to the plaintiffs. The direction in the decree for the Commissioner to take an account in respect of the properties described in schedule B-1 is therefore set aside.

Besides the trust properties described in schedule B-1 to the plaint, the other family properties, in which the plaintiffs would be entitled to a share but which are situated in foreign territories, are the properties described in schedules B and C, the B schedule properties being in Ceylon and the C schedule properties being situated in Burma. In respect of the foreign properties, the plaintiffs reserved their right to sue for partition, but they included those properties for such relief as the Honourable Court could grant in its personal jurisdiction against the defendants and the relief asked for is that the defendants 1 and 2 or such of them as were found to be in the management should be directed to render accounts of the income of the suit properties and pay over to the plaintiffs such amounts as are found due to them to the extent of that Court's jurisdiction.

The interesting question that arises for determination is whether the plaintiffs, in a suit instituted in a Court in India for partition of properties situated in India, though not entitled to ask for a partition in respect of properties situated in a foreign territory, could ask for a relief not for partition of the properties, but for an account of the income of those foreign properties and payment of their share in the income. The question as to the power of Indian Courts to entertain a suit for partition of immovable properties situated outside India was considered in *Nachiappa* v. *Muthukaruppan*[1], where a Bench of this Court held that neither under section 16 (*b*) of the Code of Civil Procedure nor under the rules of private international law has a British India Court Jurisdiction to entertain a suit for partition of immovable properties situate outside British India, especially where the partible nature of such properties is disputed and that it has no jurisdiction even to declare that the said properties are partible joint family properties; nor has it power to take such properties into

1. (1946) 1 M.L.J. 310 : I.L.R. (1946) Mad. 858.

its calculation in adjusting the equities between the parties. But the question as to whether in such a suit the plaintiffs could ask for an account of those properties and claim their share of the income did not, however, come up for consideration in that case.

In *Ramacharya* v. *Anantacharya*[1], where there was a suit for partition of certain properties situated within the jurisdiction of a British Indian Court and the suit was resisted on the ground that the plaintiffs did not bring into the suit certain other properties situated in a native Indian State, the Court held that a partition of the properties belonging to a joint family situated in British India could be granted without taking into account other properties situated outside British India. While observing that it is plain that the Court has no jurisdiction and no machinery for partitioning that property situated in a foreign jurisdiction, and with reference to a contention that the Court might nevertheless take such property into its calculation and award to the plaintiff in possession so much only of the property in British India as will equalise the shares of the plaintiff and the defendant, Telang, J., repelled that contention by pointing out that that would be " doing indirectly that which the law says may not be done directly ". The properties in a foreign jurisdiction cannot therefore be taken into account for any purpose in a suit for partition and any relief in respect of those properties could therefore be agitated only in a suit instituted in Courts which have jurisdiction over those properties.

The rule relating to jurisdiction over properties situated in a foreign territory is framed as follows in Dicey's Conflict of Laws, 6th edition, page 141 :

" *Rule* 20.—Subject to the exceptions hereinafter mentioned the Court has no jurisdiction to entertain an action for (1) the determination of the title to, or the right to the possession of, any immovable situate out of England (foreign land) ; or

(2) the recovery of damages for trespass to such immovable."

There are three Exceptions to this rule and Exception I runs thus :

" Where the Court has jurisdiction to entertain an action against a person under either Rule 27, or under any of the Exceptions to Rule 28, the Court has jurisdiction to entertain an action against such person respecting an immovable situate out of England (foreign land), on the ground of either—

(*a*) a contract between the parties to the action ; or

(*b*) an equity between such parties ;

with reference to such immovable."

There are two other Exceptions relating to trust properties arising out of Admiralty jurisdiction, which, however, do not require to be referred to in the present context.

Rule 27 reads : " When the defendant in an action *in personam* is, at the time for the service of the writ, in England, the Court has jurisdiction in respect of any cause of action, in whatever country such cause of action arises, subject however in the case of actions under the Carriage by Air Act, 1932, to the limitations therein contained."

The jurisdiction of a Court over immovable properties situated in a foreign land is restricted against a person who resides within its jurisdiction and to actions arising out of a contract between the parties to the action, or arising out of equity between them, the reason behind the rule being that it is only an action *in personam* that is entertainable though it may relate to immovable properties situated outside. A suit for an account, though in respect of the profits of immovable properties situated in a foreign territory, is contended to be an action *in personam* and therefore the present suit for an account against the 1st defendant is urged to be sustainable and such an action is in the exercise of equitable jurisdiction of Courts. Reliance is placed on the following passage in Halsbury Laws of England, Vol. 6, 2nd Edn. at page 227 : (Halsbury's Laws of England, Vol. 7, 3rd Edn. at page 37).

" The English Courts have jurisdiction to order an account of the rents and profits of a foreign immovable against any person liable to account in respect thereof, and in a suitable case, a receiver will be appointed."

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1. (1893) I.L.R. 18 Bom. 389.

In *Kashinath* v. *Anant*[1], the plaintiff, who was a member of one of the three branches of pujaris attached to a temple at Nasik, sued to establish his rights to a share in the income arising from certain immovable properties, one of such properties being situated outside British India in Nizam's Dominions and the other in another native State. It was held that the suit was with n jurisdiction, there being no dispute as to title. Jenkins, C.J., following the principle laid down by Lord Selborne in *Ewing* v. *Orr Ewing*[2], viz.,

> "The Courts of Equity in England are, and always have been Courts of conscience, operating *in personam* and not *in rem*; and in the exercise of this personal jurisdiction, they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction. They have done so as to land, in Scotland, in Ireland, in the Colonies, in foreign countries,"

held that the jurisdiction of Courts in India is governed and must be ascertained by the same principles except so far as they may be at variance with legislative enactment.

While therefore Indian Courts have no jurisdiction to determine question of title to land situated in a foreign jurisdiction, but so long as the title to land is not required to be determined, in a partition suit where by a decree for partition and allotment to one or other of the parties the Court has necessarily to adjudicate upon title by vesting title in one or other of the members, the question is whether, when rents and profits of such properties are received but burdened with an obligation arising out of a contra or trust, Courts could be considered to have no jurisdiction even to enforce such contracts or trusts. The principle which is well established in England is that the Courts have power, in the exercise of personal jurisdiction, to enforce the performance of contracts and trusts though relating to immovables in foreign land. If that is the case, the question would arise as to whether the present action, in so far as it concerns the accounts of the profits of foreign immovables could be sustained. The answer would depend upon the scope and extent of the liability of the 1st defendant to render an account and whether the right to account could be considered to be founded upon a contract, express or implied, with the 1st defendant or trust arising out of his position as father and manager of the joint family.

The suit was instituted on 8th December, 1949 and notice of demand was issued on 18th November, 1949, on behalf of the minors asking for a partition and declaring a division in status. It therefore follows that on and from 18th November, 1949, the plaintiffs could not be considered to continue to be members of an undivided joint Hindu family, the division of status having been effected by virtue of the notice, dated 18th November, 1949. The decree directs accounts of the income from the joint family properties situated in Ceylon from the date of the partition deed Exhibit B-1, namely, 12th November, 1947, when admittedly the 1st defendant's family had not been divided. It is well established that a karta or manager of a joint Hindu family is not liable to account, in the absence of proof of direct misappropriation, or fraudulent and improper conversion of the moneys to his personal use and that he is liable to account for what he has received and not for what, as reasonable and prudent manager he should have received, and the decisions go so far as to say that he is not even bound to keep accounts, unless the nature of the family properties is such, as in the case of a trading family that it becomes necessary to keep accounts. He is neither an agent nor an express trustee. In Mayne on Hindu Law and Usage, 11th edition, at page 367, it is stated that the members of the family cannot call for an account, except as incident to their right to a partition, nor can they claim any specific share of the income, nor even require that their maintenance or the family outlay should be in proportion to the income. That he is not an agent is established beyond dispute, but as to whether he is a trustee the earlier view, based on the observation of Lord Lindley in *Annamalai Chetty* v. *Murugesa Chetty*[3], was that the relation of such a person (namely, a manager) is not that of principal or agent, or of partners; it is much more like that of trustee

1. (1899) I.L.R. 24 Bom. 407.
2. L.R. (1883) 9 A.C. 34 at 40.
3. (1903) 13 M.L.J. 287 : L.R. 30 I.A. 220 : I.L.R. 26 Mad. 544 at 553 (P.C.).

and *cestui que trust*. But the view in *Arumilli Perrazu* v. *A. Subbarayadu*[1], dispelled any doubt and it was held that the manager cannot in strict parlance be a trustee and the rules applicable to strict accounts and *cestui que trusts* existing in England are not applicable.

In that case Sir John Edge observed at page 663 :

"Their Lordships desire once more to repeat the warning they have often given against attempting to apply without qualification in India the rules applicable to strict accounts between trustees and *cestuis que trusts* that exist in this country, because in truth there are a number of fiduciary relationships in India to which these rules cannot in their entirety apply. This does not mean that breach of established duty should be less severely dealt with in India than in this country, but that there are fiduciary relationships which do not involve all the duties which are imposed upon trustees here. The office of manager of a joint family estate affords an illustration of this difference."

The Full Bench decision in *Abhaychandra Roy Chowdhry* v. *Pyarimohan Guho*[2], is cited in support of the view that a coparcener may sue the karta for an account even before the partition. In that case, two questions arose for decision as to (1) whether the managing member of a joint Hindu family could be sued by the other members for an account, and (2) whether such a suit would not lie, even if the parties suing were minors during the period for which the accounts were asked. Both the question were answered in the affirmative. Mitter, J., in making the reference took the view that such a suit for accounts could not be avoided as the minor must necessarily have an idea as to what the assets of the joint family are, the receipts and disbursements, so that he might know what funds are available for partition before he could institute a regular suit for partition, and in order to obtain the information as to the state of the joint family assets including the then income and expenditure and any surplus that is available, a coparcener can sue for an account without suing for partition and adding the relief for account as auxillary one. But, Mayne with reference to this decision, observes at page 371 as follows :—

"The only difference that may possibly exist between the Dayabhaga law and the Mitakshara law as a result of this decision is that a Dayabhaga coparcener may sue the karta for an account even before division."

The very structure of Mitakshara joint family excludes the possibility of a separate share and as such a right to account against the manager of the receipts and disbursements, that is of his management of the family and for a share of the income, is a right which a coparcener of a Mitakshara family cannot enforce independent of the suit for partition. The result would be that the decree directing an account as from the date of Exhibit B-1 could not be sustained.

But the question still remains, whether after the division in status in November, 1949, the position had not changed, the plaintiffs ceasing to be coparceners, but being in the position of co-tenants with reference to the other members of the joint family. If from 18th November, 1949, the coparcenary in so far as the plaintiffs are concerned ceases to exist, the plaintiffs become co-tenants or co-owners with the other members of the family in respect of properties including the properties in Ceylon and Burma, and the question is whether in this changed status of the plaintiff with reference to the family, a suit for an account of the income and the ascertainment of their share could still be resisted as a suit for an account by coparceners against the manager. A suit for an account alone by a coparcener even against the manager of a joint Hindu family, though can be considered to be an action *in personam* but by reason of the peculiar advantageous position in which the Hindu joint family manager is placed he not being an agent nor an express trustee is not sustainable, whether the properties in respect of which the suit for account is instituted are situated in India or in a foreign territory, and a relief for account therefore cannot be asked apart from a suit for partition but only as an incident to such a suit.

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1. (1921) 41 M.L.J. 33 : L.R. 48 I.A. 280 : I.L.R. 44 Mad. 656.

2. (1870) 5 Beng.L.R. 347 (F.B.).

The severance effected consequent on notice of partition dated 18th November, 1949, renders the position of the plaintiffs different and thenceforward the parties held the properties as tenants-in-common. What was an undivided share of the plaintiffs until then becomes defined and thenceforward they are persons entitled to defined shares in the joint family properties, their shares being not liable to be varied by any further births in the family. Once the shares are defined and the relationship of co-tenancy is established, they become entitled to ask for an account of the income. The liability of each co-tenant to account for rents and profits received is statutorily recognised in England, the legal remedy being provided under statute. The tenancy-in-common is different from other tenancies, in that there is only one unity, of possession, in contrast to the joint tenancy, where there is unity of title, of possession and of estate. Apart from law, on principles of general equity the liability to account arises. An implied agency of the one who is in possession for the others can be also inferred either on the basis of tenancy or on equitable considerations. A co-owner cannot therefore escape liability to account to his other co-owners.

In *Yerukola* v. *Yerukola*[1], a Full Bench of this Court had occasion to consider the position of the members of a joint Hindu family who had become separated without acctually dividing the properties by metes and bounds. In a suit by one of the brothers against the others for partition and an account, it was held that the properties remaining undivided were held by the brothers as tenants-in-common and, with reference to the question of the proper article of the Limitation Act that was applicable to suits for accounts, it was held that Article 120 was applicable, unless from the facts of the case, it could be inferred that the person receiving the moneys and rents and profits acted as the agent of the others, in which case Article 89 would apply. Schwabe, C.J., referring to *Banoo Tewary* v. *Doonoo Tewary*[2] and *Gabu* v. *Gipru*[3], where it was held that the defendant was acting on behalf of the other co-sharers as their agent in the realisation of their shares, and noting the distinguishing feature of those cases from the facts of the case before him, observed that, even though there was no such express agreement that one brother had to realise and divide among the three brothers, such an agreement could be implied as well as express, and in the absence of evidence to the contrary, where one brother collected the assets of an estate of which he and the other brothers were co-owners, the natural inference was that he was acting as agent for himself and the other co-sharers and not on his own account.

In *Mahadeo Govind* v. *Ramachandra Govind*[4], the suit was one to recover mesne profits of lands situated outside British India. There was a dispute between the brothers about the family properties and the dispute was settled by an award and a decree was passed in terms of the award by a Court in British India. Under that decree, the plaintiff became entitled to the lands situated outside British India, the possession of which he obtained subsequent to the decree. He filed a suit to recover the mesne profits of those properties from the date of the decree to the date of his obtaining possession from his brother, who was in possession of the properties during the period, and it was held that such a suit could be instituted in a Court in British India. In answer to the contention that the British Indian Court had no jurisdiction as the suit came under section 16 (*e*) of the Civil Procedure Code, Macleod, C.J., observed that in the case of land outside British India section 16 has no application and one has to fall back upon general principles in considering whether this is a suit in which a personal relief is claimed against a defendant residing within the jurisdiction of the Court and that the proviso to the section makes it clear,

"that even although a wrong to immovable property is alleged, yet, where the relief sought can be entirely obtained through the defendant's personal obedience, then the suit can be instituted either in the Court within the local limits of whose jurisdiction the property is situate or in the Court

1. (1922) 42 M.L.J. 507 : I.L.R. 45 Mad. 648 (F.B.).
2. (1896) I.L.R. 24 Cal. 309.
3. (1920) I.L.R. 45 Bom. 313.
4. (1921) I.L.R. 46 Bom. 108.

within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain."

Following the decision in *Kashinath* v. *Anant*[1], the learned Chief Justice observed that there appeared to be an equity in favour of the plantiffs that the profits of those lands which were awarded to him in 1915 should not remain in the pockets of the defendant and, therefore there was no reason why the Indian Court should not have jurisdiction to administer that equity in favour of the plaintiff.

So, viewed either on the basis of an implied agency or purely as working out an equity in favour of the plaintiffs, the suit by the plaintiffs, even though the accounts relate to properties situated outside Indian territory, being an action *in personam* and arising out of an implied contract between the parties, or in any event to work out the equity between the parties, is maintainable. In this respect, I am of opinion that it would not make any difference, whether the property is situated in India or in a foreign territory, so long as the action is one by a member of the joint family, who had become divided in status, and whose position is that of a co-sharer or a co-tenant. In that view, while the decree for accounts and for the ascertainment of the income of the joint family properties from the B schedule properties, that is immovable properties belonging to the joint family excluding the trust property, though may not be sustainable in the form in which it is passed, the plaintiffs would in any event be entitled to an account of the income, ascertainment and payment of their shares from the properties commencing from 18th November, 1949. The decree of the lower Court will accordingly be modified.

The appeal is therefore partially allowed. There will be no orders as to costs of this appeal.

R.M. ——— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

The State of Madras, represented by the Collector of Tanjore .. *Appellant**

v.

S. Vijayaraghavan .. *Respondent.*

Madras General Sales-tax Act (IX of 1939)—Works contract—Nature of—Mixing of accounts as regards charges for materials and labour—If the entire amount becomes taxable.

When a person entrusts a press to print stationery like letter paper or visiting cards, and the press itself supplied the material, the transaction is nothing but a works contract.

Benjamin on Sales, 8th Edn., page 159, referred.

Dominion Press v. *Minister of Customs and Excise*, L.R. (1928) A.C. 340, distinguished.

The mere fact that there is no differentiation in the accounts would not make the entire amount taxable. Merely on account of the mixing or mingling of the two items together the charges for labour and the supervision would not become taxable.

Appeal against the decree of the District Court of West Tanjore in A.S. No. 216 of 1951, preferred against the decree of the Court of the District Munsif of Tiruvayyaru in O.S. No. 271 of 1950.

G. Ramanujam for the Assistant Government Pleader (*K. Veeraswami*) for Appellant.

G. N. Chari for Respondent.

The Court delivered the following

JUDGMENT :—The second appeal arises out of a suit for refund of sales-tax paid by the plaintiff, and the question to be determined is whether the transaction under consideration is a 'works contract' as defined in section 2 (*i*) (1) of the Madras General Sales-tax Act (IX of 1939).

The undisputed facts of the case show that the plaintiff supplied articles of stationery such as bill books and other things to customers and during the year

1. (1899) I.L.R. 24 Bom. 407.

* S.A. No. 1131 of 1952. 3rd March, 1955.

1947-48 the turnover was Rs. 11,701-14-0 and in the next year 1948-49 the turnover was Rs. 11,581-15-6. It is conceded that the customer did not supply the paper for the account books or the bill books, etc., but that the plaintiff supplied them and printed the necessary things on paper belonging to him. Thereafter the finished books were sold to the customer to a fixed price.

The lower appellate Court has held that even granting that this is a works contract, according to the statute itself, the price of the goods is only 70 per cent. and the 30 per cent. of the turnover should be considered to be cost of labour manufacture and supervision. Viewed in that light, the turnover in the two years would be much less than the assessable turnover and therefore, the assessment was illegally levied. In *Ramaswami* v. *State of Madras*[1], the supplier was a job printer and his turnover showed during the particular year (1) a sum of Rs. 3,664-4-3 for receipt for Civil Court work, and (2) a sum of Rs. 10,194-3-6 for printing, perforating, number ng and binding charges and (3) a sum of Rs. 5,362-5-9 being the paper used by the press. The learned Judges have held with regard to item No. 2 that it cannot be considered to be taxable at all. As regards item No. 1, *viz.*, receipt for Civil Court work, it is said that even if it is to be viewed as a works contract, since the turnover on the proportion allowed under the statute would be less than the taxable amount there is no necessity to express an opinion. Mr. G. Ramanujam for Government Pleader contends that if the plaintiff had differentiated between the cost of paper and the charges for labour, supervision, etc., then certainly the second category of turnover would not be liable to tax. I do not think that the mere fact that there is no such differentiation, would make the whole amount taxable. If the argument of the learned counsel is accepted, then it would be that on account of mixing or mingling of the two items together the charges for labour and supervision would be taxable. I do not think that is contemplated by the statute at all.

My attention was drawn to a decision of the Privy Council in *Dominion Press* v. *Minister of Customs and Excise*[2], where their Lordships held that the appellants there who were suppliers at an agreed price of printed bill heads and other commercial stationery were liable to be taxed under the Canadian Taxing Enactments, and they held that contracts for supply of such were contracts for sale. From the report it is not clear what exactly was the definition of the word 'sale' in the Canadian Act, and whether there was any separate definition for works contract, as is found in our statute.

In Benjamin on sale, 8th edition, at page 159, the learned author in discussing the case of *Clay* v. *Yates*[3], was of opinion that when there was a contract for printing the second edition of a book and the printer was to find the materials including the paper, it was not a contract for the sale of a thing to be delivered at a future time nor was it a contract for making a thing to be sold when completed, but it was a contract to do work and labour, furnishing the materials. From this it is clear that it is a works contract.

So far as the present case is concerned, I have no doubt whatever that when a person entrusts a press to print, say stationery like letter paper, or visiting cards, and the press itself supplies the material, the transaction is nothing but a works contract in which the allocation of 70 per cent. and 30 per cent. as defined in the Act will apply. Viewed in that light, the taxable amount in question in each of the years would be less than Rs. 10,000 and therefore, the plaintiff was wrongly taxed.

The second appeal is, therefore, dismissed with costs. No leave.

R.M. *Appeal dismissed.*

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1. (1954) 2 M.L.J. 694.
2. L.R. (1928) A.C. 340.
3. 25 L.J.Ex. 237 : 1 H. & N. 73 : 108 R.R. 461.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE BALAKRISHNA AYYAR.

Noor Mohammed Rowther .. *Accused.**

Criminal Law—Practice—Prosecution for failure to pay sales-tax—Accused ordered to pay fine and tax—Right of the accused to make payment to one or other of the items specifically—Court has no power to appropriate otherwise.

If a person is ordered by a Court to make payments in respect of two items or matters, whatever the items or matters may be, then in the absence of any express provision in that regard the person who is required to pay has the option of saying that the money tendered by him should be appropriated to a particular item or matter. A person making a payment is entitled to direct appropriation of the same in a manner most beneficial or at any rate least injurious to him and a Court has no jurisdiction to prevent him from making such a direction for appropriation. Where a person was convicted and sentenced to pay a fine and also the tax under section 15 (*b*) of the Madras General Sales Tax Act the accused is entitled, while paying any amount to state on which account he is paying the same. The Court is not right in directing the amount paid in respect of the fine to be credited towards the tax dues.

Yacoob Juma Khan v. *Emperor*, A.I.R. 1951 Sind 73 and *Sukumaran* v. *Special Commercial Tax Officer*, Crl.R.C. No. 787 of 1954 (Madras High Court) referred and followed.

Case referred for the orders of the High Court under section 438 of the Criminal Procedure Code, by the District Judge of Tiruchirapalli in his letter No. D-7406/2nd November, 1954, dated 1st November, 1954.

L. V. Krishnaswami Ayyar for the Accused.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) for the State.

The Court made the following

ORDER.—On 27th September, 1954, the Additional First Class Magistrate, Tiruchirapalli, convicted the accused in S.T. No. 434 of 1954 under section 15 (*b*) of the Madras General Sales Tax Act and sentenced him to pay a fine of Rs. 25 and in default to suffer simple imprisonment for three weeks. As required by section 15 (*b*) of the Act, the learned Magistrate also specified the amount of tax due from him as Rs. 116-7-0. He further directed that this amount was recoverable as if it were a fine. On 27th September, 1954, the accused tendered a sum of Rs. 25 to the Court along with a memorandum making it clear that the payment was in respect of the fine imposed upon him ; so far as the tax was concerned he prayed for a month's time to pay it. The learned Magistrate refused to allow that and passed the following order :

> " The tax is also collectable by the Court which sentenced the accused. The accused cannot pay the fine and walk off and make the tax irrecoverable. It is the duty of the Court to collect the tax as well. So unless the tax is paid there is no meaning in collecting the fine alone. The prosecution is only for realisation of the tax arrear. If this is not done, the object of the prosecution is frustrated. The accused cannot question the Court's crediting the amount tendered towards the tax due from him. The amount if any paid by the accused will be credited to the tax till it is completely wiped off. The question of granting time will be considered if at least a portion of the amount is paid."

The accused moved the learned Sessions Judge, Tiruchirapalli, under section 435, Criminal Procedure Code, to set aside the order of the Additional First Class Magistrate and alternatively to refer the matter to this Court. The Sessions Judge took the view that the order of the Magistrate was wrong and has made this reference to this Court.

I am clear in my mind that the order of the learned Magistrate is erroneous. If a person is ordered by a Court to make payments in respect of two items or matters, whatever the items or matters may be, then in the absence of any express provision in that regard the person who is required to pay, has the option of saying that the money tendered by him should be appropriated to a particular item or matter. Naturally a person making a payment would desire that the appropriation should be made in the manner most beneficial or at any rate least injurious to him, and in the absence of clear authority in that behalf a Court has no jurisdiction to prevent him from making such an appropriation. In *Yacoob*

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*Cr.R.C. No. 952 of 1954. 11th February, 1955.
(Case Referred No. 52 of 1954).

Juma Khan v. *Emperor*[1], a case cited by the learned Sessions Judge, it was held as follows :

"Where an accused, who is convicted under one section to a fine of Rs. 200 or in default to three months' imprisonment and also under two other sections to a fine of Rs. 15 or in default to one month's imprisonment for each offence, pays into Court Rs. 30 and thus impliedly requests that the payment should be appropriated to the two smaller offences, it would be so appropriated."

The same view appears to have been taken by Somasundaram, J., in *Sukumaran* v. *Special Commercial Tax Officer*[2] on the file of this Court.

In the result, the reference made by the learned Sessions Judge is accepted and the order of the Magistrate set aside. The money paid by the accused will be appropriated in the manner desired by him.

R.M. ——— *Reference accepted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE SOMASUNDARAM.

Thayammal .. *Appellant**

v.

Rangaswami Reddy and others .. *Respondents*

Practice—Suit originally instituted by three persons as joint plaintiffs—Suit in time of two of the plaintiffs who could claim the benefit of the extended period of limitation under section 6 of the Limitation Act—Subsequent withdrawal of such plaintiffs—Suit if could be continued by the other plaintiff.

Limitation Act (*IX of* 1908), *section* 6—*Benefit under—When available to a transferee.*

Civil Procedure Code (*V of* 1908), *Order* 32, *rule* 13—*Withdrawal of a co-plaintiff from a suit and effect of.*

Hindu Law—Reversioner transferring his interest in property after the opening of the reversion—Property already alienated by the limited owner—Reversioner if could affirm the alienation by limited owner to the detriment of the purchaser.

A suit was originally instituted by three plaintiffs, two of whom were entitled to the benefit of the extended period of limitation due to minority under section 6 of the Limitation Act. These two plaintiffs subsequently withdrew from the suit leaving the first plaintiff to continue the same. The suit if originally instituted by the first plaintiff alone would be out of time. On the question whether in the circumstances the suit would be in time and the first plaintiff could continue the same ;

Held : The question whether a suit is barred by limitation should be decided on the facts as they stood on the date of the presentation of the plaint. There is no provision in the Limitation Act under which a suit, which was in time on the date of the institution, could subsequently become barred by time except in cases of an additional party coming on record. For the purpose of deciding the question of limitation the allegations in the plaint and the reliefs claimed must be analysed to ascertain the real nature and scope of the suit.

Held further that the special provision of section 6 of the Limitation Act confers a purely personal exemption on a certain class of persons and the exemption as such cannot be taken advantage of by a transferee from the person under disability.

Rudra Kant Surma Sircar v. *Nobo Kishore Surma Biswas*, (1883) I.L.R. 9 Cal. 663 and *Rangaswami Chetti* v. *Thangavelu Chetti*, (1919) I.L.R. 42 Mad. 637, referred.

It is equally clear that when a person entitled to the benefit of section 6 of the Limitation Act as aforesaid transfers property to another a suit could be filed by the transferor and the transferee and such a suit would not be barred though ultimately the benefit of the decision in the suit would go to the transferee.

Hanmant Gurunath v. *Ramappa Lagamappa*, (1924) I.L.R. 49 Bom. 309 ; *Bandu Annaji* v. *Yeshwant Ramarao*, A.I.R. 1938 Bom. 358 and *Ramaswami* v. *Govindammal*, (1928) 56 M.L.J. 332, referred.

Order 32, rule 13 of the Code of Civil Procedure provides that where a minor co-plaintiff on attaining majority desires to repudiate the suit, he can apply to the Court to have his name struck out and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit. But if the Court finds that he is a necessary party, the Court may direct him to be made a defendant. Under Order 32, rule 1 (4) of the Code, a Court is not authorised to permit one of several plaintiffs to withdraw from a suit without the consent of the others.

Where a minor purports to transfer property which had already been alienated by his guardian to another he cannot convey title to the property as such. He is really transferring his right to recover the properties after setting aside the alienation. But this reasoning cannot apply to a sale by a reversioner, after the reversion has opened, of property belonging to the last male holder which was

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1. A.I.R. 1931 Sind 73. 2. Crl. R.C. No. 787 of 1954.

* Appeal No. 246 of 1950. 15th April, 1955.

alienated by the limited owner. The alienation by the limited owner is not *per se* binding on the reversioner and he is not bound to set aside that alienation. A reversioner who has transferred his interest in the property cannot thereafter affirm the alienation by the limited owner to the detriment of the purchaser.

Appeal against the decree of the Court of the Subordinate Judge (Principal) of Coimbatore in O.S. No. 108 of 1947.

D. Ramaswami Aiyangar and *P. S. Srinivasa Desikan* for Appellant.

R. Gopalaswami Aiyangar, M. R. Narayanaswami, N. S. Venkatasubba Aiyar, P. S. Balakrishna Ayyar and *P. S. Ramachandran* for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This appeal against the decree and judgment of the learned Subordinate Judge of Coimbatore involves an interesting question of law on which there is no direct authority. The facts necessary for a disposal of this appeal are: One Rama Reddi died in or about 1900, leaving behind him surviving his widow, Sinna Gangammal and his mother Peria Gangammal. A posthumous daughter, Nanjammal, was born to him subsequently. He left behind him considerable properties. Sinna Gangammal, as the widow, succeeded to Rama Reddi's estate. She died in or about 1922, and fter her death, Nanjammal, her daughter, succeeded. She died on 1st May, 934. She had two sons, Rangaswami Reddi and Muthuswami Reddi, ho became entitled to the estate as reversioners to their maternal grandfath ama Reddi. Sinna Gangammal and Nanjammal had made alienations of roperties which had belonged to Rama Reddi and had devolved on them. wo sale deeds, dated 31st March, 1937 and 8th April, 1947, Rangaswami R n his behalf and as guardian of his minor brother, Muthuswami Reddi, conv all the properties to which they were entitled as reversioners to the appellant h us, Thayammal. In the first of these sale deeds (Exhibit A-3) it was provided the purchaser should file a suit in pursuance of the sale and obtain delivery of po sion and that the two vendors shall also join with her and file the suit as plai and see that possession was given to the purchaser. It was further provided the vendors themselves shall collect the income from the properties from the of their mother's death till the date of the sale. On 9th April, 1947, the suit of which this appeal arises, was filed by three plaintiffs, namely, Thayammal, th purchaser, Rangaswami Reddi and Muthuswami Reddi. Muthuswami Redd was still a minor and was represented by Rangaswami Reddi as his next friend. Paragraph 14 of the plaint contained the following prayers:

> "(*a*) declare that the 1st plaintiff is entitled to the plaint properties and order the defendant o deliver possession of the plaint properties to the 1st plaintiff;
>
> (*b*) order that an account be taken as regards the income due to the 2nd plaintiff from 1st day, 1934 to 31st March, 1947;
>
> (*c*) decree further mesne profits to the 1st plaintiff at the rate of Rs. 3,000 per year;
>
> (*d*) the defendants do deliver possession of the B schedule properties to the 1st plaintiff;
>
> (*e*) to order the defendant to pay the costs of the suit to the plaintiffs;
>
> (*f*) to grant such and further reliefs as this Hon'ble Court deems fit under the circumstances of the case."

The suit, as already mentioned, was filed on 9th April, 1947, more than twelve years after the date of the death of the last limited owner on 1st May, 1934. It was, therefore, barred by limitation. But it was alleged in the plaint that the second plaintiff, Rangaswami Reddi, was born on 19th December, 1928, and the third plaintiff, Muthuswami Reddi was born on 7th April, 1931 and as both of them were minors when the reversionary right opened to them in May, 1934, the suit was not barred by limitation, under sections 6, 7, and 8 of the Limitation Act.

The third plaintiff, Muthuswami Reddi, became a major on 7th April, 1949. On 5th July, 1949, he executed a deed of relinquishment in favour of the first defendant, Rangaswami Reddi, in and by which for a consideration of a sum of Rs. 2,000 Muthuswami relinquished all his right and interest in the subject-matter of the suit. The deed also contained the following further recitals:

"The sale deed executed by my elder brother to Thayammal is only nominal. The debts recited in the said sale deed are false. There was no cash available at all for payment. I did not get any benefit on account of the said sale. My elder brother had no right or justification to sell away my s' are. The said sale cannot however bind me. Without myself prosecuting the suit in the Sub-Court O.S. No. 108 of 1947 I shall, so far as I am concerned, present a petition myself as plaintiff for withdrawing the suit and see it is dismissed."

On 7th July, 1949, evidently in pursuance of the deed of relinquishment, Muthuswami Reddi (3rd plaintiff), filed an application, I.A. No. 1319 of 1949, praying that the Court may be pleased to strike out his name as a co-plaintiff. In support of this application, he filed an affidavit in which he stated that he had attained majority on 8th April, 1949, that he was not willing to prosecute this suit, that the sale in favour of the first plaintiff was not binding on him, that he had given up all his rights to the 1st defendant, and that it was therefore just and necessary that he should be permitted to withdraw from the suit and the suit claim so far as it related to him be dismissed. On behalf of plaintiffs 1 and 2, a counter-affidavit was filed by the 1st plaintiff's husband denying the material allegations made by Muthuswami Reddi and stating that the petitioner could give up, if he wanted, the relief, namely, the recovery of a moiety of the *mesne profits* due from 1st May, 19 4, to 31st March, 1947, but not anything else, and it was submitted that the petitioner was a necessary and proper paıty to the suit, and in case he was not willi[illegible] to be a plaintiff he should be transposed as a defendant. On 18th July, 1949, t[illegible] learned Subordinate Judge passed the following order:

"He will be transposed as defendant, as he would be a proper party. In the event of its bei[illegible] [illegible]nd that he is not necessary, he can urge his contention regarding his costs. Amendment of plai[illegible] [illegible] advised, to be made tomorrow."

[illegible] 19th July, 1949, the first defendant filed an application, I.A. No. 1437 of 194[illegible] [illegible]ing that the Court may direct plaintiffs 1 and 2 to carry out legally essentia[illegible] [illegible]ndments to the plaint, consequent on the transposition of the 3rd plaintiff a[illegible] [illegible]fendant. The affidavit filed by the 1st defendant in support of this applica[illegible] [illegible] gives an indication as to what really prompted the application. In this affi[illegible], the 1st defendant stated that as the 3rd plaintiff had given up his claim for [illegible] mesne profits, the second plaintiff could ask for nothing more than his own [illegible]re, and hence the value of the relief asked for by the plaintiff would stand auto[illegible]atically cut down, and therefore it had to be suitably amended to conform to what could be legally claimed by plaintiffs 1 and 2 alone. The obvious implication was that when the relief was amended, the value would be less than the pecuniary jurisdiction of the Subordinate Judge's Court. The husband of th 1st plaintiff filed a counter-affidavit pleading that the jurisdiction of the Court should be determined by the value of the suit at the time of the institution, and subsequent events could not divest the Court of its jurisdiction. He also stated that there was no necessity for amending any of the allegations of the plaint, or any of the reliefs. On 21st July, 1949, the 1st defendant took out another application, I.A. No. 1488 of 1949 for an order of dismissal of the 3rd plaintiff's claim. On this an order was passed as follows:

"The claim of the 3rd plaintiff so far as the defendants are concerned, will stand dismissed. The prior order regarding transposition stands."

On 1st September, 1949, the learned Subordinate Judge made an order on I.A. No. 1437 of 1949 directing amendment of the plaint in view of his prior order in I.A. No. 1319 of 1949. The 1st plaintiff accordingly applied for an amendment of the plaint (I.A. No. 1918 of 1949). The amendment prayed for was consequential on the striking off of Muthuswami as a plaintiff and his transposition as a defendant. The 1st defendant objected to the sufficiency of the amendments prayed for and wanted further amendments to be made. On this petition, the learned Subordinate Judge made an order on 17th S p mber, 1949, directing plaintiffs 1 and 2 to make suitable amendments in certain praagraphs, namely, 10, 13 and 14 (*b*). Then followed a series of petitions: (1) I.A. No. 1919 of 1949 filed on 29th August, 1949, by the 2nd plaintiff praying that he may be permitted to continue the suit alone, transposing the 1st plaintiff as defendant, if necessary; (2) I.A. No. 2171 of 1949 by the 1st plaintiff, for an amendment of the plaint as directed by

the learned Judge: (3) I.A. No. 2172 of 1949 by the 2nd plaintiff also for amendment, and (4) I.A. No. 2260 of 1949 dated 8th October, 1949, by the 2nd plaintiff purporting to be under Order 23, rule 1 and section 151 of the Code of Civil Procedure praying that he may be permitted to withdraw from the suit and also withdraw his claim against defendants.

On 8th October, 1949, all these applications were disposed of. I.A. No. 1919 1949 was dismissed as not pressed. I.A. No. 2171 of 1949 was allowed, I.A. No. 2 of 1949 was also dismissed as not pressed. On I.A. No. 2260 of 1949 (2nd ntiff's petition for withdrawal), the pleader for the 1st plaintiff made the wing endorsement:

"No objection to the petitioner withdrawing from the claim, but he may be transposed as a dant."

2nd plaintiff himself made an endorsement as follows:

"I, the 2nd plaintiff, withdraw from the suit. I do not want the reliefs sought for against the ndants. I pray for permission."

this, the learned Judge passed the following order on 8th October, 1949, the same y on which the other petitions were disposed of:

"Permitted. The claim made on behalf of second plaintiff is withdrawn by him, and in the circumstances, each party to bear his own costs. If first plaintiff wants the second plaintiff to be on record he will be transposed as defendant on his application."

On 14th October, 1949, the Vakil for the 1st plaintiff filed the following memorandu on behalf of the 1st plaintiff:

"The 1st plaintiff does not want the 2nd plaintiff to be transposed as a defendant as the plaintiff has been permitted to withdraw his claim in I.A. No. 2260 of 1949. So there is no nece to amend the plaint."

On 18th October, 1949, another memorandum was filed on behalf of the 1st pl tiff stating that the amended plaint carrying out the amendments ordered in Nos. 1918 of 1949 and 2171 of 1949 was filed and that the withdrawal of the plaintiff's claim as permitted in I.A. No. 2260 of 1949 was mentioned in the amen plaint.

When the suit was taken up for trial, three issues were heard as prelimina issues, namely, issues 4, 10 and 15. They are in the following terms:

"(4) Whether the suit is in time in so far as Rangaswami Reddi and defendant 17 are concerned? Whether in any event, the suit is in time in so far as 1st plaintiff is concerned?

(10) Whether the 1st plaintiff's claim is within the jurisdiction of this Court?

(15) Whether the suit is in time against defendants 12 to 16?

We are not concerned in this appeal with the third of these issues relating to defendants 12 to 16. The learned Subordinate Judge held in favour of the 1st plaintiff on issue 10 on the ground that the proper forum would be the Court which could entertain the claim on the date of the institution of the suit and subsequent events would not oust its jurisdiction. He, however, answered issue 4 against the 1st plaintiff. He, therefore, dismissed the suit. Hence this appeal by the 1st plaintiff.

The reasoning on which the learned trial Judge found issue 4 against the 1st plaintiff is this: The 3rd plaintiff had repudiated the sales in favour of the 1st plaintiff on attaining majority and the 2nd plaintiff had been permitted to withdraw from the action and the 1st plaintiff did not want him even to continue as a defendant. The privilege under section 6 being personal could not be assigned and the 1st plaintiff could not take the benefit of the extended period of limitation and continue the suit.

Two questions have been mixed up in dealing with issue 4, one, whether the suit is barred by limitation, and another, whether the suit could be continued, having regard to the events which happened subsequent to the institution of the suit. The learned trial Judge was evidently inclined to hold that the suit as framed was not barred by time. In paragraph 1, he says:

"If the plaint had gone on as originally framed, no question of limitation can arise."

And his final conclusion is :

> " On the facts of the case as they exist at present, it is no longer open to the 1st plaintiff to continue the action."

Taking the question of limitation, it is obvious that the question whether a suit is barred by limitation should be decided on the facts as they stood on the dat of the presentation of the plaint. There is no provision in the Limitation Ac under which a suit, which was in time on the date of the institution, could subs quently become barred by time. We are, of course, not referring to the case an additional party coming on record. For the purpose of deciding the questi of limitation, the allegations in the plaint and the reliefs claimed must be analy to ascertain the real nature and scope of the suit. There were three plaintiffs, whom the 1st plaintiff was the transferee from the other two plaintiffs. It was c ceded by respondent's counsel that the suit so far as plaintiffs 2 and 3 were concern was not barred by limitation, because the 3rd plaintiff was a minor on the d of the institution of the suit and the 2nd plaintiff had not attained majority m than three years before suit. Though the suit was brought more than twelve ye after the death of the widow, the suit was saved from the bar of limitation by reas of section 6 of the Limitation Act. So far, there is no dispute. It was also conced by learned counsel for the appellant that if the suit had been brought only by the 1st plaintiff, it would have been barred, because he would not have been entitled o the benefit of section 6 of the Limitation Act. It is well established that the spe- l provision of section 6 of the Limitation Act confers a purely personal exemption a certain class of persons, and the exemption as such cannot be taken advantage y the transferee from the person under disability. It is sufficient to refer to of the leading authorities, the decision of the Full Bench of the Calcutta High t in *Rudra Kant Surma Sircar* v. *Nobo Kishore Surma Biswas*[1] and the decision of Court in *Rangaswamy Chetti* v. *Thangavelu Chetti*[2].

It is equally clear from the authorities that when a person entitled to the bene- section 6 of the Limitation Act transfers property to another, though the trans- himself may not be entitled to the benefit of that section, a suit could be by the transferor and that the transferee and such a suit would not be barred gh ultimately the benefit of the decision in the suit would go to the ansferee. In *Hanmant Gurunath* v. *Ramappa Lagamappa*[3], the learned Judges were ot doubt dealing with a case coming under Article 44 of the Limitation Act. There, the transferee as the 1st plaintiff and the transferor as plaintiff No. 2 together brought a suit for possession after setting aside an alienation by the guardian of the minor transferor. In that case, a decree was passed in favour of plaintiff No. 1, the transferee, for possession, and the claim of plaintiff No. 2 was dismissed as he could get no relief. One of the defendants filed an appeal to the High Court, and it was contended that the suit was time-barred because the 2nd plaintiff was not interested in the suit, as he had sold away all his right to the 1st plaintiff and the 1st plaintiff himself was not entitled to the benefit of Article 44 of the Limitation Act. This contention was overruled. The learned Judges observed :

> " No doubt it may be said in this case that the suit is substantially by the transferee, and that plaintiff No. 2 is joined to save limitation, even though he had no interest in the suit. We agree that plaintiff No. 2 is joined to save limitation, but we are of opinion that it is open to the parties to save limitation by adopting that course in view of the provisions of Article 44. We are satisfied that the plaintiff No. 2 was entitled to sue to set aside the sale in spite of the transfer in favour of plaintiff No. 1."

The principle of this decision would, in our opinion, equally apply in the application of section 6 of the Limitation Act. Indeed, this was done in a later decision of the Bombay High Court in *Bandu Annaji* v. *Yeshwant Ramarao*[4]. That was a case under section 6 of the Limitation Act. There, the mother of a minor as guardian sold a property. The minor on attaining majority assigned his right to recover the property to another, and a suit was brought by the assignor and assignee jointly

1. (1883) I.L.R. 9 Cal. 663.
2. (1919) I.L.R. 42 Mad. 637.
3. (1924) I.L.R. 49 Bom. 309.
4. A.I.R. 1938 Bom. 358.

for recovery of the property on the ground that the sale by the mother was void. It was held that though an assignee from a person who was a minor could not claim the benefit of section 6, the suit which was brought by both the assignor and the assignee was in time. The learned Judge followed the ruling in *Hanmant Gurunath* v. *Ramappa Lagamappa*[1]. The learned Judge pointed out that the vendee had every right to ask his vendor to join as a co-plaintiff in suing to recover possession of the property. He said :

> " In fact, after having sold the property and recovered consideration for the same from plaintiff, she was bound to join plaintiff 1 in this suit in order to fulfil her obligations under the sale deed."

These last observations are apposite having regard to the recitals in the sale deed, Exhibit A-3, namely: "We shall also join with you and file a suit as plaintiffs and see possession is given to you." The decision in *Ramaswami* v. *Govindammal*[2], also takes substantially the same view. In that case, the transferor was not even ranked as a co-plaintiff ; he was only a defendant. But the learned Judge held that though he was impleaded as a defendant, he was substantially a co-plaintiff.

Mr. Gopalaswami Ayyangar, learned counsel for the respondent, tried to distinguish these decisions by contending that the plaint in this case is really a combination of two plaints, one by the 1st plaintiff and the other by plaintiffs 2 and 3, because distinct reliefs have been prayed for by the several plaintiffs. While we agree that in a sense it is true that the 1st plaintiff was interested in one relief and plaintiffs 2 and 3 in another relief, so far as the relief of possession is concerned it was a prayer by all the plaintiffs. The plaintiffs prayed that the Court may be pleased to order the defendants to deliver possession of the plaint-properties to the 1st plaintiff. This prayer must be read along with the averment in paragraph 8 of the plaint which sets out the sale deeds executed by plaintiffs 2 and 3 in favour of the 1st plaintiff and with the provision in the sale-deed, Exhibit A-3, to which we have referred above. The suit, therefore, is a suit by all the three plaintiffs in respect of possession, though plaintiffs 2 and 3 agree that the possession may be given to the 1st plaintiff. We are not inclined to take a technical view of the pleading, as all that could be done in the circumstance was done. After executing the sale deeds, obviously plaintiffs 2 and 3 could not claim possession for themselves. It was not necessary that they should first have obtained possession and then they should deliver possession to the 1st plaintiff. To avoid multiplicity of proceedings, plaintiffs 2 and 3 were entitled to ask the Court to pass a decree for possession in favour of their transferee, the 1st plaintiff. This is what they did ask. We have no hesitation in holding that the suit as framed was not barred by limitation.

We have next to consider the effect of subsequent events. The 3rd plaintiff was a minor on the date of the institution of the suit. When he attained majority, he was entitled to elect whether he would proceed with the suit or abandon it. Order 32, rule 13, provides that where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff and the Court if it finds that he is not a necessary party, shall dismiss him from the suit. But if the Court finds he is a necessary party, the Court may direct him to be made a defendant. We have already mentioned how the 3rd plaintiff did repudiate the suit after attaining majority and he was made a defendant, evidently because he was deemed to be necessary party to the suit.

It was not contended that the suit failed immediately on the 3rd plaintiff being transposed as a defendant. It was assumed, and it was not disputed before us, that the suit could have continued with plaintiffs 1 and 2. It is by reason of the 2nd plaintiff's subsequent conduct and action that it has been held that the suit cannot go on. Now, let us see what he wanted to do. He first filed an application, I.A. No. 1919 of 1949, praying that he may be permitted to continue the suit as sole plaintiff. The petition was eventually dismissed as not pressed. He filed another application I.A. No. 2172 of 1949, for amendment of the plaint on the footing that he would prosecute the suit as sole plaintiff (*Vide* his affidavit filed in the application). This petition also was dismissed as not pressed. Finally he filed

1. (1924) I.L.R. 49 Bom. 309.

(1928) 56 M.L.J. 332 : A.I.R. 1929 Mad. 313.

a petition purporting to be under Order 23, rule 1 and section 151 of the Code of Civil Procedure praying that he may be permitted to withdraw from the suit and to withdraw his claim against the defendants. The pleader for the 1st plaintiff made an endorsement that he has no objection to the petitioner withdrawing from the claim. The learned Judge, by his order dated 6th October, 1949, permitted the 2nd plaintiff to withdraw the claim made on his behalf. He added that if the first plaintiff wanted th 2nd plaintiff on record, he would be transposed as defendant on his application. The 1st plaintiff's vakil made his attitude quite clear by the memorandum which he filed on 14th October, 1949, that the 1st plaintiff did not want the second plaintiff to be transposed as a defendant. Under Order 23, rule 1 (4) of the Code, the Court is not authorised to permit one of several plaintiffs to withdraw without the consent of the others. The 2nd plaintiff, therefore, could not altogether withdraw from the suit without the consent of the other plaintiff, namely, plaintiff 1. On behalf of the 1st plaintiff, his vakil no doubt stated that there was no objection to the 2nd plaintiff withdrawing his claim. We understand this to mean that the 1st plaintiff had no objection to the 2nd plaintiff withdrawing his claim to the relief which he sought for himself, namely, the relief of accounting. We do not understand this to mean that the 1st plaintiff was giving his consent to the withdrawal by the 2nd plaintiff from the suit in so far as it prayed for the delivery of possession of the property to the 1st plaintiff. As we have already observed, the 2nd plaintiff joined with the 1st plaintiff for the purpose of this prayer. We find nowhere the 1st plaintiff consenting to the 2nd plaintiff withdrawing from the suit in this respect. It is clear that without such consent the Court had no jurisdiction to permit the 2nd plaintiff to withdraw from the suit altogether. Even if the order of the learned Judge, dated 8th October, 1949, is deemed to have so permitted him, we hold that the order was wrong. The result is that so far as the prayer in paragraph 14 (*a*) of the plaint is concerned, it must be taken as if the 2nd plaintiff is still on record.

Mr. Gopalaswami Ayyangar, learned counsel for the respondent, put his case from a different aspect, mainly relying on the analogy of cases arising under Article 44 of the Limitation Act. His argument was that it was open to the 2nd plaintiff as reversioner to affirm the alienations made by the limited owners, and he must be deemed to have done this by choosing to withdraw his claim. We have no evidence here of such an affirmation. On the other hand, the amendment which he sought in I.A. No. 2172 of 1949 is on the footing that the defendants have been in unlawful possession and enjoyment of the suit properties. It is also highly doubtful if after having sold away the property to the 1st plaintiff he had still the right to affirm the transactions. Indeed, he had unequivocally disaffirmed the transaction in the sale deed executed by him in favour of the plaintiff. It is on that footing that he purported to convey the properties to the 1st plaintiff. The case of an alienation by a minor's guardian stands on a basis entirely different from that of an alienation by a limited owner like a widow. In the former case, the alienation is binding on the minor unless it is set aside. It is not void, it is voidable. In the case of an alienation by a limited owner, *prima facie* an alienation beyond her lifetime is not valid and binding on the reversioner. It is only if the alienee establishes certain circumstances that the alienation can convey to him the absolute interest in the property conveyed. When, therefore, a minor purports to transfer property which had already been alienated by his guardian to another, he cannot convey title to the property as such. He is really transferring his right to recover the properties aft r setting aside the alienations. The decision of the Bombay High Court in *Javerbhai* v. *Kabhai*[1] on which Mr. Gopalaswami Ayyangar relies relates to an alienation by a guardian; the minor after attaining majority transferred the property to another and brought a suit along with him to set aside the previous sale by his guardian. Subsequently, the vendor made an application to withdraw from the suit, and without any objection on the part of the purchaser he was allowed to withdraw from the suit. It was held that the purchaser alone had no authority

1. A.I.R. 19[illegible] Bom. 42.

to continue the suit because by such withdrawal from the suit he must be deemed to have elected to acquiesce in the sale by his guardian and his interests became extinguished under Article 44 read with section 28 of the Limitation Act. The learned Judge held that what was assigned to the purchaser was not the property but his right to sue for it. This reasoning cannot apply to a sale by a reversioner after the reversion has opened, of property belonging to the last male holder. He is not bound to set aside the alienations by the limited owner because they are not *per se* binding on him. This decision is of no help to the respondent. There is, however, one observation in the judgment of Patkar, J., which is of special interest. The learned Judge said :

> "In the present case the minor has withdrawn from the suit without any objection by the appellant, *i.e.* the subsequent purchaser. It is doubtful whether plaintiff 2 who had attained majority could have been allowed to withdraw from the suit without the consent of the subsequent purchaser, the appellant before us, under O. 23, r. 1, sub-rule 4, Civil Procedure Code."

Mr. Gopalaswami Ayyangar was unable to refer us to any authority in support of his contention that even after a transfer of his interest in the property the reversioner could affirm the alienation by the limited owner to the detriment of the purchaser. In these circumstances, we disagree with the learned Judge in his finding that it is no longer open to the 1st plaintiff to continue the action.

The appeal is allowed and the suit is remanded to the Court of the Subordinate Judge of Coimbatore for disposal of the other issues except issue 10, the finding of the learned Subordinate Judge on which, was not challenged before us. No order as to costs in the appeal. The appellant is entitled to a refund of the Court-fee paid on the memorandum of appeal.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P.V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

Kanagarathnammal .. *Petitioner**

v.

H. Sama Rao .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 12—*Appeal against a consent order —If could lie—Proceedings pending—Amending Act (VIII of* 1951), *section* 20—*Scope of—If includes an incompetent appeal.*

The provision under the Rent Control Act conferring a right of appeal against an order passed by the Rent Controller is contained in section 12 (1) (*b*) of the Act. A party who has consented to an order cannot in law be deemed to be a person aggrieved by such an order, except of course in cases of fraud, undue influence or such other vitiating circumstances.

The amendment introduced by Act VIII of 1951 giving protection to certain persons employed in essential services, *viz.*, section 7 (3-*a*) (*i*) would apply to all pending proceedings by virtue of section 20 of the Act VIII of 1951. But it cannot apply to a case where there was no proceeding pending except an appeal against a consent order, which is not competent.

Quaere : Whether the aforesaid provision could be invoked at the stage of execution of a final order of the Rent Controller ? Section 7 (3-*a*) (*i*) only says that no order of eviction shall be passed under sub-section (3) and not that no eviction shall be made.

Woodman v. *Mrs. Regina Rajan*, (1952) 1 M.L.J. 628, doubted.

Petition under section 12-B of the Madras Buildings (Lease and Rent Control) Amendment Act (VIII of 1951), praying that the High Court will be pleased to revise the order of the District Court of Mathurai, dated 25th February, 1952 and made in C.M.P. No. 1098 of 1951, presented against the order of the Court of the Principal Subordinate Judge of Mathurai, dated 3rd October, 1951 and made in C.M.A. No. 189 of 1951 (M.B.P. No. 44 of 1951 on the file of the Additional Rent Controller, Mathurai).

A. V. Narayanaswami Aiyar and *R. Venkatachalam* for Petitioner.

R. Sundaralingam for Respondent.

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*C.R.P. No. 952 of 1952. 31st March, 1955.

The Judgment of the Court was delivered by

Rajamannar, C.J.—The petitioner filed an application before the Additional Rent Controller, Mathurai, for eviction of the Respondent, who was her tenant of premises No. 132, West Masi street, Mathurai. The following order was passed on that application, on 22nd February, 1951 :—

" The parties agree and endorse in the application that the respondent may be given six months time to vacate and give possession of the building. So the respondent is granted six months time from this date to vacate the building described in the application and put the petitioner in possession of the same."

Against this order, the tenant-respondent filed an appeal to the Appellate Authority, who was the Principal Subordinate Judge of Mathurai. The appeal was dismissed on a preliminary objection as regards its maintainability on the ground that the order appealed against was passed with the consent of the parties. The tenant thereupon filed a revision petition to the District Court under section 12-B of the Act, which had been added to the original Act by the Amendment Act of 1951. The learned District Judge allowed the petition, set aside the order of the Appellate Authority dismissing the appeal and remanded the matter to the Appellate Authority for fresh consideration of a new question raised on behalf of the tenant based on the provision of the Amending Act (VIII of 1951), by which a new sub-section was added in section 7, namely, 7 (3-A). The learned Judge held that an appeal lay against the order of the Rent Controller. This conclusion was based on the fact that the provisions of the Code of Civil Procedure did not apply to proceedings under the Rent Control Act. This Revision Petition has been filed to set aside the order of the District Judge.

This Revision Petition can be disposed of on the short ground that no appeal lay against an order of the Rent Controller passed on consent of parties. We agree with the learned District Judge that the provisions of the Code of Civil Procedure do not as such apply to proceedings under the Rent Control Act. The provision under the Rent Control Act conferring a right of appeal against an order passed by the Rent Controller is contained in section 12 (1) (*b*) of that Act, which runs as follows :

" Any person aggrieved by an order passed by the Controller may, within fifteen days from the date of such order, prefer an appeal in writing to the appellate authority having jurisdiction."

A party who has consented to an order cannot in law be deemed to be a "person aggrieved" by such an order. It is evidently because of this well established position that the respondent alleged fraud and other circumstances vitiating the order purporting to have been passed by consent. It may be that if the respondent had established fraud or undue influence or such other vitiating circumstance, the consent order might have been set aside either by the Rent Controller himself or by the Appellate Authority. But there was no attempt to prove any such circumstance. The appeal was, therefore, not maintainable. The learned Subordinate Judge, held that an appeal was not maintainable. The learned District Judge completely overlooked this aspect of the matter and has held otherwise.

On 1st May, 1951, the Amedment Act of 1951 came into force. It *inter alia* introduced a new provision in section 7, namely, 7 (3-A), of which the material clause is clause (i). It is as follows :—

" No order for eviction shall be passed under sub-section (3)—

(*i*) against any tenant who is engaged in any employment or class of employment notified by the State Government as an essential service for the purposes of this sub-section, unless the landlord is himself engaged in any employment or class of employment which has been so notified ;"

Though this new provision was introduced subsequent to the filing of the application for eviction in this case, the contention on behalf of the tenant was that the new provision would apply to proceedings pending when the Amending Act came into force. In support of this contention, reliance was placed on section 20 of the Amendment Act (VIII of 1951), which provides as follows :

" Any application made, appeal preferred or other proceeding instituted under the said Act and pending at the commencement of this Act shall be disposed of as if this Act had been in force at the time when such application, appeal or proceeding was made, preferred or instituted."

The learned Judge was of opinion that by reason of this section, the new provision would apply to the present case. We agree with the learned Judge that if there was a valid appeal or other proceeding pending on the date of the commencement of the Amendment Act, then the new provision would apply, and the appeal or other proceeding should be disposed of in accordance with the new provision, if it otherwise applied. But here, there was no valid appeal pending, as we have held that the appeal was not competent. It follows that there was no justification for remanding the matter to the Appellate Authority.

In the result, the Civil Revision Petition is allowed and the order of the learned District Judge is set aside and the order of the learned Subordinate Judge is hereby restored with costs here and before the District Judge.

This Revision Petition was directed to be posted before a Division Bench, because during the course of the argument before one of us who originally heard it, a decision of Basheer Ahmed Sayeed, J., in *Woodman* v. *Mrs. Regina Rajan*[1], was cited and relied on. In that case, after a final order had been passed by the Rent Controller and an execution application was pending, the Amendment Act came into force. The tenant raised a plea that he could not be evicted in view of the new provision contained in section 7 (3-A) introduced by the Amendment Act. It was held by the learned Judge that the plea was good. It is not necessary to discuss this decision for the purpose of this Civil Revision Petition in the view we have taken that the appeal to the learned Subordinate Judge was not maintainable. As the decision has been cited to us, we must say that it appears to require reconsideration. The new provision was applied by the learned Judge in that case at the stage of execution of a final order by the Rent Controller. In terms, section 7 (3-A) will not apply to execution proceedings. All that it says is that no order for eviction shall be passed *under sub-section* (3); and not that no eviction shall be made. It is, however, not necessary to deal further with this decision.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P.V. RAJAMANNAR, *Chief Justice.*

Srikakula Chinna Venkatanarayana and others .. *Petitioners**

v.

Pannapati Elias .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 21, *rules* 66-68 *and* 90—*Sale in execution held without any proclamation at all—Effect—Plea as to invalidity of sale—When open—Dismissal of application under Order* 21, *rule* 90 *as time barred—If* res judicata *in suit for possession by auction-purchaser.*

Where there has been no publication whatever of the proclamation of sale it must be held that there has been no valid sale under the Code. Such a sale is a nullity and it cannot be said that there has been a material irregularity in conducting it.

Venkateswara Ettu Naicker v. *Ayyammal*, (1930) 1 M.L.J. 22 and *Jayarama Ayyar* v. *Vridhagiri Ayyar*, (1920) 39 M.L.J. 188 : I.L.R. 44 Mad 35, followed.

A plea as to the invalidity of such sale could be put forward as a defence to a suit for possession by the auction purchaser. The dismissal of the judgment debtor's application under Order 21, rule 90 to set aside the sale, on the ground that it was too late without determining the question as to the validity of the sale does not operate as *res judicata*. *Munishi China Dandasi* v. *Munishi Peddi Taiah*, (1920) 41 M.L.J. 261, relied on. A mere contravention of rule 72 of Order 21, does not render the sale void. *Radha Krishna* v. *Bisheshar Sahay*, (1922) I.L.R. 1 Pat. 733, relied on.

Application under section 114 of the Civil Procedure Code, for review of the Judgment of the High Court, dated 5th March, 1953, in second Appeal No. 1313 of 1949 preferred against the Decree of the Court of the Subordinate Judge of Kurnool, in Appeal Suit No. 20 of 1949, dated 21st March, 1949, preferred against the decree of the Court of the District Munsif of Nandyal in Original Suit No. 340 of 1946, dated 19th December, 1947.

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1. (1952) 1 M.L.J. 628.

* C.M.P. No. 6235 of 1953. 26th February, 1954.

P. V. Chalapathy Rao and *K. Venkataraman* for Petitioner.

T. R. Srinivasan for Respondent.

The Order of the Court was made by

Rajamannar, C.J.—This is an application for review of the judgment and Decree in Second Appeal No. 1313 of 1949. It was heard and disposed of by me on 26th February, 1953. I dismissed it on one short ground, namely, that the appellants were concluded by certain prior proceedings which eventually ended in Civil Miscellaneous Second Appeal No. 113 of 1943. The respondent filed a suit in the Court of the District Munsif of Nandyal to recover possession of land which originally belonged to one Venkatasubbiah, the father of the defendants, who are the appellants in the Second Appeal. It was sold in execution of the decree in Original Suit No. 13 of 1935 on the file of the same Court and purchased by one R. Chinnaramiah on 4th June, 1941, in Court auction. Chinnaramiah sold the property to the plaintiff respondent. The suit was brought on the allegation that the plaintiff was put in possession by the Court auction-purchaser, but the defendants subsequently dispossessed the plaintiff and took possession of the land forcibly. The main plea in defence was that the Court sale held on 4th June, 1941, was illegal and void because there was no publication of the proclamation relating to the sale. It was further stated that the Court auction-purchaser was only a benamidar of the plaintiff who was in effect the decree-holder as he had attached the decree in Original Suit No. 13 of 1935 in execution of the decree which he had obtained in Original Suit No. 367 of 1936 on the file of the same Court against the decree-holder in Original Suit No. 13 of 1935. The defendants alleged that the suit lands which were sold for Rs. 220 were worth not less than Rs. 2,000 on the date of the Court sale. The judgment-debtor in Original Suit No. 13 of 1935 the father of the appellants, filed Execution Application No. 956 of 1941 under Order 21, rule 90 and section 47 of the Code of Civil Procedure to set aside the sale. This application was dismissed by the District Munsif on the ground that it was filed after thirty days after the sale. An appeal was filed to the District Court of Kurnool, but it was dismissed. A second Appeal (Civil Miscellaneous Second Appeal No. 113 of 1943) was then filed in this Court. That was also dismissed on 13th July, 1943, by Kuppuswami Ayyar, J., on the ground that no second appeal lay because the application must be treated as one filed under Order 21, rule 72 or rule 90 and not under section 47 of the Code. The sons of the Judgment debtor, who had died meanwhile, three of the present appellants, filed an application for review of the judgment passed in the Civil Miscellaneous Second Appeal. The learned Judge dismissed the application, and in doing so, observed as follows:

"I have definitely pointed out in my order sought to be reviewed that the two grounds on which the sale was attacked, namely, that there was no proclamation and that the purchase was benami for the decree-holder are grounds which would attract Order 21, rule 90 and Order 21, rule 72 and dismissed the appeal on the ground that no second appeal lies against orders passed on a petition filed under these provisions."

The plaintiff respondent relied upon the above proceedings as a bar to present suit.

The District Munsif held that there was no proclamation of the sale as required by Order 21, rules 66-69 of the Code and that therefore the defendants were not debarred from questioning the validity of the Court sale because of the prior proceeding ending in Civil Miscellaneous Second Appeal No. 113 of 1943. On these findings, he dismissed the suit. On appeal, the learned Subordinate Judge reversed this decision and decreed the plaintiff's suit. He agreed with the District Munsif indeed, it was not disputed that the sale proclamation was not effected before the sale took place. But he held the sale on that ground was not a nullity and that non-compliance with rules 66 to 69 of Order 21 of the Code would only amount to a material irregularity which could be urged only in an application filed under Order 21, rule 90 of the Code and not by means of a separate suit. He was, however, of the opinion that the decision in Civil Miscellaneous Second Appeal No. 113 of 1943 did not operate as *res judicata*. The defendants thereupon filed the above second appeal.

I took the view that the appellants were concluded by the previous proceedings which culminated in Civil Miscellaneous Second Appeal No. 113 of 1943. I relied on the observations made by Kuppuswami Ayyar, J., in dismissing the application to review the judgment in the Civil Miscellaneous Second Appeal that the objection that there was no valid proclamation of the sale was one falling within Order 21, rule 90. I said :

> " The appellant had raised this point in such an application. But unfortunately that application was dismissed as out of time. It will not therefore be open now to the appellant to rely on what I think is a very good point namely that the sale held without proclamation is illegal."

In this present application for review of this judgment of mine, it is pointed out that the question of legality of the sale for want of proclamation was not decided on the merits in the prior proceedings as the application was dismissed as being out of time, and therefore the dismissal of the prior application would not operate as a bar to the appellant's raising the question of the invalidity of the sale in the present suit. A decision of a Bench of this Court in *Munishi China Dandasi* v. *Munishi Pedda Tatiah*[1], was cited by the learned Counsel for the petitioner as directly applying to the facts of this case. In that case, the plaintiff purchased certain lands in a Court sale upon a mortgage decree. Alleging that he had obtained delivery of the property through Court and that he was dispossessed later by the defendant, the suit was to recover possession from the defendant who was no other than the mortgagor. The defence was that the properties sought to be recovered were not included in the mortgage suit or decree but had been fraudulently inserted in the sale certificate. Both the Courts below dismissed the suit on the ground that the sale was invalid. In Second Appeal, it was contended that the defendant was debarred by *res judicata* from questioning the correctness of the sale and also that he was debarred under section 47 of the Code from raising a question relating to execution in a suit. The defendant had before the suit tried to have the sale set aside first by an application under Order 21, rule 89 and subsequently by an application under Order 21, rule 90. The latter application was dismissed on the ground that the application was too late. The contention raised on behalf of the plaintiff-appellant and the way in which the contention was replied appears from the following extract from the judgment of Spencer, J. :—

> " The appellant's pleader urged that the defendant having once applied to have the sale set aside and having failed was bound by *res judicata* from raising the contention that the sale was invalid even though his application was dismissed upon the ground that he was out of time without a determination of the question relating to the validity of the sale. He has however failed to show us how this case comes within the rule of *res judicata* as defined in section 11, Civil Procedure Code. It is quite clear that there was no adjudication upon the substantial question raised in the defendant's petition as to the validity of the sale and therefore it cannot be deemed to have been a matter directly and substantially in issue in any prior proceedings."

Clearly, this ruling applies to the present case. Here too, the prior application of the appellants was dismissed as being too late. There was no adjudication upon the substantial question raised by them as to the validity of the sale. That question was never heard and disposed of finally. The decision is also authority for the position that a plea as to the invalidity of a sale could be put forward as a defence to a suit for possession by the auction-purchaser. Mr. T.R. Srinivasan, learned counsel for the respondent, was unable to distinguish this case, nor could he say that the principle of this decision was dissented from in subsequent decisions. I must confess that I entirely overlooked this aspect when I disposed of the second appeal on the sole ground that the defendants were precluded from putting forward the plea that the sale was invalid by reason of the prior proceedings which ended with the order of Kuppuswami Ayyar, J., in Civil Miscellaneous Second Appeal No. 113 of 1943. In my view, the petitioners have made out a case for reviewing my judgment. I therefore intimated to counsel that I would hear arguments on the other points raised in the case.

The substantial question which emerges at the outset is whether a Court sale held without any publication whatever of the proclamation of sale is void or only

1. (1920) 41 M.L.J. 261.

voidable at the instance of the judgment-debtor or other aggrieved party and that only by an application under Order 21, rule 90 of the Code. In dealing with the authorities cited before me on both sides, one has to keep the distinction between a case where there has been a publication of the proclamation but the publication has been found to be defective in certain particulars and a case in which there has been no publication at all. A case of this Court in which there was no proclamation at all is that covered by the decision in *Venkateswara Ettu Naicker* v. *Ayyammal*[1]. There, Krishnaswami Nayudu, J., after accepting the finding of the Court below that there was no proclamation at all, held that the sale held without proclamation was void. The learned Judge observed :

> "It cannot be said that the total failure to make the proclamation under Order 21 ,rule 66 is a mere irregularity in the publication or conduct of the sale."

He relied upon the decision of a Bench of this Court in *Jayarama Ayyar* v. *Vridhagir Ayyar*[2]. That was not a case where the proclamation of sale was not published at all. It was published but not in the village where the lands were situate. But the process serv r had intimated at the village that the sale would be held at a place and by an officer different from those fixed by he proclamation. It was held that the sale was illegal and a nullity and not merely 'irregular' within the meaning of Order 21, rule 90 of the Code. Oldfield, J., after pointing out that no general rule for distinguishing between an irregularity and an illegality had ever been laid down, observed that on the facts of the case the result was as if the property had never been sold under the Code at all. The decision in *Basharatulla* v. *Umachurn Dutt*[3], was expressly approved. There where the property that had been advertised for a particular date was sold on that date but at an earlier hour than that stated in the proclamation, the Court held that there was no sale within the meaning of the Code. Seshagiri Ayyar, J., was of the opinion that the Code itself gave some indication as to when a sale can be regarded as irregular and when ill gal. He thought that on the language of Order 21, rule 90, where there was no publication or conduct of the sale, the sale should be regarded as illegal. On the facts of the case before him, his conclusion was that in effect there had been no publication at all. We are not now concerned with the correctness of the decision in so far as it held that on the facts of the case there had been no publication at all. The value of the decision, in my opinion, lies in the enunciation of the general principle that where there is no publication or conduct of the sale, then it is not a case of mere irregularity. It is as if a sale had not been held at all within the meaning of the Code. If there was no publication of the sale whatever, at any place or in any manner, but some officer of the Court chose to hold a sale at some place on some date, it cannot be said that there has been a material irregularity or fraud in publishing a sale. Likewise it follows from this decision that if there is in effect no conducting of the sale it would not be a case of material irregularity in conducting it. Suppose the selling officer does not conduct an auction but merely takes a private offer and reports to the Court that the property has been sold to the person making that offer, can it be said that there has been a conduct of the sale? I think not. Following the principle of this decision and the decision of Krishnaswami Nayudu, J., in *Venkateswara Ettu Naicker* v. *Ayyammal*[1] and on the concurrent findings of the Courts below that there was no publication of the sale whatever, I hold that there has been no sale at all under the Code and the alleged sale was a nullity.

Mr. T.R. Srinivasan for the respondent relied strongly on the recent decision of a Bench of this Court to which I was a party in *Kavu Patteri* v. *Mana Naika.*[4] At the outset, it must be borne in mind that that was not a case where there was no publication. There was a publication but the sale was held on a date different from the notified date without an order of adjournment and without a further sale proclamation. One cannot also overlook the actual facts and circumstances of the case. The execution sale was fixed by the sale proclamation inadvertently for 24th

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1. (1950) 1 M.L.J 22.
2. (1920) 39 M.L.J. 188 ; I.L.R. 44 Mad. 35.
3. (188) I L.R. 16 Cal 794.
4. (1953) 1 M.L.J. 582 ; I.L.R. (1953) M. 1143.

January, 1942. That date being a penultimate Saturday was a Court holiday, and the sale was held on Monday the 26th, Sunday also being a holiday. It was held that the sale was not a nullity and there was only an irregularity in publishing and conducting the sale. It is clear that this decision does not directly govern the present case: Where there has been no proclamation at all. Venkatarama Ayyar, J., who delivered the judgment of the Bench discussed the case law relating to the failure to observe one or other of the rules contained in Order 21 of the Code relating to sales in execution. The learned Judge pointed out that the trend of the decisions was clearly to establish that mere breaches of these rules would not render the sale void but they would only be material irregularities furnishing a ground for taking action under Order 21, rule 90. He observed thus :

"The principle to be deduced from these authorities is that breaches of the provisions of the Civil Procedure Code relating to execution against immovable properties commencing from their attachment down to their sale should all be dealt with under Order 21, rule 90, and not otherwise and that the order of confirmation under Order 21, rule 92, should give the final quietus to all objections which could be raised under Order 21, rule 90."

Mr. Srinivasan particularly relied upon that part of the judgment of the learned Judge where dealing with the decision in *Jayarama Ayyar* v. *Vridhagiri Ayyar*[1], he expressed the view that there was considerable ground for dissenting from the reasoning on which that decision was based. But the reasoning which he was referring to is that conditions as to time and place of the sale are fundamental and their violation would render the sale void. The learned Judge was not dealing with a case like the present where there had been no publication whatever of the proclamation of sale. Nowhere does he express his dissent from the observation of Seshagiri Ayyar, J., to which I adverted earlier in the judgment, namely, that where there is *no* publication or conduct of the sale the sale should be regarded as illegal. I have no reason to doubt the correctness of the ruling in *Kavu Patteri* v. *Mana Naika*[2]. But it has no direct application to the facts of the present case.

Reliance was placed by Mr. Srinivasan on the decisions in *Harindra Nath* v. *Bhola Nath Bahu*[3] and *V. S. Sankaran* v. *Hasta Bahadur*[4]. In neither case is there any attempt to discuss the question whether an irregularity or defect in a sale proclamation and complete absence of publication stand on the same footing. They are therefore not of much assistance. Nor does the decision in *Asha Lata Basu* v. *Manindra Nath Basu*[5], carry the matter further.

Mr. Chalapathi Rao, learned counsel for the petitioner, further contended that the sale was void as there was breach of Order 21, rule 72 of the Code. In my opinion, there is no substance in this contention. A contravention of that rule does not make the sale void—Vide *Radha Krishna* v. *Bisheshar Sahay*[6].

In the view that I have taken that on the finding that there has been no publication whatever of the proclamation of sale it must be held that there has been no valid sale under the Code, I allow the second appeal and set aside the decree of the lower appellate Court and restore the decree of the trial Court. The plaintiff will pay the costs of the defendants in the Courts below but there will be no order as to costs in the second appeal. Leave granted.

K.S. *Appeal allowed.*

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1. (1920) 39 M.L.J. 188 : I.L.R. 44 Mad. 35.
2. (1953) 1 M.L.J 582 : I.L.R. (1953) Mad. 1143.
3. A.I.R. 1937 All. 407.
4. A.I.R. 1944 Rang. 188.
5. I.L.R. (1941) 2 Cal. 570.
6. (1922) I.L.R. 1 Pat. 733.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

T.P.S. Hariram Sait by guardians Parvathi Ammal and Peevammal .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 28 (1) (c)—Penalty under—When could be levied.

In order to levy a penalty under section 28 (1) (*c*) of the Income-tax Act, what has to be proved is that the person who has to be penalised has concealed particulars of his income. The concealment must be of the assessee's income and the assessee should be conscious of it.

The fact that the father of the assessee (a minor) was guilty of concealment or suppression of income in the previous accounting year could not be a ground to penalise the assessee after the death of the father.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939), in R.A. No. 194 of 1951-52 (Madras) of Income-tax Appellate Tribunal, Bombay, on its Bench A file.

S. Swaminathan for Applicant.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The question referred to this Court under section 66 (1) of the Indian Income-tax Act, 1922, ran :

"Whether on the facts and in the circumstances of the case, the penalty under section 28 (1) (*c*) of the Act could be levied on T.P.S. Hariram Sait in respect of the return filed for the assessment year 1943-44."

The facts relevant for the disposal of this question lie in a short compass. T.P. Sokkalal Ram Sait and his minor son Hariram Sait constituted a Hindu undivided family. Sokkalal carried on a lucrative business in beedi manufacture. All along he was assessed to income-tax in the status of a Hindu undivided family, which consisted of himself and his minor son. Sokkalal Sait died on 22nd June, 1942. After his death, for the accounting period which ended with 16th August, 1942, the guardians of Hariram Sait, who was still a minor submitted the return to the Income-tax Officer. The Income-tax Officer found that there had been suppression of income. In addition to the income-tax levied on the basis of the income estimated by the Income-tax Officer he levied a penalty of Rs. 10,000 under section 28 (1) (*c*) of the Act on Hariram Sait. The penalty was ultimately affirmed by the Appellate Tribunal. It is the validity of the levy of that penalty that is now in question.

Section 28 (1) (*c*) of the Indian Income-tax Act runs :

"If the Income-tax Officer....................in the course of any proceedings under this Act, is satisfied that any person—

....

(*c*) has concealed the particulars of his income........................he (the Income-tax Officer) may direct that such person shall pay by way of penalty................"

What has to be proved is that the person who has to be penalised has concealed particulars of his income. In this case the person charged with and found guilty of having effected the concealment of income was Hariram Sait. The concealment, to bring it within the scope of section 28 (1) (*c*), must be a concealment of Hariram Sait's income and it must also have been a concealment of which Hariram Sait was conscious. The finding of the Income-tax Officer which was accepted by the Assistant Commissioner and eventually by the Tribunal, was that it was Hariram Sait's father Sokkalal who was mainly responsible for the suppression of the Income.

* Case Referred No. 26 of 1952. 18th April, 1955.

It should be remembered that Sokkalal died on 22nd June, 1942, and the accounting year came to a close on 16th August, 1942. There was no finding either by the taxing authorities or by the Appellate Tribunal that Hariram Sait himself was in charge of his estate or that his guardians were in any way responsible for any concealment or suppression of income. The requirement of section 28 (1) (c) being that Hariram to be penalised must have himself concealed his income, and that requirement not having been satisfied, we have to hold that there was no basis at all for the Tribunal to come to the conclusion, that Hariram should be penalised to the extent of Rs. 10,000.

In the view we have taken of the requirement of section 28 (1) (c), it is not necessary to discuss any of the other questions, no doubt interesting, raised by counsel on both sides.

We answer the question in the negative and in favour of the assessee. The assessee will be entitled to the costs of this reference. Counsel's fee Rs. 250.

R.M. ——— *Reference answered in favour of the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE MACK AND MR. JUSTICE KRISHNASWAMI NAYUDU.

The Tanjore Permanent Bank, Ltd., represented by its secretary M. Soosai Marian .. *Appellant**

v.

The Indian Overseas Bank, Ltd., represented by its Agent at Nagapattinam and another .. *Respondents.*

Provincial Insolvency Act (V of 1920), section 54—Applicability—Transfer of property to a creditor with a view to escape threatened criminal prosecution—If liable to be set aside as a fraudulent preference—Contract Act (IX of 1872), section 23—If applicable.

In order to bring a transfer by a debtor in favour of his creditor as an act of fraudulent preference under section 54, it must be established that the transfer was in favour of a creditor and it was made within three months of the date of the insolvency by a person unable to pay his debts and that he had creditors other than the creditor in whose favour the transfer was made and that the transfer was with a view to prefer that particular creditor. Whether a particular transfer is a fraudulent preference within the meaning of section 54 is a question of fact. If the sole or the only view was to prefer the creditor, then undoubtedly the transaction could not be supported. But if there are several considerations which must have prevailed upon the insolvent other than merely preferring a particular creditor, then the Court has to examine such considerations and find out which of those considerations eventually led him into the transaction.

Where the dominant motive that prevailed upon the insolvent was to escape an imminent criminal prosecution threatened by one creditor and also to avoid facing immediate execution by attachment as the debtor had failed to furnish security in his appeal against a decree in favour of another creditor, the execution of a security bond of all the properties to cover those debts cannot be considered to have been with a view to prefer those two creditors.

Considerations such as whether the security bond results in stifling criminal prosecution and as such against public policy under section 23 of the Contract Act are all extraneous to the only point to be decided, *viz.*, whether the transfer has been made with a view of giving that creditor a preference over other creditors under section 54.

[*Case law reviewed.*]

Per *Mack, J.*—If a creditor fortuitously discovers that his debtor has committed a criminal non-compoundable offence and by threat of prosecution compels him to convey to him all his property in satisfaction of his debt, is it right that he should be permitted to pay himself in full leaving the other creditors in the lurch, this favoured creditor failing moreover to do his public duty of initiating a prosecution in fact compounding an offence which is not compoundable, and deriving from his breach of public duty considerable financial advantage?

Section 54 of the Provincial Insolvency Act, in order to harmonise with justice, equity and good conscience, appears to be in need of amendment.

Anomaly in section 54 read with section 6 (2) and (3) arising from the judicial interpretation given to the words " with a view of giving that creditor preference ", pointed out.

Appeal against the Order of the District Court of East Tanjore at Nagapattinam, dated the 14th November, 1949 and made in I.A. No. 202 of 1949 and I.P. No. 2 of 1948 on the file of the District Court of East Tanjore at Nagapattinam.

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* Appeal Against Order No. 346 of 1950. (C.M.P. No. 6193 of 1950). 2nd March, 1955.

K. Bhashyam and *T. R. Srinivasan* for Appellant.

K. S. Naidu for 1st Respondent.

The Court delivered the following

JUDGMENTS : *Mack, J.*—Left to myself and untrammelled by precedents in case law, I would have held that justice and equity required this alienation, which undoubtedly had the effect not only of preferring the Overseas Bank to the Tanjore Permanent Bank but also of defrauding the latter, to be set aside as a fraudulent preference under section 54 of the Provincial Insolvency Act. My learned brother whose judgment I had the advantage of perusing has however based his decision on principles indoctrinated by a formidable array of case law, into the words "with a view of" in this section, of dominant intention and pressure and voluntary nature, that I feel I would not be justified in expressing a different opinion and referring this case for resolution by a third Judge. Left to myself I would have been inclined to give the words "with a view of" a more elastic meaning as being the equivalent to its ordinary dictionary meaning "with the intention of", not necessarily a dominant intention to be determined after a psycho analytical vivisection of what is in this case the criminal mentality of the insolvent at the time he made this alienation. For instance, the dominant intention of a robber may be to escape with his booty and if obstructed, he may cause murder or grievous hurt intending of course to do so in furtherance of his dominant objective which was to escape. But nonetheless the law affords him no escape from the full consequences of the acts which he intended. But as my learned brother is not prepared to agree with me, and in the absence of any precedent in case law which affords support to the view I am taking, I have decided to accord my reluctant concurrence with the judgment he is about to deliver. Although the facts in this case are peculiar and not on all fours with any other cases placed before us, I cannot say that it is not in accordance with principles laid down in the wealth of case law which he has cited.

As my learned brother has said, insolvency litigation in its inception adopted practically *in toto* the English Acts without, however, keeping pace with some changes in the English Acts in view of difficulties created by English case law which I do not propose to traverse. I will confine myself to a resulting anomaly in our present Act. Section 6 (*b*) of the Provincial Insolvency Act reproducing the original English Act sets out as one of the acts of insolvency on which a debtor could be adjudicated a transfer of his property or of any part thereof "with intent to defeat or delay his creditors". This corresponds to section 1 (1) (*b*) of the English Bankruptcy Act which after amendment in 1914 now reads as follows :—

"If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof."

According to Williams on Bankruptcy, 16th Edition, page 6, the words "with intent to defeat and delay his creditors" were omitted in the Act of 1914 as superfluous and misleading, and intended to relieve the Court and jury from having to find an intent which is often contrary to the actual fact. In this insolvency petition, one of the acts of insolvency alleged was this alienation Exhibit A-14 in favour of the Overseas Bank, as one coming within the scope of section 6 (*c*) and void as a fraudulent preference under section 54. This was not gone into in the insolvency petition, and adjudication was founded on the departure of the insolvent from his dwelling house and usual place of business, an act of insolvency under section 6 (*d*). An anomaly resulting from our decision is therefore that the alienation under Exhibit A-14, though undoubtedly fraudulent viewed from all standpoints, could not have been made an act of insolvency on which adjudication could have been founded, although by it the insolvent had alienated all his property for the benefit of two creditors and that too, fraudulently.

In the case before us, the insolvent had mortgaged identical paddy bags in the same godowns to two banks as security for substantial overdrafts from them;

He was therefore defrauding both banks. Bank B first discovered a shortage of over 1,700 bags and brought pressure on him to make good the deficiency in security. Bank A then some days later discovered a shortage of over 4,000 bags and by threatening prosecution is said to have compelled the insolvent to make this alienation of all his property to them and for the benefit of another creditor. Bank B who has been defrauded is left high and dry. They immediately prosecuted the insolvent who was convicted of theft of bags of paddy he had delivered into their possession as security under key and open loans, and the insolvent was sentenced to imprisonment. If a creditor fortuitously discovers that his debtor has committed a criminal non-compoundable offence and by threat of prosecution compels him to convey to him all his property in satisfaction of his debt, is it right that he should be permitted to pay himself in full, leaving other creditors in the lurch, this favoured creditor failing moreover to do his public duty of initiating a prosecution, in fact compounding an offence which is not compoundable, and deriving from this breach of public duty considerable financial advantage? I can myself see little difference between this kind of pressure and a creditor who wrongfully confines his debtor and threatens him literally with a big stick held over his head with grievous hurt until he executes a conveyance which gives him a preference over all other creditors, one which appears to be protected under section 54, on the principle that the debtor did not make the transfer voluntarily with a view to prefer but in order to escape the consequences with which he was threatened.

I am saying all this in order to indicate that section 54 of the Insovency Act, in order to harmonise law with justice, equity and good conscience, appears to be in need of amendment. There is further an inherent anomaly in section 54 read with section 6 (2) and (3) arising from the judicial interpretation given to the words " with a view of giving that creditor preference ", in that a transfer with this objective though it may not be *per se* fraudulent, shall be deemed null and void as against the receiver. But there appears to be no way under the Act itself of declaring an alienation fraudulent *per se*, the alienation Exhibit A-14 in this case undoubtedly was to the knowledge of the insolvent, void as against the receiver. To avoid these obvious anomalies, in addition to amending section 6 (*b*) on the lines of the present section 1 (1) of the English Bankruptcy Act, the following addition to section 54 (1) by way of a proviso appears to be necessary :

> "Provided that if in the opinion of the Court the transaction was to the knowledge of the insolvent or, in fact, a fraud on creditors, or induced by pressure or intimidation by a creditor of a kind opposed to law or public policy, it shall be set aside as void, as against the Receiver."

The statute, case law and precedent being that they are, I accord my concurrence to the judgment my learned brother is about to deliver with these recommendations for amendment in legislation.

Krishnaswami Nayudu, J.—The Tanjore Permanent Bank, Limited, creditors in the insolvency of the 2nd respondent, are the appellants, the 1st respondent being the Indian Overseas Bank, Limited, at Nagapattinam. The appeal arises out of a petition filed by the appellants for annulment of security bond executed by the insolvent in favour of the 1st respondent on 19th December, 1947, for Rs. 45,000 under section 54 of the Provincial Insolvency Act. The insolvent was carrying on trade in paddy and also owned a rice mill at Puthur situated on the outskirts of Nagapattinam. He was adjudicated on 22nd January, 1948, in I.P. No. 2 of 1948 on the appellants' petition. The insolvent had dealings both with the appellants' branch at Tiruvarur a place about 18 miles from Nagapattinam and with the 1st respondent bank from 1945, the dealings consisting in borrowing monies on the pledge of goods. It is the appellants' case that by the end of November, 1947, the insolvent owed them about Rs. 48,000 on account of produce loans, that is loans advanced on the pledge of paddy and rice bags, and that on 13th January, 1948, the Secretary of the appellants-bank and the manager of the Tiruvarur branch went to the business premises of the insolvent and found that the mill was not working and that all the goods pledged to them had been removed and the debtor was not in his place of residence. The insolvent is charged with having

executed in favour of the 1st respondent a security bond on 19th December, 1947, for Rs. 45,000 creating a security over all or substantially all his properties with a view to defeat and defraud his other creditors and it is urged that the transfer of the properties in favour of the 1st respondent-creditor was with a view to give that creditor a preference over all other creditors and the security bond was therefore fraudulent and void as against the appellants.

It will be necessary to refer to the following facts to appreciate the contentions of the appellants as regards the fraudulent nature of the deed of security (Exhibit A-14) executed in favour of the 1st respondent-bank. The goods on which loans were raised with both the banks were all stocked in godowns belonging to the insolvent and it is common ground that the goods, which were the subject-matter of the security in favour of both the banks, were stocked in the same godowns. On 27th November, 1947, P.W. 3, the Inspector of the appellants-bank, was deputed to inspect and verify the stock under the produce loans, and in his report Exhibit A-5 dated 29th November, 1947, he states he inspected the godowns on 27th November, 1947, that there was an outstanding loan of Rs. 54,435 due to the appellants, that the stock as per books of the bank should be 6981 bags of paddy and 30 bags of rice and that on verification of the stock on 27th November, 1947, along with the branch manager P.W. 5, he found a shortage of 1394 bags of paddy for which a margin of Rs. 11,152 was to be collected from the insolvent. P.W. 3 stated that the godowns were all found locked and he opened them with the keys produced by P.W. 5, the branch manager and that at the time of the inspection as the insolvent was absent, he instructed the accountant of the insolvent to pay the money covering the shortage. After receipt of the communication by the bank to the insolvent, he paid a sum of Rs. 2,300 on 4th December, 1947; Rs. 1,500 on 5th December, 1947; Rs. 1,300 on 8th December, 1947 and Rs. 2,000 on 10th December, 1947 and on the whole a sum of Rs. 7,100 was recovered towards the sum of Rs. 11,152 payable by the insolvent on account of the shortage detected by P.W. 3. From Exhibit A-9 dated 10th December, 1947, a communication sent by P.W. 5 to the appellants' head office at Tanjore, it is seen that P.W. 5, was assuring the head office that the insolvent was making real attempts to discharge the loans. But after the last payment of Rs. 2,000, the insolvent wrote to the appellants on 11th December, 1947, under Exhibit A-11 asking for 30 days' time for discharging the entire loans. There is nothing to show that any steps were taken by the appellants to recover the balance. P.W. 5 said that he was pressing the insolvent as usual, but there was not much pressure just then from the head office and that he suspected the *bona fide* of the insolvent only on 11th January, 1948 and thereupon wrote to the head office on 12th January, 1948 and then went to the mill and godowns of the 2nd respondent and found the godowns empty and the mill not working and the 2nd respondent making himself scarce. On a complaint preferred by the appellants-bank on the 13th January, the insolvent was prosecuted in the Magistrate's Court for offences of theft and criminal breach of trust in C.C. No. 465 of 1948. This action was taken in pursuance of P.W. 5's letter Exhibit A-18.

The impugned document Exhibit A-14 came to be executed in the following circumstances. The insolvent, who was having produce loans transactions, with the 1st respondent-bank, was indebted to it in a sum of Rs. 55,000 in the beginning of December, 1947. On 11th December, 1947, the 1st respondent issued a notice to the insolvent calling upon him to close his account within a week, but there was no reply to that notice. The agent of the 1st respondent bank, R.W. 1, suspected from letters written by the Grain Purchasing Officer to three rice mills owners on 15th December, 1947, estimating the stock in the insolvent's godown at about 2,000 bags that the stock must have dwindled, as on that date the stock, according to their books, should be 5,800 bags of paddy. He thereupon proceeded to the mill premises on 16th December, 1947, for the purpose of inspecting the godowns and he found that the godowns we e locked with the 1st respondent bank's locks and on opening the godowns found that the stock consisted of paddy bags mixed with husk bags. The husk bags being more than the number of the paddy

bags. He then inspected the doors and found that the padlock of one of the rooms had been tampered with and entry effected into it without opening the lock, and in another room it looked as if entry had been effected into it by removing the back door from its hinges. He counted the paddy bags and found a large shortage, since, on a rough calculation, there were only 1,100 bags. He took a letter from the insolvent on that date (Exhibit B-23) stating that out of the 5,800 bags of paddy and 92 bags of rice, which were placed as security in the 1st respondent's bank, he had taken about 4,000 bags of paddy and appropriated the same for his own use.

The events that look place between the 16th and 19th December, 1947, which led to the execution of the document are spoken to by R.W. 1 and R.W. 2; R.W. 1 says that he went to the lawyer's house at 11 A.M. and consulted him and his lawyer represented that it was late that day and a complaint could be given on the following day. At 1 P.M. on the same day one Jayaveera Pandya Nadar and R.W. 2 came to his office, and wanted to know what R.W. 1 proposed to do in regard to the insolvent. R.W. 1 says he told them that he intended to proceed criminally against him and that they pointed out to him the futility of such action in regard to the recovery of money due to the bank. They then proposed that some security might be taken from the insolvent and the insolvent came and joined in the discussions and pleaded that, if criminal action was taken he would be ruined and undertook to give security for the repayment and also represented that he had large outstandings to collect. Then R.W. 1 consulted his lawyer and, on his advice, agreed to take the security, due provision being made for the payment of not only the amount due to him but also of the decree debt in O.S. No. 8 of 1946 due by the insolvent. R.W. 1 came back to his office and told Jayaveera Pandya Nadar, R.W. 2 and the insolvent that necessary steps could be taken for execution of the security bond. On 19th December, 1947, the document was written in the premises of the insolvent's rice mill and was executed by the insolvent. The circumstances under which Exhibit A-14 was executed and as spoken to by R.W. 1 are corroborated by R.W. 2, a javali merchant and a constituent of the Indian Overseas Bank, R.W. 2 says that he accompanied the insolvent and Jayaverra Pandya at their request to the 1st respondent-bank in order to pacify R.W. 1. The insolvent was told by him that the only way out of the difficulty was to give security to the bank.

Exhibit A-14 is styled as a security bond and it recites that in respect of the credit and debit dealings which the insolvent had been having with the 1st respondent-bank, a sum of Rs. 39,000 was payable by him, that apart from the said sum about Rs. 6,000 had to be paid to Seshachala Naidu, the plaintiff-decree-holder in O.S. No. 8 of 1946, that the insolvent had filed an appeal against the said decree and the same was pending and, if the decree was confirmed in appeal, he would have to pay Rs. 6,000 and that the sum was therefore reserved with the bank. This accounts for the security being for Rs. 45,000. It is further, recited that excluding the sum of Rs. 6,000 for the balance of the amount due from the insolvent *viz.*, Rs. 39,000 and also in respect of further transactions, the security over the properties would enure, in any event, to the limit of Rs. 45,000. The actual amount due to the 1st respondent as per the accounts on that date was Rs. 38,624-1-8 and this together with the amount due under the decree covered the entire amount for which the security was offered, and there was nothing left as and by way of security to cover further dealings.

The insolvent's position at the time with reference to the decree in O.S. No. 8 of 1946 may now be considered. That decree arose out of a suit instituted by his uncle and the decree was passed after contest. The insolvent filed an appeal A.S. No. 433 of 1947 on the file of the High Court, Madras, which was pending. As application was made for stay of execution of the decree (C.M.P. No. 5786 of 1947) and stay was ordered on 30th October, 1947, on his paying a sum of Rs. 2,500 within four weeks and offering security for the balance. In compliance with that order, on 28th November, 1947, he filed an affidavit (Exhibit A-13) in the District Court of Nagapattinam stating that he paid Rs. 2,500 that day and for the balance

he was filing a letter of security, and that he had a house worth Rs. 10,000 and rice mill and rationshop worth Rs. 60,000. By that affidavit, he gave an undertaking that he would not alienate the properties without the permission of that Court. The security, however, was not accepted and the matter was adjourned to 6th January, 1948, for better security. Exhibit B-39 is an affidavit filed by the decree-holder in O.S. No. 8 of 1946 on 19th December, 1947, the date of Exhibit A-14, in which he states that the security furnished by the insolvent, who was the judgment-debtor, was not accepted and the Court gave him time till 6th January, 1948, for offering better security, that in the meantime he was reliably informed that the insolvent was offering his property as security to a local bank, apparently the 1st respondent, and that the insolvent was making himself scarce. He therefore asked for immediate execution by attachment of the property. These give an indication that, while the 1st respondent-bank was prepard to prosecute the insolvent criminally, the decree-holder in O.S. No. 8 of 1946 was threatening immediate execution. It was in these circumstances that one finds that Exhibit A-14 the impugned document came into existence.

The grounds alleged in the petition in respect of the fraudulent transfer are that there was no compelling necessity to offer any security as the amount due to the 1st respondent was already secured by pledge that the 2nd respondent had transferred all or substantially all his properties and there was equally no conceivable necessity to secure future advances or for the payment of Rs. 6,000 to the decree-holder in O.S No. 8 of 1946, that the Nagapattinam agent of the 1st respondent was an intimate friend of the insolvent and that, shortly after the execution of the bond, the insolvent had wound up the mill and made himself scarce. The suggestion of friendship of the agent furnishing a ground for this transfer was not pressed before us, the contention having been repelled by the learned District Judge. Shorn of the allegation that the document was the result of friendship of the agent with the insolvent, the substance of the attack is that there was no compelling necessity to support the transaction. It is on the facts so far stated depends the decision of the only question in this case as to whether under section 54 o the Provincial Insolvency Act, the impugned transfer was made with a view to prefer the Indian Overseas Bank to the other creditors of the insolvent.

Section 54 (1) is in the following terms :

> "Every transfer of property, every payment made, every obligation incurred, and every judicial proceedings taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, f such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court".

This section corresponds to section 56 of the Presidency-Towns Insolvency Act, and is modelled on the English statute. The corresponding provision in England was section 92 of the Bankruptcy Act of 1869. That section contained a saving clause ; the section, excepting the saving clause, was repeated in section 48 of the Bankruptcy Act, 1883 and section 54 of the Bankruptcy Act, 1914. The saving clause in section 92 of the Bankruptcy Act provided that the section "shall not affect the rights of a purchaser payee, or incumbrancer in good faith and for valuable consideration." But the saving clause was omitted in section 48 of the Bankruptcy Act of 1883 and was thereafter not incorporated in the subsequent enactments. But sub-section (2), in terms of sub-section (2) of section 54 of the Provincial Insolvency Act, came to be added in section 48 of the Bankruptcy Act, 1883, and section 44 of the Bankruptcy Act, 1914, with the result that the terms of the Indian Enactments are the same as found in section 44 of the Bankruptcy Act of 1914. The removal of the saving clause and the substitution of the sub-section has a material bearing on the question of the good faith or otherwise of a preferred creditor. While under the Bankruptcy Act of 1869, even if a transaction was found to be void as a fraudulent preference, if it was shown that the preferred creditor acted in good faith, that is, without the knowledge of the insolvent condition of the debtor and of his intention to prefer him, such a creditor could be saved

by reason of his having acted in good faith, the good faith of a preferred creditor is no longer material under the law as it prevails now in England, as laid down in the subsequent Bankruptcy Act. The position in India is the same as in England that the good faith or otherwise of a creditor, who is preferred, is immaterial. In order to bring a transfer by a debtor in favour of his creditor as an act of fraudulent preference under section 54, it must be established that the transfer was in favour of a creditor and it was made within three months of the date of the insolvency by a person unable to pay his debts and that he had creditors other than the creditor in whose favour the transfer was made and that the transfer was with a view to prefer that particular creditor. The real question that has to be decided is as to whether the insolvent ex cuted the security bond with a view of giving the Indian Overseas Bank a preference over the other creditors, the other essential conditions being present in the case.

The law of bankruptcy is foreign to India and there is nothing corresponding to the law of insolvency found in Hindu jurisprudence. Neither the Smritis nor the texts provide anything approximating to the law of insolvency, though the payment of debts by a debtor to a creditor is regulated and the means and method of payment and the proceedings for recovery are also provided. The insolvency law is therefore one borrowed from England and, the language of the Indian enactment being in terms of the corresponding English statute, English decisions on the interpretation of the terms of the enactment could be safely applied to cases arising, in India under section 54 of the Provincial Insolvency Act and section 56 of the Presidency Towns Insolvency Act. Whether a particular transfer is a fraudulent preference within the meaning of the provision has been held to be a question of fact. To arrive at the finding, it is necessary to make a proper approach to the facts governing the cases having in view the principles that have to be applied in appreciating the evidence and arriving at the correct conclusion.

In Ex parte *Taylor*, In re *Goldsmid*[1], it was held that in order that a payment or transfer of property, made by a bankrupt within three months before the presentation of the petition on which he was adjudicated a bankrupt, should amount to a fraudulent preference within section 48 of the Bankruptcy Act, 1883, it is essential that it should have been made by him " with a view of giving a preference " to the creditor to whom it was made ; it is not sufficient that the creditor was in fact preferred, and the Court must, therefore, in each case consider as a question of fact what was the real or dominant motive of the bankrupt in making the payment or transfer, and, if the Court comes to the conclusion that the bankrupt's real motive was (*e.g.*) to save himself from exposure or from a criminal prosecution, the payment or transfer is not a fraudulent preference. In that case, there was a payment to the preferred creditor, which the bankrupt made on his being threatened by the creditor that he would summon him before the Lord Mayor on a charge of embezzlement and the facts of the case pointed out that the bankrupt had so conducted himself as to make himself liable for criminal prosecution. Lord Esher, M.R., expounded the manner in which section 48 of the Bankruptcy Act had to be construed in the following terms : (page 299).

" The Court must find not only that a payment was made to a particular creditor, but that it was made " with a view " of giving him a preference over the other creditors. It has been said that the Court must be satisfied that the preferring of the creditor was the predominant view of the debtor—that if he acted from mixed motives, the Court must find out which was the predominant view in his mind. That no doubt is so, though I should have been content to say that the payment must have been made with a view of preferring the creditor. What is meant by " with a view "? It is the same thing as with an " intent ". The moment you come to this, that you have to perform the metaphysical operation of finding out what a man's intent was, surely then you ought not to throw away all the tests which have been adopted by great and careful Judges for the purpose of doing this. You cannot throw out of account the fact that a man was threatened with something which he would not at all like, in order to see whether he did not act with the dominant view of getting rid of that pressure. You must also, as James, L.J., said, take into account the man's own mind, and see whether, if he has done a very wicked and abominable thing, he may not afterwards have been doing that which, if he had a scrap of conscience left, he ought to have done-repaid his former evil deed. If you come to the conclusion that that was the dominant motive in his mind, you must hold that he made the

1. (1887) 18 Q.B.D. 295.

payment, not with a view of preferring the person to whom he made it, but in order to satisfy his own conscience. It is impossible to lay down any exhaustive rule; the Court must judge from the particular facts of each case whether the debtor did make the payment with the view or intent of preferring the creditor."

Applying the principle to the facts of that case, the learned Law Lord observed that the preference was the result of threat of criminal prosecution and the bankrupt acted solely with the view of saving himself from exposure, infamy and danger and that in the circumstances there could not be any fraudulent preference.

Lindley, L.J., in the course of his judgment, repelling the contention that it would be sufficient if the creditor was actually preferred and that was the meaning of "with a view" observed at page 301:

"That would be to strike out from section 48 the words, "with a view of giving such creditor a preference over the other creditors." It is impossible to infer the debtor's view from the mere fact that the creditor was preferred. But, looking at the facts of this case, I think that Cave, J., drew the right inference, that the bankrupt's sole motive was to prevent an exposure of his conduct.

Lopes, L.J., observed at page 302:

"The mere making of a preferential payment is not a fraudulent preference. The substantial motive of the debtor in making it must be looked at. If the substantial motive is to prefer the creditor, the payment is a fraudulent preference. If the substantial motive is reparation for past wrong, or to avoid evil consequences to the debtor himself, the payment is not a fraudulent preference."

That an actual threat or actual pressure of creditors is not necessary but if the transfer proceeds under an apprehension of legal process as if the defendant had actually threatened her (bankrupt) so that the execution of the transfer was not a voluntary tr. nsfer, but the effect of fear however groundless tha might be, that would not make the transaction void was the view taken in *Thomson* v. *Freeman*[1]. That view was considered to be good law even after the lapse of 110 years by Lord Halsbury in *Sharp* v. *Jackson*[2], where a trustee, who had committed breaches of trust and was insolvent, on the eve of his bankruptcy conveyed an estate to make good the breaches of trust, without any pressure or request by his *cestuis que trust*, it was held that there was no fraudulent preference within section 48 of the Bankruptcy Act, 1883, the debtor's object being to shield himself from the consequences of his breaches of trust. With reference to a contention that since there was no pressure the debtor was free to do the one thing or the other a: d when he executed the transfer in favour of one of the creditors, whatever the debtor's motive might have been his view or intention was to benefit certain creditors and he must be taken to have intended the natural consequences of his act, Lord Halsbury quotes with approval the view of the construction of the statute by Lord Esher and observed that the answer:

"....would depend upon what was in his mind. Whether it is called 'intention' or 'view' or 'object' does not appear to me to matter much. The question is whether in fact he had the intention to prefer certain creditors. It has been argued that the debtor must be taken to have intended the natural consequences of his act. I do not think that is true for this purpose. I think one must find out what he really did intend.........It seems to me clear, therefore, that he made this conveyance not with the 'intention' or 'view' or 'object' or whatever it may be called of preferring these persons, but for the sole purpose of shielding himself. Under these circumstances, what he did is not a fraudulent preference within the Bankruptcy Act."

In *Ramsay*, In re, *Deacon*, Ex parte[3], Phillimore, J., observed at pages 84-85 that the proper view of the law is that

"the Court must be satisfied that the dominant or substantial motive was to prefer the creditor, and was not to obtain some advantage to the debtor, or rather, to get rid of the negative expression, that there was no substantial advantage to the debtor likely to accrue by reason of the act of preference, no escape from criminal prosecution, no escape from being declared, whether criminally or not, a trustee who had failed in his trust, no advantage which would enable him to keep afloat and carry on his business."

On the facts of that case it was found that the master motive was in the direction of fraudulent preference.

In *Tomkins* v. *Saffery*[4] relied upon by the appellants, the debtor was a member of the stock exchange and he became unable to meet his stock exchange engagements and gave notice thereof to the Secretary. Under the rules of the stock exchange,

1. (786) I.T.R. 155.
2. (1899) A.C. 419.
3. (1913) 2 K.B. 80.
4. (1877-8) 3 A.C. 213.

in such circumstances, the defaulter ceases to be a member of the body. Under the rules, two of the members of the body act as official assignees of the defaulter, a meeting of the creditor is called, the defaulter (as he is required to do) make, his statement, and the assembled creditors having decided what is to be dones these official assignees carry the decision into execution. The Committee of the stock exchange had the power to re-admit the defaulter. The debtor made his statement declaring that at that time he had no debts outside the stock exchange. His stock exchange creditors then consented to accept a composition, and, to provide for a part of it he gave them a cheque for £5,000 then standing to his credit in the Bank of England. The official assignees obtained the money and apportioned it among his stock exchange creditors. He afterwards confessed to owing debts to a large amount to outside creditors, and was declared a bankrupt. In a motion by the trustee in bankruptcy to recover the sum of Rs. 5,000 from the assignees of the stock exchange, it was held that he was entitled to claim it, for what was done by the debtor amounted to a *cessio bonorum* and constituted an act of bankruptcy. Lord Cairns (Lord Chancellor) held that there was on the part of the bankrupt a cession of all he possessed for the purpose of business, and as for the question whether it was a fraudulent preference under section 92 of the Bankruptcy Act of 1869, which contained a saving clause protecting *bona fide* transferees, after referring to the facts of the case, posed the following question " was the payment made under pressure?" and in answer observed at page 225.

"It was said, if it was made under pressure, it is the pressure you are to look to, it is the pressure you are to take as the *causa causans* of the payment, and not any intention of giving a preference to particular creditors. I will accept for this purpose that statement of the law, and accepting it, I am bound to say, and to say without the slightest hesitation, that in my opinion there was no pressure whatever here leading to the making of this payment. The creditors upon the stock exchange were not the originators of that which was done. The person who set the machinery in motion which was brought into active operation over this £ 5,000 on the 28th of April was Mr. Cooke (the debtor) himself. It was he who....endeavouring to comply with the rules of the body to which he belonged, announced to that body that he was unable to fufil his engagements, and being a defaulter, and making it known to his stock exchange creditors that he was a defaulter, thereupon received a summons to attend a meeting of those creditors; he was the person who set the machinery in motion ....Pressure, therefore, there was none. The act was done, the payment was made, as a part and parcel of that machinery, which was set in motion by the bankrupt himself."

Then the Lord Chancellor proceeds to examine the application of the saving clause to section 92, which, however, does not arise for consideration here.

In *Ex Parte Hall, In Re Cooper*[1], a trader told one of his creditors on the 17th February, 1873, that he was about to stop payment. The creditor then pressed for security for his debt and threatened to commence proceedings against the debtor at once. On the 19th February the debtor delivered two bills of exchange accepted by some other person, to a third person, telling him to hand them to the creditor. On the 24th of February the debtor filed a liquidation petition and on the 10th of March he was adjudicated a bankrupt. It was held that the delivery of the bills of exchange amounted to a fraudulent preference of the creditor, and that it was void as against the trustee in the bankruptcy under section 92 of the Bankruptcy Act of 1869. Jessel, M.R., observed at page 585;

" It is plain that it was the voluntary act of the bankrupt. It appears to me that it would be absurd to call it pressure. A man says to his creditor, 'I am about to become bankrupt, or I shall stop payment in a week.' The creditor says, 'Pay me my debt, or I will sue for it.' Can that be called *bona fide* pressure by the creditor? When you consider the matter, it seems to me that it would be absurd so to call it. And that is exactly what occurred in the present case. Of course it would be an entirely different matter if the creditor did not know of the state of his debtor's affairs. It is suggested that there was pressure by the creditor on the 14th of February, but it is plain that that pressure had produced no effect."

The view of the construction of the corresponding provision in the Bankruptcy Act has been adopted and followed by Judges in India in a number of decisions arising under cases of fraudulent preference. The cases where the principles laid down in the English decisions have been cited and followed are; *Official Receiver* v. *Nallaperumal*[2]; *Kasi Iyer* v. *Official Receiver, Tanjore*[3]; *Ramaswami* v. *Chinnathambi*[4];

1. (1881-2) 19 Ch.D. 580.
2. A.I.R. 1929 Mad. 471.
3. A.I.R. 1929 Mad. 821.
4. A.I.R. 1932 Mad. 459.

Gangappa v. *O. R., Bellary*[1]; *Krishna* v. *Devarayan*[2]; *Nripendra Nath Sahu* v. *Ashutosh Ghose*[3]; *Ranga. Reddy* v. *Official Receiver, Anantapur*[4]; *Official Assignee of Madras* v. *T. B. Mehta and Sons*[5] and *Arunachalam Chettiar* v. *Official Receiver of Tanjore*[6].

In *Arunachalam Chettiar* v. *Official Receiver of Tanjore*[6], relied on by the appellants, the facts were that the debtors were heavily involved in October 1921 and were threatened with suits and applications for attachment and arrest before judgment and there seemed to be very little hope of averting bankruptcy. In those circumstances they executed a mortgage in favour of a creditor, the appellant in that case, the debt due to him being Rs. 10,900 and odd and the mortgage was executed to secure Rs. 10,000 out of that sum. The creditor in whose favour the mortgage was executed was found to be aware of the condition of the debtor's affairs. There was no other immovable property excepting the one that was given as security; but the debtors executed over the identical property two mortgages one in favour of the appellant and the other in favour of third parties. They closed their business subsequently. On these facts, Venkatasubba Rao, J., found that the motive that operated in the mind of the debtors could not be the safeguarding of their interests and the averting of unpleasant consequences and the so-called pressure was not real and that the mortgage amounted to a fraudulent preference.

In *Ranga Reddy* v. *Official Receiver, Anantapur*[4], a sale deed executed by the insolvent in favour of his nephew and son-in-law was sought to be set aside under section 54 of the Provincial Insolvency Act.. The insolvent was the guardian appointed under the Guardians and Wards Act of the transferee. On his attaining majority the transferee, the erstwhile minor, complained to the Court that the insolvent had misappropriated the ward's funds and asked for an account for the amount in respect of the alleged breach of trust. The impugned sale deed was then executed by the insolvent. Venkatasubba Rao, J., observed, on the facts of the case, that

> "the test in such cases is, what is the dominant or operative motives of the debtor in making the transfer. Is it a reasonable inference from the facts above mentioned, that the dominant view which influenced the second respondent (insolvent) was to prefer a particular creditor, or, is it more reasonable to hold that he acted with a view to protect himself from exposure or from any sort of proceedings?"

The learned Judge further observed at page 870-871 :

> "The question is not whether several motives have not operated on the mind of the creditor but what among them was the dominant or effectual motive. If the debtor is influenced solely by one motive, the case presents no difficulty whatsoever; but when the Court has to ascertain which of the several motives is the operative or substantial motive, its task becomes difficult. In the present case, there is on the one hand the desire on the part of the debtor to protect himself; there may be on the other, in view of the admission referred to above, some desire to benefit his own near relative. In a case like the present, it is natural, if not inevitable, that the debtor has present to his mind, *as one view among several*, the giving of a preference to the particular creditor benefited; that could hardly be decisive of the matter."

And following the words of Bowen, L.J., in *Hill Ex Parte Bird, In re*[7], viz.,

> "It is a very difficult matter to prove that the dominant motive was the sole motive, and I think that the true test under section 92 is this: (1) had the debtor a view of giving a preference to the creditor? and (2) was that the operative effectual view?"

held that the transfer could not be deemed to be a fraudulent preference.

The true rule of construction of section 54 being almost identical with the language of the corresponding provision in the English enactment, we have fortunately the guidance of very eminent Judges in England, where similar language of the English statute was carefully and exhaustively analysed and has been correctly construed by those learned Judges. There is no difficulty therefore in knowing what the correct and proper meaning is of the language of the provision. But the

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1. A.I.R. 1935 Mad. 300.
2. (1940) 1 M.L.J. 786 : A.I.R. 1940 Mad. 228.
3. (1915) I.L.R. 43 Cal. 640.
4. (1937) 2 M.L.J. 868 ; A.I.R. 1938 Mad. 177.
5. (1918) 36 M.L.J. 190 : I.L.R. 42 Mad. 510.
6. (1925) 49 M.L.J. 562.
7. (1883) 23 Ch. D. 695.

real difficulty that arises in any case is as to the correct approach that requires to be made keeping in mind the proper view of the construction of the section.

On the facts of this case, I must express that I have the least difficulty in coming to the conclusion that the view taken by the learned District Judge that the impugned transfer does not amount to a fraudulent preference is correct. Here is the case of a debtor, who became heavily involved on the date of the transfer and successfully managed to obtain credit from two banks on the same goods for a considerable period of time without the fraud being detected. He had also been disposing of the pledged goods without the knowledge of the respective banks, and this depleting of the stock which secured many loans from the banks was first detected by the Tanjore Bank on 27th November, 1947, when the Inspector of the Tanjore Bank inspected and found the shortage and the insolvent was asked to make good the amount which he tried to do by payment of several sums amounting to Rs. 7,100 out of a total of Rs. 11,152 being the value of the shortage. The last of such payment was made on 10th December, 1947. After that no definite step was taken nor any proceeding contemplated by the appellant-bank. By Exhibit A-11, dated 11th December, 1947, the insolvent informed the appellant-bank that he had till then paid Rs. 7,100 and that he would pay the balance of the amount within two or three days and asked for 30 days time for discharging the entire loans. There is a letter written by P.W. 5, Panchanathan, the manager of the appellant-bank, to the insolvent (Exhibit B-9, dated 16th December, 1947) which discloses that the insolvent had been asking P.W. 5 to sell certain jewels, for making a further payment towards the dues to the appellant. The learned District Judge has commented on the conduct of P.W. 5 and the friendly letter he wrote, Exhibit B-9, which indicates that P.W. 5 had been hand in glove with the insolvent and he must have been very friendly and must have known even the disappearance of the bulk of the goods by 16th December, 1947, when the Indian Overseas Bank eventually detected the disappearance of the stock. There is room for believing that P.W. 5 and the insolvent were good friends. In the schedule of assets and liabilities of the insolvent he had shown the Tanjore Bank as creditor only to the extent of Rs. 20,000 and he had included P.W. 5 himself as creditor to the extent of Rs. 14,500, the suggestion being that P.W. 5 had a share in the loan obtained from his bank and that the entire amount obtained as loan from the Bank was not intended for the insolvent but the amount was shared by P.W. 5 and the insolvent. It is unfortunate that in this case the insolvent has not been examined; his evidence could have been very valuable for more than one reason not only on the question of collusion of P.W. 5, but also on the other and more important question as to what considerations prevailed upon the insolvent in executing the security bond. But, in view of the other evidence in this case, the decision on the latter question, however, does not present any difficulty.

It is not disputed that the 1st respondent-bank was not aware of the extent of the liabilities of the insolvent, nor of his indebtedness to the Tanjore Bank on the security of the very same goods over which the 1st respondent had advanced moneys. On the 16th December, 1947, as a result of the surprise inspection by R.W. 1 the shortage was detected and from the evidence R.W. 1 and R.W. 2 whose evidence has been accepted by the lower Court and about whose veracity nothing could be suggested the events that led up to the execution of Exhibit A-14 can be clearly understood. There was undoubtedly a threat of criminal prosecution, which was imminent and which, but for the intervention of Jayaveera Pandya Nadar, would have been put into execution. The decision taken by the insolvent to execute the security bond was mad practically on the spot on 16th December, 1947, and it is here that one has to judge what was it that made the insolvent to come to that decision. One can picture or imagine what could have passed in the mind of the insolvent at the time when R.W. 1 threatened to criminally prosecute him. The insolvent must have been satisfied that he could not escape by making any assurances as to payment as in the case of the Tanjore Bank, where, however, there was no threat or suggestion of criminal prosecution on 27th November, 1947, or subsequently at any time, the insolvent

knowing full well that in the 1st respondent bank he had no obliging friend like P.W. 5 and that it was certain that R.W. 1 would criminally prosecute him for which purpose he had already consulted his local lawyer. Whether it is a case of analysing mentally the state of the insolvent's mind, or call it psycho-analysis, or reading his mind at the psychological moment the decision to execute the security bond was come to, such analysis could only be based on the evidence in this case, and not on what the insolvent could say since he was not examined. This is not a case, however, where there is paucity of evidence as to the circumstances that attended the execution of the security, when it might be difficult, especially in the absence of the insolvent's evidence, to find out, what could have been the state of his mind. There is clear evidence that there was that threat of criminal prosecution, not an empty threat, but a threat which was sure to be put into action and the avoidance of the criminal prosecution has been spoken to which must necessarily be the *causa causans* and the motive force in the insolvent agreeing to give security. The test is to find, what is it that eventually and effectually operated in the mind of the insolvent or what is the compelling force that induced him, or what is the immediate cause for the insolvent to enter into a transaction of this nature. The term 'with a view' has been explained by the learned Judges in England elaborately and vividly by the use of such phraseology as the English language would permit, all of which provide only one test for understanding the meaning of "with a view", that is, if no other consideration prevailed but the only object was to prefer the 1st respondent-bank, then it could be said it was done voluntarily, nothing else influencing his decision to make the preference. If the sole view or the only view was to prefer the creditor, then undoubtedly the transaction could not be supported. But, if there are several considerations which must have prevailed upon the insolvent other than merely preferring a particular creditor, then the Court has to examine such considerations and find out which of those considerations eventually led him into the transaction.

In every case of a preference of one creditor to another there might arise a feeling among the other creditors that injustice has been done to them by reason of the properties not being available for distribution under the insolvency law. We are not concerned with the propriety or the morality of the insovent's conduct in obtaining large sums from the appellant-bank and others and by execution of th security depriving them of the rateable distribution which they would be entitled to get if the properties had been made available for their benefit as well; but we are only concerned with the examination of the facts that led to the execution of the security and applying the principle of section 54 to a given case and finding whether the facts come within the four corners of the terms of that section. The facts have to be judged not by the result, since the result in such cases is likely to be to the detriment of other creditors and deprive them of the benefit of the insolvency law. Equally the *bona fides* or otherwise of the preferred creditor are immaterial. It may be, though not in the present case, that the preferred creditor might be having full knowing of the bankrupt circumstances of the insolvent and with that knowledge he might in a given case, where the debtor has so placed himself in a position as to be liable to be proceeded against criminally, by a threat of such prosecution, obtain a transfer of his properties and such a transfer could not be assailed under section 54.

If the mere preference was what was intended to bring it within the language of section 54, as Lord Halsbury pointed out in *Sharp* v. *Jackson*[1].

"Nothing could have been easier than to have enacted if they had thought proper to do so, that any preference to one creditor over another creditor, or any greater advantage....but any advantage given by previous payment to one creditor, to which advantage all the other creditors were not a party, should of itself be a preference which should be void under the statute. Nothing, I say, could have been easier than to have made such an enactment, if that was intended, but, in my opinion, no such intention is to be gathered from the statute".

Considerations such as whether the security bond results in stifling criminal prosecution and as such against public policy under section 23 of the Indian Con-

1. (1899) A.C. 419 at 423.

tract Act are all extraneous to the only point to be decided, *viz.*, whether the transfer has been made with a view of giving that creditor a preference over other creditors under section 54. The security bond in this case might be open to attack under other provisions of law, which, however, have not been raised or argued in this appeal ; the only point on which this security is sought to be avoided is that it offends section 54 of the Provincial Insolvency Act. Considerations such as whether the transaction could be considered to be a moral act or whether it is inequitable or whether it offends the other provisions of law are all foreign to the scope of an enquiry as to whether a particular transaction is affected by section 54 of the Act. These matters could not enter into the consideration of the question of finding out whether the transaction impugned under section 54 has been made with a view to prefer the creditor or otherwise.

It was argued with considerable emphasis that if the motive or the intention, or whatever that persuaded the insolvent to execute the security bond, was the avoidance of a criminal prosecution, the facts and circumstances of this case would show that he not only defrauded the 1st respondent-bank but he had equally made himself liable for similar offences and liable to be proceeded against by the appellant bank and when he agreed to execute the security bond he must have been aware that he had defrauded the appellant-bank and they were likely to proceed against him criminally and that, even though he might escape such a prosecution from the 1st respondent-bank by agreeing to execute the security bond, he could not by agreeing to execute the security bond avoid criminal prosecution altogether. It is therefore urged that the threat of criminal prosecution could not have had any effect in the insolvent's mind and that could not therefore be considered to be a factor, which urged him to execute the document. The fallacy of this argument lies in assuming that this aspect, namely, that he might not escape a prosecution from the appellant-bank was present and could reasonably be expected to have been present in his mind at the time. On the other hand, in spite of the de ection of fraud by the appellant-bank, not only did they not threaten any criminal prosecution, but they did not even take steps in any civil Court for the enforcement of their right and were content to receive the payment in instalments. It is not unreasonable to expect the insolvent to have been under the belief, especially in view of the very friendly relations he had with the manager of the appellant-bank, P.W. 5, that there was not likely to be any trouble from the quarter and the prosecution, if any, in so far as the 1st respondent was concerned, was not only real but imminent. Here again, even assuming he had in his mind that he had another criminal prosecution to face—and which he eventually faced at the instance of the appellant-bank—so long as it has been found on the evidence that it was the threat of criminal prosecution from the 1st respondent-bank that immediately indu ed him to offer to execute the security bond, that is sufficient to hold that the document was the result of that threat. It is here that the dominant motive that prevailed upon the insolvent was to escape the criminal prosecution, not forever and from every quarter, but from the 1st respondent-bank.

Apart from the imminent prosecution from the 1st respondent-bank the insolvent had to face the execution proceedings in O.S. No. 8 of 1946. Exhibit B-39 is an affidavit filed by the decree-holder in O.S. No. 8 of 1946 and immediate execution by attaching emergently the properties of the insolvent was asked for on the ground that the insolvent did not furnish security in pursuance of the order of the High Court which granted stay pending disposal of the appeal filed against the decree in the said suit. This affidavit asking for immediate execution is dated, 19th December, 1947. The inclusion therefore of the sum of Rs. 6,000 to be reserved in the hands of the 1st respondent-bank for payment to the decree-holder in case eventually the insolvent did not succeed in the appeal against the decree was necessitated by the execution proceedings asking for immediate execution. Further, it has to be noted that the insolvent gave an undertaking by his affidavit, Exhibit A-13, filed in the District Court of Nagapattinam that he would not alienate the properties till the disposal of the said appeal. Apart from the pressure by the

decree-holder in O.S. No. 8 of 1946 applying for immediate execution, provision had to be made, if the insolvent was to carry out his agreement with the 1st respondent-bank to execute the security over the immovable properties, for the payment of the decree amount in view of the undertaking not to alienate the properties. The inclusion therefore of Rs. 6,000 in the security bond was to avoid attachment of the properties and also to escape proceedings for contempt in view of the undertaking given to the Court. The circumstance that the decree-holder in O.S. No. 8 of 1946 was the insolvent's uncle could in no view be considered to be a ground for the invsolvent to make arrangement for payment of his debt and thus to prefer him to the other creditor. It will therefore be seen that the arrangement for payment of two of the creditors of the insolvent in preference to other creditors could not therefore be considered to have been with a view to prefer those creditors.

In the result, the appeal is dismissed ; in the circumstances of the case, each party will bear his respective costs throughout.

C.M.P. No. 6193 *of* 1950.—We are unable to find any ground for admitting the additional documents in appeal. The documents sought to be admitted are three hundies executed by the insolvent in favour of Sait Sajjandas Kalidas, bankers, Tiruchirapalli, and the certified copies of the plaint and decree in O.S. No. 39 of 1948 of the file of the Sub-Court, Tiruchirappalli. The ground alleged in the affidavit in support that the appellant expected these documents to be filed when the insolvent was examined does not appeal to me, since, according to the affidavit the appellant got the copies only after the case was closed, on the 12th November, 1949. The grounds alleged do not satisfy the requirements of Order 41, rule 27, Civil Procedure Code. If the relevancy of these documents is for the purpose of showing there were other decrees against the insolvent and there was default in payment of the hundies, these documents are really unnecessary as the insolvent has disclosed in his list of assets and liabilities, Exhibit A-15, the outstanding decree debt due to Sait Sajjandas Kalidas. If the argument is that the effect of Exhibit A-14 is to transfer all the assets of the insolvent amounting to *cessio bonorum*, the fact that apart from these immovable properties, there were several outstandings mentioned in the affidavit could not be ignored. Even otherwise, assuming that by Exhibit A-14 he had transferred all his properties, it might amount to an act of insolvency, but it is not a relevant consideration in examining whether the transaction is affected by section 54 of the Provincial Insolvency Act.

The petition is dismissed.

K.S. ——— *Appeal and petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI NAYUDU.

Logambal Ammal .. *Petitioner.**

Court-fees—Leave to sue in forma pauperis *refused by the Master—Appeal to the Judge in Chambers dismissed—Original Side Appeal—Court-fee payable—High Court-fees Rules, Item* 45 (1)*—Applicability.*

An order by the Master refusing to grant leave to sue *in forma pauperis* to an applicant is one under Order 33 of the Code of Civil Procedure and is as such appealable under order 43, rule (1) (*nn*) of the Code. An appeal to the Judge in Chambers from an order of the Master, though in the form of a Judge's summons as required by the Original Side Rules is an appeal under the said provision of the Code of Civil Procedure and the character of the proceedings before the Judge is not changed. An appeal from an order passed by the Judge in Chambers on appeal from the order of the Master, is an appeal under clause 15 of the Letters Patent and Item 45 (1) of the High Court-fees Rules would not apply to such an appeal and the proper Court-fee payable is that provided under item 45 (2) because a Judge of the High Court sitting in Chambers is not subordinate to the High Court, notwithstanding that an appeal is provided against the order or judgment of a single judge of the High Court to a Bench of the same High Court.

On appeal from the order of Hon'ble Mr. Ramaswami, J., dated 11th November, 1954, and made in exercise of the ordinary original jurisdiction, in Application No. 4431 of 1954 in Application No. 756 of 1954 (pauper suit sought to be filed, in the Original Side of the Court).

* S.R. No. 3484 of 1955 (O.S.A.) 10th May, 1955.

O. Radhakrishnan for Petitioner.

G. Ramanujam for the Assistant Government Pleader (*K. Veeraswami*) for the State.

The Court made the following

ORDER.—This arises out of a reference made by the Master as regards the correct fee payable on the appeal.

The appellant applied for leave to institute the suit *in forma pauperis* in Application No. 756 of 1954, which came up before the Master, who rejected the application and refusing him permission to sue as pauper, by his order, dated 10th September, 1954. As against the order dismissing his application an appeal was preferred to the Judge sitting in Chambers, Application No. 4431 of 1954, which likewise was dismissed on 11th November, 1954. The order of the Master was passed under Order 33, rule 7, Civil Procedure Code, after taking evidence and hearing arguments. As against the order of dismissal of the appeal before the learned Judge, this O.S.A. is preferred with a Court-fee of Rs. 2 on the memorandum of appeal. The appeal was returned for payment of proper Court-fee.

The contention of the appellant is that though the order of the Master was appealed against, the proceeding before the learned Judge is virtually not an appeal, but only an application, as the proceeding is only a Judge's summons and the order of the learned Judge dismissing the Judge's summons seeking to set aside the order of the Master could only be considered to be an order which would be appealable under the Civil Procedure Code and a Court-fee of Rs. 2 only is payable under item 45 (1) of the High Court-fees rules. Item 45 is as follows :

"Memorandum of appeal from an order other than an order under the Madras Agriculturists Relief Act, 1938 :

(1) Where the order appealed from would be appealable under the Code of Civil Procedure, 1908, if it had been passed by a subordinate Court .. Rs. 2.

(2) In any other case. .. Rs. 100."

The obvious fallacy in the contention of the learned counsel is that he assumes that the Judge's summons taken out to set aside the order of the Master is not an appeal. An order passed under Order 33, rule 7, Civil Procedure Code, is appealable under Order 43, rule 1 (*nn*), which provides that " an order under rule 5 or rule 7 of Order 33, Civil Procedure Code, rejecting an application for permission to sue as pauper on the ground specified in clause (*d*) or (*d*-1) of rule 5 aforesaid " is appealable. The order having been passed by the Master under Order 33, rule 7 and being appealable, an appeal was filed before the learned Judge which, under the Original Side Rules, has to be in the form of a Judge's summons. The mere fact that the Original Side Rules provide the form of the appeal to be by way of Judge's summons would not deprive the character of the proceedings before the Judge, being a proceeding to set aside the order of the Master, which right to set aside the order is by way of an appeal provided for under Order 43, rule 1 (*nn*), of the Code. The present Original Side Appeal is not against an order passed rejecting the application for leave to sue *in forma pauperis* under Order 33, rule 7, but is against an order passed by the Judge sitting in Chambers on the Original Side of the High Court in appeal, and an appeal against such an order is provided for under clause 15 of the Letters Patent. The order of the learned Judge is therefore not an order passed under Order 33, rule 7, but an order passed in appeal. Item 45 of the High Court-fees Rules provides for the payment of Court-fee of Rs. 2 only when the order appealed from would be appealable under the Civil Procedure Code if it had been passed by a subordinate Court. It is needless to point out that a Judge of this Court sitting in Chambers is not subordinate to the High Court notwithstanding that an appeal is provided against the order or judgment of a single Judge of the High Court to a Bench of the same High Court.

In any view, Item 45 (1) of the High Court-fees Rules would not apply to the present case and the proper Court-fee is that provided under item 45 (2), namely, Rs. 100.

R.M. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MACK.

Minor Krishna Raju and another .. *Petitioners**

v.

Ayyappa Chettiar and another .. *Respondents.*

Limitation Act (IX of 1908), *section* 6—*Applicability—Suit by guardian on pronote in name of minors filed five years after date of pronote—If entitled to benefit of section* 6—*Interest for more than* 3 *years disallowed—Civil Procedure Code* (*V of* 1908), *section* 34.

Where a pronote is obtained by a guardian in the name of the minors the minors are entitled to sue on it after attaining majority and to obtain the full benefit of section 6 of the Limitation Act. The benefit of section 6 is not limited to the period after the cessation of the disability, but applies also to the period during which disability exists. Persons under disability are not forbidden to sue or apply (by their next friend) before the cessation of disability; their next friend may sue or apply at any time during the continuance of the disability, whether the ordinary period of limitation has already expired or not. Accordingly a suit filed by a guardian after five years from the date of the pronote in the name of minors cannot be held to be time-barred. [Interest, however, was allowed only for three years prior to the suit.]

Mitra's "Law of Limitation and Prescription", seventh edition at page 78, referred to. *Ramanuja Ayyangar* v. *Sadagopa Ayyangar*, (1904) 15 M.L.J. 249: I.L.R. 28 Mad. 205 and cases following it distinguished.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Principal Small Causes Judge, Salem, dated 17th June, 1952 and passed in S.C. No. 1095 of 1951.

C. S. Swaminathan for Petitioner.

D. Ramaswami Aiyangar and *P. R. Varadarajan* for Respondents.

The Court delivered the following

JUDGMENT.—This petition raises a simple point of limitation for determination, which obviously has been wrongly decided by the learned Small Cause Judge. The Advocate-Guardian, appointed by the District Court for two minors in O.P. No. 15 of 1945, obtained a pronote for Rs. 297-4-0 on 25th August, 1946, from two debtors of the minors' estate. The guardian filed the suit, on 1st August, 1951, without doing anything to save limitation during the usual period of three years. The District Munsif dismissed the suit as time-barred, holding that the pronote was to the guardian solely though described in it as guardian of the minors and that, therefore, the benefit of section 6 of the Limitation Act could not be claimed by the minors. He appears to have been misguided by a ruling in *Ramanuja Ayyangar* v. *Sadagopa Ayyangar*[1], the facts of which he thought were more or less on fours with the present case. That was a case of a minor, who sued by his next friend in August, 1903, to recover an amount on a promissory note, executed in September, 1897, in favour of his mother and alleged to have been made and delivered on account of his estate. The District Munsif held that as the minor's money had been lent on the pronote, the suit was not barred by limitation. The learned Bench held that the mother's name alone appeared on the pronote as the holder and payee, and that therefore, under the Negotiable Instruments Act, she was the person who was entitled to sue. This decision was followed in *Vishnu Narayan Deo* v. *Keshav Gajanan Potbhare*[2], in which it was held that section 6 of the Limitation Act had no application to a suit on a promissory note taken by a guardian on behalf of a minor, which ought to be instituted within three years of its date. That decision was considered by another Bench of the Bombay High Court in *Manikshet* v. *Ajamkha Wallad Sardarkha*[3]. That was a case, in which, after attaining majority, a minor, on behalf of himself and his younger brother, were permitted to sue on a bond exe-

* C.R.P. No. 2019 of 1952. 28th February, 1955.

1. (1904) 15 M.L.J. 249 : I.L.R. 28 Mad. 205.
2. (1924) 26 Bom.L.R. 426.
3. (1926) I.L.R. 50 Bom. 831.

cuted to their mother as guardian. It would appear that *Vishnu Narayana Deo* v. *Keshav Gajanan*[1], proceeded on the assumption that the pronote considered there was similar to the pronote in *Ramanuja Ayyangar* v. *Sadagopa Ayyangar*[2].

There can be no doubt that the pronote in the present case was in the name of the minors who are entitled to sue on it after attaining majority, and to obtain the full benefit of section 6 of the Limitation Act. Mitra in his Law of Limitation and Prescription, 7th edition, at page 78, cites a wealth of case law in support of the following propositions:

"The benefit of section 6 is not limited to the period after the cessation of the disability but applies also to the period during which disability exists. Persons under disability are not forbidden to sue or apply (by their next friends) before the cessation of disability ; their next friends may sue or apply at any time during the continuance of the disability, whether the ordinary period of limitation has already expired or not."

One of the more recent decisions in support of the above view is *Ramesh Chandra* v. *Firm Kashi Ram Bhajan Lal*[3]. It would be most anomalous to hold that it would be open to a minor to sue after attaining majority, in which case he would be fully entitled to full time allowed by section 6, and to deny the guardian's right to sue on his behalf before he attains majority and more than three years from the date of a pronote. In this case although the Advocate-Guardian, is strictly entitled in law to file a suit at any time before the minors attain majority, one would have expected him to file the suit within the ordinary period of three years from the date of the pronote. There may be, of course, some reasons which led him to file the suit after 5 years from the date of the pronote. The suit cannot be held to be time-barred.

The plaintiffs ask for interest at contract rate on the pronote, namely, 6¼ per cent. from the date of the pronote, that is, for 5 years prior to the institution of the suit. I see no grounds for allowing interest for more than three years prior to the suit, which is the normal period and within which the Court guardian should I think have instituted the suit. There will be a decree in favour of the plaintiffs for Rs. 297-4-0 with interest for three years at 6¼ per cent. upto the date of the suit and at 6 per cent. thereafter. Mr. Ramaswami Iyengar for respondents says that a plea, that they were agriculturists, was taken in their written statement. But it is obvious from the lower Court's order that this plea was abandoned, and the only point for determination when the suit came up for hearing in the lower Court was this limitation issue.

The petition is allowed with costs.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE KRISHNASWAMI NAYUDU.

T.M. Sivasubramania Chettiar .. *Petitioner**

v.

G.M. Ramaswami Iyer and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 10—*Prior application—When a bar to a subsequent application.*

The language of section 10 of the Madras Buildings (Lease and Rent Control) Act, 1949, is clear and what is required to be established to attract the operation of the bar under that section is not that the revious application was finally disposed of but that the issues that were raised between the same parties in the revision petition had been finally decided. The words 'finally decided' in the section clearly implies that the prior application should have been decided on the merits.

Ranganatham v. *Sankarlal Davey*, (1949) 2 M.L.J. 594 and *Revathi* v. *Venkataraman*, (1949) 2 M.L.J. 597, referred.

Even if one of the issues in a prior application has not been finally decided it will be open to a petitioner to file a subsequent eviction petition on the ground on which there had been no final adjudication on merits.

1. (1924) 26 Bom.L.R. 426.
2. (1904) 15 M.L.J. 249 : I.L.R. 28 Mad. 205.
3. A.I.R. 1936 All. 152.

*C.R.P. No. 2089 of 1952. 20th January, 1955.

In whatever manner a previous petition was disposed of, whether it was dismissed for default of appearance or it was withdrawn with liberty or without liberty to file a fresh application or was not pressed and dismissed or in any other manner disposed of, short of adjudication on merits the bar under section 10 will not operate.

Gudivada Jagannadham v. *A.S. Krishna & Co., Ltd., Guntur,* (1952) 1 M.L.J. 156, distinguished and doubted.

Petition under section 115 of Act V of 1908 and section 12-B of the Madras Buildings (Lease and Rent-Control) Act praying that the High Court will be pleased to revise the order of the District Court of Coimbatore, dated 22nd February, 1952, and made in C.M.P. No. 530 of 1951, presented to revise the order of the Court of the Subordinate Judge (Prl.) Coimbatore, dated 6th August, 1951 and made in C.M.A. No. 48 of 1951, preferred against the order of the Court of the Rent Controller, Pollachi, dated 18th February, 1951 and made in R.C.P. No. 106 of 1950.

S. Thyagaraja Ayyar for Petitioner.

T. V. Balakrishnan for Respondent.

The Court delivered the following

JUDGMENT.—This Revision Petition arises out of an application under the Madras Buildings (Lease and Rent Control) Act. The petitioner is the landlord, whose petition for eviction was allowed by the House Rent Controller, Pollachi and confirmed in appeal by the Subordinate Judge, Coimbatore, but eventually dismissed in revision by the learned District Judge, Coimbatore. The ground on which the learned District Judge found that the landlord was not entitled to possession was that a previous application for possession on the same grounds, having been dismissed, the present petition under the Rent Control Act, out of which this revision arises, was not maintainable under section 10 of the Madras Buildings (Lease and Rent Control) Act.

The landlord filed R.C.P. No. 136 of 1949 before the House Rent Controller, Pollachi, for the eviction of the tenants on two grounds, *viz.*, that they had allowed the rent to fall in arrears and that the premises were sublet, the subletting having been to one Govindaswami. When that petition came up before the Rent Controller on the 3rd, February, 1950, the landlord, the petitioner did not press the petition and it was dismissed. The present petition R.C.P.No.106 of 1950, was instituted in September, 1950, eviction being sought on two grounds, *viz.*, that the tenants had committed waste on the property and that they had sublet the premises to Govindaswami. The learned District Judge while holding that there was subletting to Govindaswami which would entitle the petitioner for an order of eviction, dismissed the petition on the ground of the bar under section 10 of the Act. The learned District Judge, relying on the decision of Subba Rao, J., in *Gudivada Jagannadham* v. *A. S. Krishna & Co. Ltd., Guntur*[1], upheld the contention of the respondents as to the bar of the petition under the provisions of section 10 of the Act.

Section 10 says :

"The Controller shall summarily reject any application under sub-section (2) or under sub-section (3) of section 7 which raises between the same parties or between parties under whom they or any of them claim, substantially the same issues as have been finally decided or as purport to have been finally decided, in a former proceeding......"

The meaning of the words "finally disposed of" has been the subject of consideration in two Bench decisions of this Court, to one of which I was myself a party, *viz.*, *Ranganatham* v. *Sankarlal Davey*[2] and *Revathi* v. *Venkataraman*[3]. In the former case, a previous application by a landlord was dismissed for default of appearance and it was held that the dismissal did not act as a bar against a second application for eviction being filed, the view taken being that the words "finally decided" in the section clearly implied that the prior application should have been decided on merits and that without an adjudication on the merits, the issues could not be said to have been finally decided. In the latter decision, a previous application for eviction was withdrawn and the withdrawal was with liberty to file a fresh petition, and it was held that where an application for eviction

1. (1952) 1 M.L.J. 156.
2. (1949) 2 M.L.J. 594.
3. (1949) 2 M.L.J. 597.

was withdrawn and dismissed, it cannot be said that the petition was finally disposed of to bar a fresh application for eviction, the view taken being that there should be a decision on merits so that it may be a bar for further proceedings for eviction. It was observed that when an application for eviction was dismissed for default of appearance or for non-prosecution, a subsequent application was not liable to be rejected under section 10 of the Act.

It is not suggested in this case that either of the grounds on which the previous petition was filed was gone into and that there was an adjudication on the merits. And it is common ground that the petition was withdrawn as not pressed. It is, therefore, obvious that there could not have been a decision on merits of either of the issues that arose in that petition. The decision of Subba Rao, J., relied on by the learned District Judge, proceeds on a diffierent set of facts. In that case, the petitioner applied for eviction on four grounds, and he obtained an order for eviction on a decision on merits of all the four grounds. But in appeal by the respondent, he gave up two of the grounds and in respect of the other two grounds, the Subordinate Judge found against him. Subsequently, he filed another petition on the two grounds which were not pressed in the appellate Court. The objection of a bar under section 10 was taken and the view of the learned Judge was that when an application with specific grounds was filed and if some of the grounds are not pressed, an order of the Court dismissing the application on that basis is a final adjudication on the questions raised but not pressed. With great respect to the learned Judge, while it could be said that there was a final adjudication of the petition, it is, however, difficult to say that there was a final adjudication on the questions raised but not pressed. The language of section 10 is clear and what is required to be established is not that the previous petition was finally disposed of but that the issues that were raised between the same parties in the previous petition had been finally decided. In my view, even if one of the issues has not been finally decided in the previous petition, it will be open for the petitioner to file a subsequent eviction petition on the ground on which there had been no final adjudication on merits. That question, however, does not arise in the present case, as it could not be pretended that there has been any decision on any of the issues on merits in R.C.P. No. 136 of 1949. The fact that the petitioner did not press the previous petition could not be held, within the meaning of the language of section 10, as a bar for a subsequent eviction petition, as the issues raised in the previous petition had not been finally decided, as only a decision on merits would amount to a final decision. In whatever manner the previous petition was disposed of, whether it was dismissed for default of appearance, or it was withdrawn with liberty or without liberty to file a fresh application, or was not pressed and dismissed, or in any other manner disposed of, short of adjudication on merits, the requirements of section 10 could not be held to have been complied with, as it is only a decision on merits that would justify the view that a subsequent application is barred by virtue of section 10 of the Act. The learned District Judge has failed to appreciate the scope of the present petition and erred in relying on the decision quoted in *Gudivada Jagannadham* v. *A. S. Krishna & Co., Ltd., Guntur*[1], the facts of which are entirely different from the facts of the present case.

In the result, the petition is allowed with costs here and in the Court below. Time for delivery of possession one month.

R.M. *Petition allowed.*

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1. (1952) 1 M.L.J. 156.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE KRISHNASWAMI NAYUDU.

S.S.S. Latchumanan Chettiar .. *Appellant**

v.

M.L.N. RM. Veerappa Chettiar and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 66—Object and scope of—Benami purchases at execution sales—When prohibited—Purchase by one on behalf of another under a pre-existing arrangement—If prohibited.

Section 66 of the Code of Civil Procedure has been enacted to check benami purchases at execution sales, for the benefit of or at the instance of judgment-debtors. The object is to discourage not only purchases for the benefit of the judgment-debtors, but also to discourage secret purchases, with a view to secure the best price for the properties in an open public auction and ensure the decree-holders the full benefit of their decrees. But the scope of the section should not be extended so as to apply to cases where the decree-holders have, by an arrangement among themselves sought to safeguard their interests without being defeated by the judgment-debtors. Such arrangements must be upheld and section 66 of the Code cannot be invoked to defeat such arrangements.

The preponderance of authority of the various Courts in India tends towards the view that section 66, Civil Procedure Code, could be applied only when the suit is based on the sole ground that the purchase at the auction by the certificated purchaser is on behalf of the plaintiff, that is, when the purchase is an ordinary benami transaction as it is commonly understood in this country, where the auction-purchaser is a benamidar of the plaintiff and where no other circumstances exist as to any antecedent relationship existing between the parties or any pre-existing interest in the properties arising under law or under any arrangement. If it is shown that there is some independent pre-existing interest in the properties sold or the plaintiff is otherwise interested in the result of the sale and, if in these circumstances, an arrangement is entered into whereby the property is purchased in the name of one and subsequently the plaintiff was to be given a share or an interest in the same, it cannot be held that such a transaction is a benami transaction which is hit by section 66, Civil Procedure Code. The section should be applied strictly and confined to cases which come within the specific language of the provisions and its scope cannot be extended to cases where it would be necessary in the interests of justice to give effect to the real nature of the transaction.

Appeal against the decree of the Court of the Subordinate Judge, Dindigul, in Appeal Suit No. 147 of 1948, preferred against the Decree of the Court of the District Munsiff of Periakulam in Original Suit No. 346 of 1947.

M. Murugappa Chettiar for Appellant.

G. R. Jagadisan for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. His suit was for partition of two items of immovable properties in which his claim was for an 1/6th share. He obtained a money decree in O.S. No. 160 of 1933 on the file of the District Munsiff's Court, Periyakulam, against one Palanisami Chetti. The firm of which the 2nd and 3rd defendants were partners also obtained a money decree in another suit O.S. No. 44 of 1933 on the file of the same Court against the said Palanisami Chetti. The suit properties were attached in execution of both the decrees by the respective decree-holders and proceedings for bringing the properties to sale were taken. The properties were put up for sale on 9th November, 1933 and 7th December, 1933, in execution of the decree in O.S. Nos. 160 of 1933 and 44 of 1933 respectively. On the date of the first sale, that is, on 9th November, 1933, an agreement (Exhibit A-5) was entered into between the plaintiff's agent representing the plaintiff and the agent of defendants 2 and 3 on their behalf. The substance of the agreement is whomsoever of the two decree-holders may take in auction the properties, the plaintiff would be entitled to an 1/6th share and defendants 2 and 3 to a 5/6th share, (the 1/6th and 5/6th shares being arrived at in proportion to the respective amounts of their decrees) and that the expenses of the sale should be met in the same proportion. In pursuance of the said agreement, item 2, which is of an extent of 69 cents, was purchased by the plaintiff in his name for a sum of Rs. 71 and item 1 measuring 2 acres 67½ cents was purchased by defendants 2 and 3 in their names for Rs. 1001. Possession of the properties were delivered to the respective parties, item 2 on 20th March, 1924 and item 1 on 30th July, 1934. The

* S.A. No. 2699 of 1949. 28th February, 1955.

accounts in respect of the sales appear to have been looked into by the parties and each has been claiming and receiving from the other his share of the expenses in the proportion of 1/6th and 5/6th as originally agreed upon. Exhibit A-21, dated 15th February, 1934, is an endorsement of payment of Rs. 166-13-4 to defendants 2 and 3 as and for the 1/6th share out of the sale price of Rs. 1001 for item 1. Exhibit A-12, dated 23rd July, 1944, is the copy of the account sent by the plaintiff to defendants 2 and 3 in respect of the sale price and expenses as regards item 2 and defendants 2 and 3 pay the 5/6th share payable by them. Exhibit A-7 is a similar extract of account of defendants 2 and 3 furnishing the details of the expenses relating to the sale of item 1 and evidencing the receipt of 1/6th share payable by the plaintiff of those expenses. Exhibit A-8, dated 13th April, 1935, is a further list of expenses in respect of which the plaintiff pays his 1/6th share. Exhibits A-9, A-10 and A-11 are similar further extracts of accounts relating to the expenses. There is also the evidence of the plaintiff's witnesses that the produce of both the items of land were divided in 1936 in the proportion agreed upon. There is, therefore, no doubt that the parties had acted on the agreement excepting that the properties were not partitioned as per the shares agreed upon. On 5th March, 1937, the 2nd defendant on behalf of his firm assigned the entire item 1 under Exhibit B-1 to one Kodumudi Alagappa Chetti claiming that the firm was solely entitled to the property and without reference to the agreement entered into with the plaintiff. Alagappa Chetti in his turn sold item 1 along with his other properties to the 1st defendant under Exhibit B-2, dated 6th February, 1939. The purchases made by Alagappa Chetti and by the 1st defendant, who was a minor on the date of the sale in his favour, have been found to have been made with the knowledge of the agreement, Exhibit A-5. The truth and the binding nature of the agreement was denied by the defendants. But both the Courts have found that the agreement was true and was executed by the agent of the plaintiff and the agent of defendants 2 and 3 and that it was acted upon and that till 1936 they adjusted their rights relating to their proportionate share of the income. The suit was, however, dismissed as being barred under section 66, Civil Procedure Code and confirmed in appeal by the learned Subordinate Judge of Dindigul.

The only question therefore that requires to be determined in this suit is whether the suit for partition is not maintainable in respect of item 1 of the suit properties under section 66, Civil Procedure Code. The plaintiff claims title to a 1/6th share on the strength of the agreement, Exhibit A-5. The case in the plaint isthat, since the amounts due under their respective decrees were not paid, both of them had to attach the same properties belonging to the judgment-debtor and bring them to sale, then they entered into an agreement, Exhibit A-5 that in order to recover the said debts both of them should jointly execute the decrees and that in case the properties were brought to sale and the same purchased by either of them both should be entitled in the proportion of 1/6th and 5/6th respectively and, in pursuance of this arrangement, they brought the properties to sale and the plaintiff was only asking for a share consequent on the arrangement between himself and the 2nd and 3rd defendants.

Section 66, clause (1), Civil Procedure Code which is the relevant provision is in the following terms :

> "No suit shall be maintained against any person claiming title under a purchaser certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

The bar under this provision arises if the suit is laid on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims. The case set up by the plaintiff in answer to this objection in the lower Court was that this was not a case of a *benami* transaction but that the plaintiff and defendants 2 and 3 became partners in a joint venture to purchase the properties and a suit by a partner to get his share was not therefore affected.

There has been a series of judicial decisions on the subject. The corresponding provisions in the earlier Codes are section 260 of the Act of 1859 and section 317

of the Act of 1882. The earliest case is *Mussumat Buhuns Kowur* v. *Lalla Buhooree Lall*[1], where a purchaser in a Court sale was resisted by the defendant in possession who pleaded that he was the real purchaser and that the purchase was made benami by the certified purchaser, it was found that the fact of the plaintiff's title being certified as purchaser was not conclusive by section 260 of that Act and that section 260 was confined to a suit brought against a certified purchaser and did not embrace a suit brought by him against a party in possession. The plea of benami therefore was found to be permissible as a defence, though it could not found a cause of action for a suit for possession against the Court auction-purchaser. The Privy Council observed at page 525:

"The object which the framers of the Code probably had in view was to prevent judgment-debtors becoming secret purchasers at the Judicial sales of their property, and to empower the Court selling under a decree to give effect to its own sale, without contention on the ground of benami purchase, by placing the ostensible purchaser in possession of what it had sold, and of insuring respect to that possession by enacting that any suit brought against him on the ground of benami shall be dismissed."

It was pointed out by the Privy Council that the Code has not made benami purchase unlawful and that therefore the real owner may set up his right against the benamidar when his possession is interfered with, as in that case. It was also observed that there was no reason for giving the provisions of the Code a larger operation than the language imported.

In *Bodh Singh Doodhooria* v. *Gunesh Chunder Sen*[2], it was held that the provisions of section 260 of the Code of 1859 applied to ordinary benami purchases at execution sales but did not affect purchases of property by one member of a joint Hindu family in his own name with the joint funds. As regards the object of the provisions, the Privy Council observed at page 329:

"They were designed to check the practice of making what are known as benami purchases at execution sales, *i.e.*, transactions in which *A* secretly purchases on his own account in the name of *B*. Their Lordships think that they cannot be taken to affect the rights of members of a joint Hindu family, who by the operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition, however made, by a member of the family in his sole name, if made by the use of the family funds."

In *Monappa* v. *Surappa*[3], where a purchaser acted benami in buying the property, the initial deposit for the purchase having been paid by the person claiming to be the real owner, the balance having been found by the purchaser, and after the sale the real owner was allowed to continue in possession with an understanding that the purchaser would transfer the property on repayment of the balance of the purchase money, it was held, following the dictum of the Privy Council in *Mussumat Buhuns Kowur* v. *Lalla Buhooree Lall*[1], that since the purchaser acknowledged that his purchase was benami and gave up possession on the understanding that he would transfer the property, sections 317 of the Code was no bar to the institution of the suit and that section 317 contains only a statutory direction that a benami purchase at an auction sale in execution of a decree shall not be accepted as the sole ground of a suit against the certified purchaser.

In *Sankunni Nair* v. *Narayanan Nambudiri*[4], *Kumbalinga Pillai* v. *Ariaputra Padiachi*[5] and *Patracharior* v. *Ramaswami Chettiar*[6], where the purchases have been found to have been made by agents, suits for recovery of the properties were held not to be barred under section 317.

In *Venkatappa* v. *Jalayya*[7], a suit against the auction-purchaser for specific performance of an agreement to convey half a share of the immoveable property, which was purchased in Court auction under agreement subsequent to the purchase, but in pursuance of an arrangement even before the sale, that the property should be purchased in his name and one-half of it should be conveyed to the plaintiff after the sale certificate was obtained, a Full Bench of our High Court held that such a suit was not barred on the ground that the purchase was made on behalf

1. (1872) 14 M.I.A. 496.
2. (1873) 12 Beng. L.R. 317.
3. (1887) I.L.R. 11 Mad. 234.
4. (1894) 4 M.L.J. 64 : I.L.R. 17 Mad. 282.
5. (1895) I.L.R. 18 Mad. 436 : 5 M.L.J. 200.
6. (1918) 9 L.W. 276.
7. (1919) 37 M.L.J. 98: I.L.R. 42 Mad. 615 (F.B.).

of the plaintiff within the meaning of section 66, Civil Procedure Code. It was also held that it was not a benami transaction at all and the allegation in the plaint that the auction-purchaser was a benamidar had not the effect of debarring the plaintiff under section 66, Civil Procedure Code, from maintaining the suit for specific performance.

This decision was cited with approval by the Privy Council in *Vadivelu Mudaliar* v. *Peria Manicka Mudaliar*[1]. Here as well, there was an agreement prior to the sale that after the purchase the property will be conveyed by the appellant, in whose name the properties were allowed to be purchased. After the sales were made in the name of the appellant, the appellant bound himself by agreements to carry out the original agreement with the respondents. In suits by the respondents against the appellant for specific performance, the defence was that the suits were barred under section 66, sub-section (1). It was held that the fresh agreements made after the sale, though carrying out those made before the sale, were not affected by section 66 and the suits were therefore not barred. The Privy Council took the view that the subsequent agreements were unaffected by the section.

In *Suryanarayana* v. *Venkata Subbarao*[2], the plaintiff's property was sold in execution of a decree against him and it was bought by the defendant in his name but the entire amount of the sale price and expenses of the sale was admittedly furnished by the plaintiff, part of it on the day of sale and the balance four days after the sale. On the latter date the defendant addressed a latter to the plaintiff where he referred to the fact of the sale and of the plaintiff having got the defendant to bid at the sale at the plaintiff's cost and concluded by stating that the said land shall be reconveyed to the plaintiff whenever required by him without demanding any consideration therefor. In a suit for specific performance of the agreement contained in the letter, the defendant pleaded section 66 (1), Civil Procedure Code, in bar of the suit. It was held that the facts fell directly within the scope of the section 66 (1), Civil Procedure Code. The decisions in *Venkatappa* v. *Jalayya*[3], and *Vadivelu Mudaliar* v. *Peria Manicka Mudaliar*[1] were distinguished. In that case it will be seen that the judgment-debtor himself entered into an agreement with a third party for purchase of the properties benami, he having provided the entire consideration and the fact that the agreement was subsequent to the sale was held not to make difference on the facts of the case, and if such a transaction were to be allowed, it would be frustrating the object of section 66 (1) provisions of which, in the view of the Privy Council in *Ganga Sahai* v. *Kesri*[4],

> "were designed to create some check on the practice of making what are called benami purchases at execution sales for the benefit of judgment-debtors."

In the present case, however, the suit was not for specific performance of any agreement subsequent to the sale and these decisions may not have any direct application, though subsequent to the sale the conduct of the parties would justify the conclusion that they confirmed the arrangement entered into and acted upon it and intended to stand by it.

In *Ganga Sahai* v. *Kesri*[4], one of the three joint decree-holders of a mortgage decree alone took out execution under section 231 of the Code stating that the other decree-holders had died, and praying that execution might be subject to the rights of their heirs and representatives. He obtained leave to bid at the sale, purchased the property in his own name, and furnished with a certificate of sale, got possession of the property. It was held in a suit by the heirs of the other decree-holders for the shares they were entitled to under the decree, that section 317 of the Code was not applicable as a defence to the suit, and that the plaintiffs were entitled to recover their shares of the mortgaged property. After referring to section 317 corresponding to section 66 of the present Code, it was observed in that decision as follows, at page 564 :—

1. (1920) 39 M.L.J. 11 : I.L.R. 43 Mad. 643 (P.C.).
2. (1951) 2 M.L.J. 76.
3. (1919) 37 M.L.J. 98 : I.L.R. 42 Mad. 615 (F.B.).
4. (1915) 29 M.L.J. 329 : L.R. 42 I.A. 177 : I.L.R. 37 All. 545 (P.C.).

"In their Lordships' opinion the provisions of that section have no application to the present case. They were designed to create some check on the practice of making what are called benami purchases at execution sales for the benefit of judgment-debtors and in no way affect the title of persons otherwise beneficially interested in the purchase."

In *Achhaibar Dube* v. *Tapasi Dube*[1], in execution of a joint decree on a mortgage one of the decree-holders obtained leave to bid at the auction sale and purchased the mortgaged property for the exact amount of the decree, namely, the mortgage debt, interest and costs. Satisfaction of the decree was entered up and the purchaser took possession of the property. It was held that section 317 of the Code of Civil Procedure did not preclude the other joint decree-holder from suing for a declaration that the property so purchased was the joint property of himself and the actual purchaser. After referring to the decision in *Bodh Singh Doodhooria* v. *Gunesh Chunder Sen*[2], Richards, J., observed as follows at page 560 :

"It seems to me, however, that the principle of the reasoning of their Lordships of the Privy Council goes somewhat further than the case of a joint Hindu family. For example, the reasoning would apply with equal force to the case of a partnership under the circumstances I have supposed above. I think also, if the allegations of the plaintiff were proved, that is to say, that the plaintiff being entitled to half of the debt and interest recovered against Babu Janaki Prasad, the defendants purchased the property by means of setting off the amount of the joint decree, and that the property so purchased from the date of purchase upto the commencement of the proceeding for partition was treated as joint property, that the plaintiff would, notwithstanding the provisions of section 317, be entitled to a declaration that the purchased property was under the circumstances joint property and must be treated as such in the partition proceedings."

In *Vishwanath Dhondiraj* v. *Pandharinath Ganesh*[3], a house was sold in execution of a decree. The 1st defendant was the certified purchaser, but half the money was supplied by the plaintiff. The plaintiff brought a suit claiming to recover half of the house by partition. The lower Courts dismissed the suit on the ground that it was a case of a joint venture to buy property at a Court sale and as the sale certificate was issued in the name of one only the suit was not maintainable under section 66, Civil Procedure Code. On appeal to the High Court, it was held that the case was one of partnership in a single transaction for the purpose of purchasing the property and that section 66 had no application to the facts of that case Macleod, C.J., after referring to the case in *Achhaibar Dube* v. *Tapasi Dube*[1], observed as follows at page 604 :

"I do not think there is any difference between the case where one of the partners in a partnership, which is in existence for other purposes, buys property from the joint funds in his own name, and the case where there is a partnership in a single adventure in which two or more persons agree to unite their funds for the purpose of purchasing the property. There is no intention then of a secret purchase by one person in the name of another. It is a joint transaction. The fact that it is conducted by one partner on behalf of himself and as agent of the other partner or partners, takes it out of the range altogether of benami transactions."

Reliance was placed by the lower Court on the decision in *Bishan Dayal* v. *Kesho Prasad*[4], where the plaintiff sued for possession of a half share of a certain property, of which the defendant was the certified purchaser at an auction sale in execution of some other person's decree. The plaintiff alleged that the bid at the auction was made by the defendant on behalf of both the plaintiff and the defendant and the plaintiff was accordingly the owner of half the property. The parties were not members of a joint Hindu family, or of a partnership firm. It was held that the suit was barred by section 66, Civil Procedure Code, Sulaiman, C.J. and Bajpai, J., in dealing with the Privy Council case in *Ganga Sahai* v. *Kesri*[5], observed at page 119 as follows :

"It is urged before us that their Lordships intended to lay down that the rights of persons who are otherwise beneficially interested in the purchase can never be affected by the provisions of the section. We think that their Lordships intended to protect the interest of persons beneficially interested in the property purchased, other than those who claim to have made a benami purchase in the name of the auction purchaser, who are not entitled to maintain the suit contrary to the provisions of section 66. Further, the title of persons otherwise beneficially interested would not be affected......"

1. (1907) I.L.R. 29 All. 557.
2. (1873) 12 Beng. L.R. 317.
3. (1926) I.L.R. 50 Bom. 600.
4. I.L.R. (1937) All. 113.
5. (1915) 29 M.L.J. 329: L.R. 42 I.A. 177: I.L.R. 37 All. 545 (P.C.).

The learned Judges, however, were unable to agree with the view expre sed by the Bombay High Court in *Vishwanath Dhondiraj* v. *Pandharinath Ganesh*[1].

The decision in *Bishun Dayal* v. *Kesho Prasad*[2], went up to the Privy Council and it was confirmed (vide *Bishun Dayal* v. *Kesho Prasad*[3]), the Judicial Committee observing that it was sufficient to say that the only case pleaded by the plaintiff was that Ram Dayal derived his right to half of the village from the auction-purchase having been made in part on his behalf by Kesho Prasad, and no case independent of this purchase and basing title upon subsequent possession was traceable in the memorandum of appeal.

The decision in *Bishun Dayal* v. *Kesho Prasad*[2], was followed by the Patna High Court in *Shiva Shankar Sah* v. *Manoharan Ray*[4], where it was held that section 66, Civil Procedure Code, operates as a bar to a claim by a person who alleges that the actual purchase was either on behalf of himself exclusively or of himself jointly with the certified purchaser, whether the purchase is alleged to be in execution of an express agreement or otherwise and the fact that the principal claims only to have provided a part of the purchase money and to be entitled to only a share in the property does not make any difference in principle.

In *Upendralal Pal* v. *Ajaharuddin Ahmad*[5], where the plaintiffs and three others had all decrees against a common judgment-debtor, and when the properties of the judgment-debtor were put up for sale, the decree-holders agreed that the properties would be purchased in the name of two of them and subsequently the properties would be divided in certain proportions, the parties having contributed towards the purchase in the said proportions, and when a suit was instituted for recovery of the plaintiffs' shares, it was held that section 66 was a bar. The learned Judges were of opinion that the operation of section 66 cannot be ousted by the existence of any private agreement or undertaking and that the only cases in which section 66 could not come in are those where, independent of any agreement or undertaking, the plaintiffs had a right to the purchase by operation of law.

In another case of the Calcutta High Court in *Durgadas De* v. *Bagalananda De*[6], where the purchase was made by a member of the Dayabhaga family, not being the Karta, out of joint family funds and a suit was instituted by a member for recovering the share, the suit was held to be maintainable and the defence raised under sections 66, Civil Procedure Code, was rejected. The object with which the section was enacted as observed by the Privy Council in *Bodh Singh Doodhooria* v. *Gunesh Chunder Sen*[7], and *Ganga Sahai* v. *Kesri*[8], was approved.

The Bombay High Court in *Nimalchand* v. *Madanlal*[9], did not agree with the view taken by the Calcutta High Court in *Upendralal Pal* v. *Ajaharuddin Ahmad*[5], that the operation of section 66 cannot be ousted by the existence of any private agreement or undertaking. In the Bombay case the facts are these : Two items of properties belonging to one Buda Vanjari in survey numbers 21 and 71 were mortgaged to the defendants in 1919. The plaintiffs purchased the equity of redemption of S. No. 21 in 1923. The defendants instituted a suit on the mortgage. An agreement was then entered into between the plaintiffs and the defendants on 14th July, 1940, under which possession of S. No. 21 was to be given to the defendants. In execution of his decree the defendants brought to sale and purchased both the items. The plaintiffs claimed half a share in S. No. 71 as per the terms of the agreement entered on 14th July, 1940. A defence under section 66, Civil Procedure Code, was taken, relying on the observations of the Privy Council in *Ganga Sahai* v. *Kesri*[8], that the provisions "were designed to create some check on the practice of making what are called benami purchases at execution sales for the benefit of judgment-debtors" and it was contended that the plaintiffs having purchased the equity of redemption in respect of one of the properties were in position of judgment-debtor

1. (1926) I.L.R. 50 Bom. 600.
2. I.L.R. (1937) All. 113.
3. I.L.R. (1940) K.P.C. 406 : A.I.R. 1940 P.C. 202 (P.C.).
4. (1939) I.L.R. 18 Patna 181.
5. (1933) I.L.R. 61 Cal. 371.
6. (1934) I.L.R. 61 Cal. 440.
7. (1873) 12 Beng.L.R 317.
8. (1915) 29 M.L.J. 329 : L.R. 42 I.A. 177 ; I.L.R. 37 All. 545 (P.C.).
9. A.I.R. 1952 Bom. 30.

and therefore it was a pure and simple benami transaction, which was sought to be prevented by the enactment of section 66. The learned Judges were of the opinion that it was not every private agreement or undertaking that necessarily attracted the application of section 66, nor could it be said that every private agreement or undertaking affecting the property sold at an auction sale was within the mischief of section 66.

In the present case, the plaintiff attached the suit properties in execution of his decree and, if the properties had been sold, he would be entitled, at any rate, to rateable distribution of the proceeds of the sale along with the defendants, the other attaching decree-holders, and, to that extent, it cannot be said that he is not interested in the result of sale or would not be affected by allowing the properties to be sold without his interest being sufficiently protected. Though it cannot be that he had a beneficial interest in the properties sold, just as a member of a Hindu joint family where the Court auction-purchase is out of joint family funds, in the name of one of the members or in the case of a purchase of property in the name of one of the partners out of partnership funds, the plaintiff has certainly an interest to the extent of getting his decree satisfied out of the sale proceeds. His position, therefore, though not identical with, is analogous at least to, that of the joint decree-holders. This is therefore a case where it could not be said that the plaintiff's claim is based on an agreement and solely for the reason that the purchase by the defendants was benami for him, though in respect of a share in the properties. He cannot be considered to be an absolute stranger to the transaction having no connection or interest in the properties, which were brought to sale. This will be sufficient to take this case away from the mischief of section 66, which, as laid down by the Privy Council, has been enacted to check benami purchases at execution sales for the benefit of or at the instance of judgment-debtors. The object is to discourage not only purchases for the benefit of the judgment-debtors, but also to discourage secret purchases, with a view to secure the best price for the properties in an open public auction and ensure the decree-holders the full benefit of their decrees. But the scope of the section should not be extended so as to apply to cases like the present, where the decree-holders have, by an arrangement among themselves, sought to safeguard their interests without being defeated by the judgment-debtors. Such arrangements must be upheld and section 66 cannot be invoked to defeat such arrangements. It has been seen that section 66, Civil Procedure Code, has been held not a bar to suits instituted for recovery of possession of the properties, or for a share therein where, by operation of law, the plaintiff has been held to possess an interest, for instance, in cases of purchase by a manager of the joint family in the name of a member out of joint family funds, as was the case in *Bodh Singh Doodhooria* v. *Gunesh Chunder Sen*[1], and *Durgadas De* v. *Bagalananda De*[2], or of purchase by agent for the principal as in *Sankunni Nayar* v. *Narayanan Nambudri*[3], *Kumbalinga Pillai* v. *Ariaputra Padiachi*[4] and *Patrachariar* v. *Ramaswami Chettiar*[5], or purchase by a partner as in *Viswanath Dhondiraj* v. *Pandharinath Ganesh*[6] and *Bhudarsao* v. *Samarathmal*[7]. The decision in *Venkatappa* v. *Jalayya*[8] and *Vadivelu Mudaliar* v. *Peria Manicka Mudaliar*[9], are instances where the purchase was in pursuance of an agreement prior to the sale and ratified by a subsequent arrangement to re-sell, where also section 66 has been held to have had no application.

The preponderance of authority of the various Courts in India tends towards the view that section 66, Civil Procedure Code, could be applied only when the suit is based on the sole ground that the purchase at the auction by the certificated purchaser is on behalf of the plaintiff, that is when the purchase is an ordinary benami

1. (1873) 12 Beng.L.R. 317.
2. (1934) I.L.R. 61 Cal. 440.
3. (1894) 4 M.L.J. 64 : I.L.R. 17 Mad. 282.
4. (1895) 5 M.L.J. 200 : I.L.R. 18 Mad. 436.
5. (1918) 9 L.W. 276.
6. (1926) I.L.R. 50 Bom. 600.
7. A.I.R. 1940 Nag. 1.
8. (1919) 37 M.L.J. 98 : I.L.R. 42 Mad. 615 (F.B.).
9. (1920) 39 M.L.J. 11 : L.R. 47 I.A. 108 : I.L.R. 43 Mad. 643 (P.C.).

transaction as it is commonly understood in this country, where the auction-purchaser is a benamidar of the plaintiff and where no other circumstances exist as to any antecedent relationship existing between the parties or any pre-existing interest in the properties arising under law or under any arrangement. What has to be discouraged is a pure and simple benami transaction in Court auction purchase by virtue of this provision. If it is shown that there is some independent pre-existing interest in the properties sold or the plaintiff is otherwise interested in the result of the sale and, if in these circumstances, an arrangement is entered into whereby the property is purchased in the name of one and subsequently the plaintiff was to be given a share or an interest in the same, it cannot be held that such a transaction is a benami transaction which is hit by section 66, Civil Procedure Code. It must be borne in mind that benami transactions are not as such held to be illegal. On the other hand, in cases where the real owner claims title on the ground that the property was purchased benami, Courts have endeavoured to give effect to the real title notwithstanding that the *ex facie* title was in another. It is necessary to apply section 66, Civil Procedure Code, strictly and confine it to cases which come within the specific language of the provision and not extend its scope to cases where it would be necessary in the interests of justice to give effect to the real nature of the transaction.

In the result the appeal is allowed with costs throughout.

No leave.

[The order calling for a finding on other issues and orders thereon are omitted as unnecessary for the purpose of this Report.]

R.M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE RAMASWAMI GOUNDER.

A. S. Kuppuswami Iyer .. *Petitioner**

v.

The Tirunelveli Municipal Council, represented by its Commissioner having its office at V. O. Chidambaram Building in Swami Nalliappar High Road, Tirunelveli .. *Respondent.*

Madras District Municipalities Act (V of 1920), *section* 80 (2) *and Madras Buildings (Lease and Rent Control) Act (XXV of* 1949), *section* 4—*Assessment of property tax—Rent at which the buildings may reasonably be expected to be let—If should be same as 'fair rent' that may be fixed by the Rent Controller under the Madras Act (XXV of* 1949).

The Madras Buildings (Lease and Rent Control) Act, 1949, is a special Act intended to achieve certain special purposes. It has no connection with the provisions of the District Municipalities Act relating to the determination of the gross annual rental value of buildings. For the purpose of ascertaining the reasonableness of the rental value under section 82 (2) of the District Municipalities Act, the Municipality need not be guided by the fair rent that may be fixed by the Rent Controller under the House Rent Control Act.

Petition under section 115 of Act V of 1908 praying the High Court to revise the decree of the Court of the Subordinate Judge of Tirunelveli dated 7th November, 1952 and passed in A.S. No. 116 of 1952 preferred against the decree dated 28th February, 1952, of the Court of the District Munsif of Tirunelveli in O.S. No. 386 of 1950.

T. M. Ramaswami Aiyar and *A. R. Krishnaswami Aiyar* for Petitioner.

T. K. Subramania Pillai and *R. Pichai* for Respondent.

The Court delivered the following

JUDGMENT :—This revision is filed against the judgment and decree of the learned Subordinate Judge of Tirunelveli dismissing an appeal preferred to him against the order of the learned District Munsif dismissing the suit filed by the present petitioner as the plaintiff against the respondent municipality to recover a sum of Rs. 44-4-0 said to be the excess property tax collected from him for the two half years of 1949-50 and the first half year of 1950-51.

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* C.R.P. No. 154 of 1953. 8th July, 1955.

The house in question was constructed by the petitioner about the year 1939 and thereafter the assessment was made on the basis of the gross annual value of Rs. 360. That continued till 1949 when there was a quinquennial revision of the assessment, and when the gross annual value was fixed by the municipality at Rs. 480. It was on that basis the tax was enhanced giving rise to the difference of Rs. 44-4-0 which was claimed in the suit. The main contention that was urged in the Courts below as well as in this revision is that the municipality had no reasons to enhance the gross annual value which prevailed till 1949 and that that value should have been based upon the fair rent which may be fixed for the house under the Madras Buildings (Lease and Rent Control) Act.

Before considering that point, it is well to remember the admission made by the plaintiff himself in the statement which he made to the municipality that the estimate of the annual value of Rs. 480 arrived at by the Commissioner would be proper, if the fair rent to be fixed under the Rent Control Act were not to be taken into account. It will be seen that under section 82, clause 2 of the District Municipalities Act, it is declared that the annual value of lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year. As I said, there is no controversy that, if let, the gross annual value of the house would certainly be Rs. 480 if not more. But the contention is, if the fair rent which the Rent Controller may fix were to be taken into account, then the gross annual value fixed by the municipality would be unreasonable and excessive. The question is whether for the purpose of ascertaining the reasonableness of the rental value under section 82 (2) the municipality should be guided by the fair rent that may be fixed by the Rent Controller under the House Rent Control Act. It must be borne in mind that the latter Act is a special Act intended to achieve certain special purposes. There is no connection between the one enactment and the other, though both have been passed by the same legislature. The House Rent Control Act is intended to serve certain definite purposes. Supposing the State passes another enactment saying that in the municipality no tenant shall pay rent to the landlord, it cannot be contended that the municipality will be precluded from collecting any property-tax. If the Rent Control Act goes out of consideration, then there can be no question that the rental value adopted by the municipality was reasonable within the meaning of the District Municipalities Act.

I, therefore, think that there is no point for interference in this Revision, and it is accordingly dismissed with costs.

R.M. — *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE SOMASUNDARAM.

Rajamuthukoil Pillai and another .. *Petitioners**

v.

Periyassami Nadar *alias* Vedamanicka Nadar .. *Respondent.*

Evidence Act (I of 1872), section 73 and Article 20 (3) of the Constitution—Direction to accused to give thumb-impression in Court for comparison with certain other documents on which the complainant relied—Whether opposed to Article 20 (3) of the Constitution.

A direction by Court asking an accused to give his thumb impression would amount to asking him to furnish evidence against himself which is prohibited under Article 20 of the Constitution.

Sharma v. *Satish Chandra*, 1954 S.C.J. 438 and Judgment in Crl. R.C. No. 677 of 1954, referred to.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Additional 1st class Magistrate of Tirunelveli, dated 7th April, 1954 and made in C.C. No. 25 of 1954.

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*Criminal Revision Case No. 413 of 1954. 24th September, 1954.
(Criminal Revision Petition No. 385 of 1954).

V. P. Gopalan Nambiar for the Petitioners.

K. Venkateswaran for the Respondent.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

The Court made the following

ORDER.—This is a revision by the accused against an order passed by the Additional 1st Class Magistrate, Tirunelveli, on a petition filed by the complainant in C.G. No. 25 of 1954, on his file, asking the Court to issue a process to the accused to produce a certain document and also to direct him to give his thumb-impression in Court so that it may be compared with certain other documents on which the complainant relied. So far as the issue of the process for the production of the document was concerned, the accused had no objection to it and it had been ordered. So far as the prayer for directing the accused to give his thumb-impression was concerned, the accused objected to it, but the lower Court relied on section 73 of the Evidence Act and directed him to give his thumb-impression. It is this portion of the Lower Court's order that is being impugned by the accused in this petition.

The learned counsel for the petitioner relied on the decision of the Supreme Court in *Sharma* v. *Satish Chandra*[1] and another decision in Crl. R.C. No. 677 of 1954 on the file of this Court in support of his contention. In the Supreme Court decision, in considering Article 20, clause (3), their Lordships have held that to be a witness means to furnish evidence, and in this case what is sought by the complainants is that the accused, by affixing his thumb-impression, should furnish evidence to the Court. This is, as pointed out by the Supreme Court, prohibited under Article 20 (3). A Bench of our Court following this decision of the Supreme Court has held that asking the accused to produce certain documents falls within the scope of the decision of the Supreme Court and that such an order cannot be passed. As pointed out already, it seems to me that this direction asking the accused to give his thumb-impression would amount to asking him to furnish evidence which is prohibited under Article 20 (3). The accused therefore cannot be compelled to give his thumb-impression as directed by the magistrate.

The petition is allowed and the direction of the lower Court asking the accused to give his thumb-impression in Court is set aside.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Swaminathan Chettiar .. *Petitioner**

v.

Vellachami Servai and others .. *Respondents.*

Court-fees Act (VII of 1870), *section* 7 (iv) (*c*)—*Applicability—Landlord suing as owner alleging that defendants are lessees who threaten to remove the entire crops and asking for appointment of receiver to harvest the crop—Court-fee payable.*

Where a plaintiff claims to be the owner of the lands, and claims that the defendants are lessees under him and that they have executed lease deeds in his favour agreeing to pay fixed rates of rent and the only allegation of the plaintiff is that the defendants have conspired together to claim the entire ownership in the lands and the crops in themselves and to cheat the plaintiff of his lands and rents, the plaintiff ought to pray for a declaration that he is the owner of the suit lands in question and that he has leased them out to the defendants, as his tenants, stipulating for the rents mentioned in the lease deeds, and then to pray for the appointment of a receiver to harvest the crops as a consequential relief, since the defendants had conspired together to remove and appropriate the entire crops for themselves. In such a case court-fee has to be paid under section 7 (iv) (*c*) of the Court-fees Act.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Sivaganga, dated 23rd June, 1954, and made in check slip in O.S. No. 350 of 1953.

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1. 1954 S.C.J. 428.

* C.R.P. No. 1278 of 1954. 4th May, 1955.

K. S. Desikan for Petitioner.

Respondents not represented.

The Court delivered the following

JUDGMENT.—This is a petition by one Swaminathan Chettiar, the plaintiff in O.S. No. 350 of 1953 on the file of the District Munsif, Sivaganga, to revise and set aside the order of the District Munsif directing the petitioner to pay Court-fee under section 7, clause (iv) (*c*) of the Court-fees Act.

The facts are briefly these : The petitioner, Swaminathan Chettiar, claimed to be the iruwaram owner of the suit holdings in the possession of 38 defendants in the suit, each defendant holding a different extent of land. The defendants, according to the plaintiff, had executed lease deeds in his favour agreeing to pay six marakkals of paddy for each chei and one bundle of straw for swamibogam, and also a half share of the produce. They were all later on said to have conspired together to appropriate the entire produce of the lands for themselves, and not to pay one grain of paddy or one bundle of straw to the plaintiff, and to have, in pursuance of the conspiracy, resolved to harvest the entire crops and remove them without paying the rent stipulated for in the lease deeds. As there was the allegation of conspiracy between all the defendants, the plaintiff joined them all in one suit, instead of filing separate suits against each of them. He prayed for the appointment of a receiver for harvesting the crops, so that the rents stipulated for in the lease deeds might be safeguarded. He did not pray for the recovery of the rents themselves because they had not yet fallen due. He paid only a Court-fee of Rs. 15 under Article 17-B of Schedule II. The Court-fee Examiner issued a check-slip to the effect that, on the allegations in the plaint, Court-fee should have been paid under section 7, clause (iv) (*c*) of the Court-fees Act. But, as he considered that there might be some statutory difficulties in the way of such valuation, he was of opinion that the plaintiff might be allowed to pay a fixed court-fee of Rs. 15 as regards each defendant, or in all Rs. 570 as against the Rs. 15 Court-fee in all paid in the plaint. The learned District Munsif agreed with the Court-fee Examiner that Court-fee was payable under section 7, clause (iv) (*c*) of the Court-fees Act, but did not agree with him that there were any statutory or other difficulties in the way of the payment of the Court-fee under section 7, clause (iv) (*c*). He held that there was absolutely no doubt that the appointment of a receiver asked for in the plaint was only a consequential relief, the ownership of the lands in question and the right to recover the rents stipulated under the leases being the basis for asking for this relief. In other words, the learned District Munsif was of opinion that the plaintiff should have asked for a declaration that the lands in the possession of the defendants were iruwaram lands of which the plaintiff was the owner, and that the plaintiff was entitled to recover rent as per the lease deeds executed by the defendants in his favour, and, as a consequential relief, for the appointment of a receiver to harvest the crops, as the defendants had conspired together to remove the crops in entirety, claiming the sole and exclusive right to them and the lands. The learned District Munsif passed orders accordingly. Hence this revision petition.

I have perused the entire records, and heard Mr. Desikan, the learned Counsel for the plaintiff-petitioner. None of the 38 defendants has cared to appear, obviously because they are all poverty-stricken tenants, who have not got substance enough to engage counsel or even to appear in person in this Court. But, as it is a Court-fee matter, I have to examine the question carefully and come to a conclusion.

Mr. Desikan urged that this was a case where the plaintiff could sue for the appointment of a receiver as the main and only relief, like a reversioner suing for the appointment of a receiver to an estate, where the widow or her alienee or both are indulging in gross acts of waste, which will soon make the estate go out of existence, leaving nothing for any reversioner to succeed to or inherit. I cannot agree that the analogy is correct. In the case mentioned by Mr. Desikan, the reversioner would have no present right at all in the estate, neither title nor possession ; indeed, the reversioner might die before the widow, as he does in many a case. So, it will

be unreasonable in the case of the reversioner not to allow him to sue for the appointment of a receiver as the sole and only relief in the circumstances stated. But, here, the plaintiff claims to be the owner of the lands, and claims that the defendants are lessees under him and that they have executed lease deeds in his favour agreeing to pay fixed rates of rent. His only allegation is that the defendants have conspired together to claim the entire ownership in the lands and the crops in themselves and to cheat him of his lands and rents. It is obvious, therefore, that the plaintiff ought, in the circumstances of this case, to pray for a declaration that he is the owner of the suit lands in question and that he has leased them out to the defendants, as his tenants, stipulating for the rents mentioned in the lease deeds, and then to pray for the appointment of a receiver to harvest the crops, as a consequential relief, since the defendants had conspired together to remove and appropriate the entire crops for themselves. So, I am of opinion that the lower Court was perfectly right in asking for court-fee to be paid under section 7, clause (iv) (*c*) of the Court-fees Act.

This petition deserves to be and is hereby dismissed. Time is given for the plaintiff to pay the deficit court-fee into the lower Court by 3 p.m. on 15th July, 1955, as prayed for.

K.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

M. R. Radha and another .. *Petitioners.**

Penal Code (XLV of 1860), *section* 143—*Scope of—Five or more members defying a prohibitory order and enacting a prohibited drama—Nature of offence—Grant of bail—Conditions if can be imposed.*

In the case of five persons and more defying a prohibitory order against staging a particular drama, they may be taken as having a common object of defying the order and they being members of an unlawful assembly, which is a cognisable offence, a police officer has power to arrest them without warrant and bring them before a Magistrate for remand. The offence will fall under section 143, Indian Penal Code, which is cognisable. But it is a bailable offence and the Magistrate has to release them on the execution by each of them of a bond for a reasonable amount each with two sureties for a like amount. Beyond that the Magistrate has no jurisdiction to impose any other conditions. Accordingly the further conditions imposed in the instant case by the Magistrate, that the persons should not reside within the limits of the Town and Taluk for a period of 15 days from the date of the order and that they should not enact any drama, are beyond the jurisdiction of the Magistrate when granting bail in a bailable offence.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Executive First Class Magistrate, Kumbakonam, dated 9th March, 1955, and made in M.P. No. 1 of 1955.

M. K. Nambiyar and *K. K. Venugopal* for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

The Court made the following

ORDER.—This is an application to revise the order passed by the Executive First Class Magistrate, Kumbakonam. The revision is restricted to that portion of the order relating to the conditions imposed on the petitioners while bail was granted. An order under section 144, Criminal Procedure Code, was passed against the petitioners, as the 1st petitioner and his troupe were about to stage at a particular theatre from a particular date an objectionable version of Ramayana styled as Lava Kusa which was deliberately intended to outrage the religious feelings of a class of the Hindu Public by insulting or blaspheming or profaning the religious beliefs of that class, and which was indecent and scurrillous and that as it was likely to lead to an imminent breach of the peace, the petitioner and his troupe were prohibited from staging the said drama at the particular theatre.

* Criminal Revision Case No. 176 of 1955. 29th April, 1955.
(Criminal Revision Petition No. 171 of 1955).

On information that the 1st petitioner and his troupe were defying the prohibitory order, and that he had collected an unlawful assembly for the purpose of staging the drama at the particular theatre, the police officer proceeded to the particular theatre with a party and found the petitioner with troupe of about 20 persons on the stage enacting the prohibited drama. There was an audience numbering over 1000. As the police officer was of opinion that the petitioner and his troupe were members of the unlawful assembly in consequence of defying the prohibitory order under section 144, Criminal Procedure Code, he arrested the petitioners and produced them before the Executive First Class Magistrate, Kumbakonam, for remanding them. The Magistrate released them on bail on the execution by each of them of a bond for Rs. 2,000 each with two sureties for like amount on the following conditions :

That the petitioners shall not conduct any drama and shall not reside within the limits of Kumbakonam Town and Taluk for a period of 15 days from the date of the order, 9th March, 1955.

It is in respect of these conditions that have been imposed on the petitioners by the Executive First Class Magistrate, Mr. Nambiar, the learned Counsel for the petitioners has taken exception and, contends that the Magistrate has no jurisdiction to impose such conditions on the petitioners. That the police officer has power to arrest any person under section 151, Criminal Procedure Code, if he is satisfied that the person is likely to commit cognisable offence cannot be disputed. If a single individual has defied the order, the offence will fall under section 188, Indian Penal Code, and will not amount to a cognisable offence and he cannot be arrested without warrant. In the case of five persons and more defying a prohibitory order, they may be taken as having a common object of defying the order and they being members of an unlawful assembly, which is a cognisable offence, a police officer has power to arrest them without warrant and bring them before a Magistrate for remand. In this case, the offence will fall under section 143, Indian Penal Code, which is cognisable. But it is a bailable offence. Therefore, the Executive First Class Magistrate has to release the petitioners on the execution by each of them of a bond for a reasonable amount each with two sureties for like amount. Beyond that the Magistrate has no jurisdiction to impose any other conditions. The further conditions imposed on them by the Magistrate, namely, that they should not reside within the limits of Kumbakonam Town and Taluk for a period of 15 days from the date of the order and that they should not enact any drama, are beyond the jurisdiction of the Magistrate when granting bail in a bailable offence.

The conditions imposed on the petitioners by the Magistrate are illegal and they are set aside.

K.S. ——— *Conditions imposed set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Peria Valliappa Chettiar (died) and another .. *Appellants**

v.

Rangayya Goundan (died) and others .. *Respondents.*

Limitation Act (IX of 1908), sections 19 and 20—Scope—Payment towards a debt by a mortgagor who has parted with a portion of the equity of redemption of the mortgaged properties—Whether binds the prior assignees—Payments—When would save limitation.

Under section 20 (1) of the Limitation Act when payment on account of a debt or interest on a legacy is made before the expiration of the prescribed period of limitation by the person liable to pay the debt or by his duly authorised agent, a fresh period of limitation shall be computed from the time when the payment was made.

A mortgagor who has lost all interest in the mortgaged property cannot bind by an acknowledgment under section 19 or by a payment of principal or interest under section 20 of the Limitation Act,

*Second Appeal No. 1959 of 1946. 15th February, 1955.

a person on whom his interest has devolved whether the devolution is of the whole of the mortgaged properties or only a part thereof.

Pavayi v. *Palanivela*, (1940) 1 M.L.J. 766 : I.L.R. (1940) Mad. 872 (F.B.) referred and explained.

In order to be binding on the assignee the acknowledgment or payment must be made before the person making it has parted with his interest in the property to his assignee. If he has disposed of all his interest in the property but the personal liability remains and the payment is made within six years then the limitation is saved.

Thayyanayaki Ammal v. *Sundarappa*, (1941) 2 M.L.J. 913 referred.

There is some difference, however, between an acknowledgment under section 19 of the Limitation Act and a payment under section 20 of the Act and the principles of the one cannot be made wholly applicable to the other. *Narayanappa Naicker* v. *Ramalingam Pillai*, (1950) 2 M.L.J. 13 explained.

If on the other hand the personal liability is barred, if at least part of the mortgaged properties remains with the mortgagor or his assignees, then the payment made by such a person would bind the person on whom the other properties have devolved.

Narayana Reddiar v. *Venkatesa Reddiar*, (1943) 1 M.L.J. 135 and *Thayyanayaki* v. *Sundarappa*, (1941) 2 M.L.J. 913 followed.

Narayanappa Naicker v. *Ramalingam Pillai*, (1950) 2 M.L.J. 13 referred and distinguished.

A purchaser of the equity of redemption is a person liable to pay the mortgage debt within section 20 of the Limitation Act and hence if under a mortgage decree for sale of the mortgaged property to which he is a party, though exempted from personal liability, he pays interest as such, such payment gives a fresh period of limitation for execution of the decree ; but an auction-purchaser of the mortgagor's interest is undoubtedly not a person who has any personal liability.

Askaram Sowcar v. *Venkataswami Nayudu*, (1920) 40 M.L.J. 218 : I.L.R. 44 Mad. 544 referred.

The expression " a person liable to pay " the debt in the first paragraph of sub-section 1 of section 20 of the Limitation Act comprehends not only the mortgagor and his personal representatives upon whom the contract is personally binding but includes the purchaser of the equity of redemption also.

The principle is that so long as the mortgagor has not parted with his interest in the mortgaged properties and continues to be liable under the mortgage he can make a payment which will serve under section 20 of the Limitation Act to start a fresh period of limitation.

Kempamma v. *Racha Setty*, (1947) 1 M.L.J. 153 approved.

Appeal against the decree of the Court of the Principal Subordinate Judge of Salem in Appeal Suit No. 113 of 1945 preferred against the decree of the Court of the District Munsif of Sankaridrug at Salem in O.S. No. 387 of 1943.

N. C. Vijayaraghavachari and *N. C. Srinivasan* for Appellants.

D. Ramaswami Ayyangar, *P. S. Srinivasa Desikan* and *P. R. Varadarajan* for Respondents.

The Court delivered the following

JUDGMENT.—The 4th defendant is the appellant and on his death pending the second appeal his legal representative has come on record as the second appellant. The suit was to enforce a mortgage, Exhibit P-1 for Rs. 1,000, dated 21st October, 1918, executed by the first defendant for himself and as guardian of his minor undivided son, the second defendant, in favour of the first plaintiff. In execution of a money decree against the joint family of the first defendant one item of the mortgaged properties was sold in Court auction and was purchased by the decree-holders themselves represented by defendants 4 to 7 and 14. Their rights have now vested in the 4th defendant. The plaintiffs prayed for sale of the items comprised in the hypotheca including the item now claimed by the 14th defendant and the defence is that so far as that item is concerned, the suit is barred by limitation. The answer of the plaintiffs to get over the plea of limitation was that there was a registered endorsement of payment of Rs. 25 on 20th October, 1930, that is, before the property liability under Exhibit P-1 and that even as regards the item sold out the claim is not barred by limitation since the suit was brought on 5th October, 1942, that is, within 12 years of the endorsement under section 20 of the Indian Limitation Act. The trial Court dismissed the suit as against the item claimed by the 14th defendant but the lower appellate Court has reversed that decree and passed a preliminary decree against the entire hypotheca. Hence this second appeal by the fourth defendant claiming to have the item purchased by him exonerated from the operation of the mortgage decree.

Under section 20, clause (1), of the Limitation Act where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt of legacy or by his duly authorised agent a fresh period of limitation shall be computed from the time when the payment was made. If, therefore, it is held that the endorsement, dated 20th October, 1930, evidenced the payment made by the person liable to pay the debt, then the decision of the lower appellate Court is right, but what is argued is that in regard to the item which is claimed by the 14th defendant, it had gone out of the ownership of the first defendant's joint family long before the payment was made towards the debt and that in that case any payment made towards the debt could not be a payment made by the person liable to pay the debt in respect of the property which has gone out of the ownership. Thus it is urged that no liability is imposed upon the property in which the equity of redemption has ceased to be with the mortgagor to pay any portion of it and if such payment is made, it cannot be considered to be one made under section 20 of the Limitation Act. The Full Bench decision in *Pavayi* v. *Palanivela*[1], lays down that a mortgagor who has lost all interest in the mortgage property cannot bind by an acknowledgement under section 19 or by a payment of principal or interest under section 20 of the Limitation Act a person on whom his interest has devolved whether the devolution is of the whole of the mortgage properties or only a part thereof. In order to be binding on the assignee the acknowledgment or payment must be made before the person making it has parted with his interest in the property to the assignees. In the case before the Full Bench the payment was made after the equity of redemption in the entire properties had been assigned by the mortgagor to a third party and after the mortgagees had lost all their personal remedies against the mortgagor. In those circumstances the Full Bench held that the payment made by a person who has no liability whatever, either personal liability which had become barred or liability against the property which has already been transferred and the ownership in it has been lost by him, cannot bind the purchaser of any portion of the mortgage property. Learned counsel for the appellant invited my attention to a passage at page 885 of the report wherein the learned Chief Justice observes as follows :—

> " In certain of the cases to which I have referred the mortgagor retained an interest in part of the mortgage properties sold but do not consider that this makes any difference in principle. The question is whether a mortgagor who has lost all interest in the mortgage property can by an acknowledgment within the meaning of section 19 or by the payment of interest or principal within the meaning of section 20 of the Limitation Act bind a person on whom his interest has devolved."

Because the learned Chief Justice did not consider that the retaining of interest in part of the hypotheca by the mortgagor would not make any difference in principle, it is urged for the appellant that the Full Bench decision applies to the facts of the present case since at the time the payment was made by the first defendant on 20th Octobe , 1930, except one item purchased by the 4th defendant, he had the ownership and possession of the rest of the items and that being the case he was personally liable to pay the debt. It is further urged that the words " by the person liable to pay the debt " specified in section 20 (1) of the Limitaton Act, implies and connotes a personal liability existing and not a liability charged or impressed upon the property, but this argument is against the trend of decisions of this Court which has been followed by the Calcutta High Court as well. This Court in *Askaram Sowcar* v. *Venkataswami Naidu*[2], following *Chinnery* v. *Evans*[3], held that a purchaser of the equity of redemption is a person liable to pay the mortgage debt within section 20 of the Limitation Act and hence if under a mortgage decree for sale of the mortged property to which he is a party though exempted from personl liability he pays interest as such, such payment gives a fresh period of limitation for execution of the decree but the auction-purchaser of the mortgagor's interest is undoubtedly not a person who has any personal liability. This decision lays down following the identical language of the English statute, that he is a person liable to pay the mortgage debt. The learned Judges also refer to the earlier case, *Bolding* v.

1. (1940) 1 M.L.J. 766 : I.L.R. (1940) Mad. 872 (F.B.).
2. (1920) 40 M.L.J. 218 : I.L.R. 44 Mad. 544.
3. (1864) 2 H.L.C. 115 at 135.

Lane[1], which was followed in *Chinnery* v. *Evans*[2]. The Calcutta High Court has laid down the same proposition, following *Askaram Sowcar* v. *Venkataswami Naidu*[3], and the English Cases, in *Bhuban Mohan Singh* v. *Ram Gobinda Goswami*[4], where B. B. Ghose and Cammiade, JJ., had held that the expression

> "'a person liable to pay' the debt in the first paragraph of sub-section 1 of section 20 of the Limitation Act comprehends not only the mortgagor and his personal representatives upon whom the contract is personally binding but includes the purchaser of the equity of redemption also."

No decision laying down any contrary principle has been cited before me. It is, therefore, clear that when the first defendant made the payment he was a person liable to pay the debt because 12 years had not elapsed from the date of the execution of the mortgage in which case a suit for the sale of the properties brought on that date would not have got barred. The further question is even if it is paid by the person liable to pay the debt, whether the property which no longer belongs to him can be made liable by such payment. There are two decisions of this Court which take a view contrary to the contentions of the appellant. Lional Leach, C.J. and Lakshmana Rao, J., had to consider a case in *Narayana Reddiar* v. *Venkatesa Reddiar*,[5] where the facts were as follows: After the mortgagor had created two mortgages on certain properties he was adjudged insolvent but before that, some of the mortgage properties had been sold by him and the rest of the properties were sold by the Official Receiver. The legal representatives of the purchaser of the rest of the properties from the Official Receiver paid a sum towards the interest due on the mortgage and this payment was duly endorsed on the mortgage deed. The question was whether such a payment would keep the mortgage debt alive even on the properties sold by the insolvent before he was adjudged. The decision in *Askaram Sowcar* v. *Venkataswami Naidu*[3] was followed by the learned Judges in holding that the purchaser of the equity of redemption is one liable to pay the mortgage debt within the meaning of section 20 of the Limitation Act. They also refer to the decision of Wadsworth and Patanjali Sastri, JJ., in *Thayyanayaki Ammal* v. *Sundarappa*[6], where at the time the payment and endorsement were made, the property had passed out of the ownership of the mortgagor but the personal liability remained. As the payment was within six years of the mortgage, Wadsworth and Patanjali Sastri, JJ., held that a part payment by a mortgagor who has already parted with the mortgage property but is a person liable to pay under his covenant saves the right of suit against the purchaser of the equity of redemption. Following that observation and applying it to a case of the survival of the property liability, Leach, C.J., held that a payment which falls within the provisions of section 20 of the Limitation Act starts a fresh period of limitation for an action on the debt against all persons who are liable thereon. They also refer to the Full Bench decision and distinguish it on the ground that it related to a case where the mortgagor who had lost all interest in the mortgage property and was not a person liable to pay the debt could not bind by an acknowledgment under section 19 or by payment of principal or interest under section 20 of the Limitation Act the person on whom his interest had devolved. It was further elaborated by stating that in order to bind the assignee the acknowledgment or payment must be made before the mortgagor had parted with his interest in the property. Therefore though the Full Bench decision was expressly restricted to a case where there was neither personal liability nor property liability subsisting at the time of the payment the observation that it does not make any difference in principle whether the mortgagor has retained interest in part of the mortgage property should be understood in the light of the explanation given by the learned Chief Justice in *Narayana Reddiar* v. *Venkatesa Reddiar*[5]. It is therefore, clear that either the personal liability or the property liability must remain with the person making the payment. If he has disposed of all his interest in the property but the personal liability remains and the payment is

1. (1863) 1 D. G. J. and Sm. 122: 46 E. R. 47.
2. (1864) 2 H.L.C. 115 at 135.
3. (1920) 40 M.L.J. 218: I.L.R. 44 Mad. 544.
4. A.I.R. 1926 Cal. 1218.
5. (1943) 1 M.L.J. 135.
6. (1941) 2 M.L.J. 913.

made within six years then *Thayyanayaki Ammal* v. *Sundarappa*[1], is an authority for holding that the suit is not barred. If on the other hand, the personal liability is barred and at least part of the mortgage property remains with the mortgagor or his assignees, then the payment made by such a person would bind the person on whom the other properties have devolved. But Mr. Vijayaragavachariar argued that the decision in *Narayana Reddiar* v. *Venkatesa Reddiar*[2], is a case where the payment was made by the purchaser of some of the properties and not by the mortgagor himself. I do not find any difference in principle for the reason that the purchaser of part of the properties who makes the payment if anything has not got the same liability as the original mortgagor. If such a purchaser by making a payment can keep the mortgage debt alive as against the other items of properties it is all the more reasonable that the original mortgagor himself by making the payment can keep it up. Both these cases were considered by Chandrasekhara Ayyar, J., in *Kempamma* v. *Racha Setty*[3], where the payment was made after the mortgagor had parted with one item and his personal liability had got barred. The learned Judge observes as follows :—

> " The Full Bench decision in *Pavayi* v. *Palanivela*[4], gives rise to some doubt whether in such a case it could not be successfully urged that the suit was barred, but two later decisions have made it abundantly clear that if a payment is made under section 20 of the Limitation Act by the person liable to pay, a fresh period of limitation would start in favour of the creditor. The decisions are *Thayyanayaki* v. *Sundarappa*[1] and *Narayana Reddiar* v. *Venkatesa Reddiar*[2]. The second decision accepts the interpretation of the Full Bench decision given by Wadsworth and Patanjali Sastri, JJ. The Chief Justice delivered the judgment in the Full Bench case as well as in *Narayana Reddiar* v. *Venkatesa Reddiar*[2]. The principle is that so long as the mortgagor has not parted with his interest in the mortgaged properties and continue to be liable under the mortgage he can make a payment which will serve under section 20 of the Limitation Act to start a fresh period of limitation."

With respect I am in entire agreement with the observations of the learned Judge.

In a discussion of the Full Bench case *Pavayi* v. *Palanivela*, in the Notes of Indian Cases[5], there is the following statement :—

> " In between these two views there is another line of thought that at any rate if the mortgagor making the payment has at that time some interest in the mortgage properties the prior assignees from him would be bound by such payment. Vide *Chinnery* v. *Evans*[6]."

Next, reliance is placed upon the decision of Raghava Rao and Krishnaswami Nayudu, JJ., in *Narayanappa Naicker* v. *Ramalingam Pillai*[7], where there are certain observations to the effect that if the person sought to be bound by the acknowledgment or payment is a person who has prior to such acknowledgment or payment acquired an interest in the property the acknowledgment or payment will not be binding upon him although the person making the acknowledgment or payment is at the time possessed of some interest or other in the properties mortgaged. But this decision makes no reference whatever to the explanation of the Full Bench case by the learned Chief Justice himself in *Narayana Reddiar* v. *Venkatesa Reddiar*[2].

There is also no discussion as to whether the person who makes the payment is one liable to pay the debt. It has also to be remembered that the case, *Narayanappa Naicker* v. *Ramalingam Pillai*[7], was a case of acknowledgment under section 19 of the Limitation Act and not a payment under section 20 of the said Act. There is certainly some difference between the two and I do not think that the observations of Raghava Rao, J., can be made applicable to a payment under section 20 of the Limitation Act. I am therefore of the opinion that the decision of the lower Court is right. The second appeal fails and is dismissed with costs.

Leave granted.

R.M. ——— *Appeal dismissed.*

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1. (1941) 2 M.L.J. 913.
2. (1943) 1 M.L.J. 135.
3. (1947) 1 M.L.J. 153.
4. (1940) 1 M.L.J. 766 : I.L.R. (1940) Mad. 872 (F.B.).
5. (1940) 2 M.L.J. (N.I.C.) 21 at 22.
6. (1864) 2 H.L.C. 115.
7. (1950) 2 M.L.J. 13.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Sivagaminatha Mooppanar & Sons .. *Petitioner**

v.

The Income-tax Officer, II Circle, Mathurai and another .. *Respondents.*

Income-tax Act (XI of 1922), section 28—Legislative competence of—Levy of penalty for evading tax—Validity—Constitution of India, Article 14—If offended by section 28 of the Income-tax Act—Levy of penalty by the Income-tax Officer after the assessment is completed—Validity.

Entry 54 of the Federal list in Schedule VII of the Government of India Act, 1935, empowered the Central Legislature to enact laws with respect to " taxes on income " and entry 42 of the same list with respect to " offences against laws with respect to any of the matters in that list." The expression "taxes on income" is of the widest import and would include taxes in relation to the taxation of evaded income. The content of a law relating to income-tax would comprehend a law designed to prevent evasion of the tax by the levy of suitable penalties. Section 28 of the Income-tax Act introduced by the amending Act of 1939 was validly enacted and within the competence of the Central Legislature.

The said section does not offend the equal protection of laws guaranteed by Article 14 of the Constitution. In some concrete instances there might be overlapping between the provisions of section 28 and the provisions of sections 51 to 53 of the Act. But the two sets of penal provisions are directed to secure very different objects. Sections 51 and 52 have been enacted for vindicating public justice and for the punishment of an offender for deliberate infraction of the law, whereas section 28 is enacted for the purpose of rendering evasion unprofitable and of securing to the State compensation for damages caused by attempted evasion. Section 28 (4) of the Act provides for a concession to the assessee in overlapping cases and if a penalty had been levied from an assessee a prosecution on the same facts is not to be launched. The two remedies are not mutually exclusive but are concurrent.

Helvering v. *Mitchell*, 303 U.S. 390 : 82 L.Ed. 912.

Spies v. *United States*, 317 U.S. 492 : 87 L.Ed. 418.

The penalties imposed under the two sets of provisions of the Income-tax Act, *viz.*, section 28 and sections 51 to 53, to enforce the tax law embrace both civil and criminal sanctions. The former consists of additions to the tax by way of levy of a penalty upon determination of the fact of concealment of income, by an administrative agency and with the burden on the Government to prove its case beyond reasonable doubt. The latter consist of penal offences enforced by the criminal process in the familiar manner. The invocation of one does not exclude resort to the other.

The proceedings for the levy of a penalty under section 28 of the Act must be initiated by an authority when such authority was in seisin of the assessment or other proceedings in the course of which it is found that the assessee has brought himself within the mischief of section 28. It may be that the computation of the exact amount of penalty may have to wait the final assessment after appeal, etc. But this does not mean that the proceedings before the officer has come to an end ousting his jurisdiction to issue a notice to hear the party or to levy a penalty.

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed with W.P. No. 683 of 1954 the High Court will be pleased to issue a writ of prohibition forbidding the Respondents herein from proceeding with the collection of penalties levied by the Income-tax Officer, II Circle, Mathurai, the 1st Respondent herein, by his order, dated 14th February, 1953 and made in G.I. 37-S./44-45 ; G.I. 37-S./45-46 ; G.I. 37-S./46-47 and G.I. 37-S./47-48 for the assessment years 1944-45, 1945-46, 1946-47 and 1947-48 respectively.

R. Kesava Aiyangar and *K. Parasaran* for Petitioner.

C. S. Rama Rao Sahib for Respondents.

The Advocate-General (*V. K. Tiruvenkatachari*) appearing on behalf of the Attorney-General of India.

The Court made the following

ORDER.—These are petitions for the issue of writs of prohibition forbidding the first respondent, the Income-tax Officer, II Circle, Mathurai and the Collector of Mathurai from proceeding with the collection of penalties levied against the petitioner by the 1st respondent for the assessment years 1944-45,

* Writ Petitions Nos. 683 to 686 of 1954. 6th May, 1955.

1945-46, 1946-47 and 1947-48, the four petitions relating to the four years mentioned above.

The petitioner is a yarn-dealer. Part of his business consists of exports to Ceylon. For the assessment year 1944-45 he submitted a return to the income-tax authorities claiming a loss of Rs. 23,891. In regard to the next year, 1945-46 his return disclosed a net profit of Rs. 25,152. The returns in respect of both the years were taken up for consideration together by the then Income-tax Officer, Mathurai, Sri Rathnaswami, who came to the conclusion that the returns of the petitioner should not be accepted and that he had deliberately furnished false particulars regarding his income and, after making some additions, computed his total income for the year 1944-45 as resulting in a profit of Rs. 3,914. The tax payable on this income was Rs. 183-15-0 for which a demand notice was issued. For the year 1945-46 the Income-tax Officer determined the net assessable income at Rs. 1,28,376. The tax computed on the basis of this figure came to Rs. 67,951-4-0 for which a demand notice was issued under section 29 of the Act. The assessments were completed and these assessment orders were passed on 31st March, 1947. On the previous day that is on 30th March, 1947, he issued a notice to the petitioner to show cause why a penalty should not be levied, for the deliberate concealment of his income and for furnishing false particulars of such income under section 28 (1) (*c*). The assessee took the assessment order in appeal to the Appellate Assistant Commissioner and, when that was dismissed, to the Income-tax Appellate Tribunal. This appeal was dismissed on 10th December, 1949. We shall complete the narration of the assessment proceedings for the years 1946-47 and 1947-48 before referring to the penalty proceedings in regard to which notice had been issued relating to the years 1944 to 1946. For the year 1946-47 the assessee's return disclosed a net income of Rs. 18,668 while for 1947-48 the assessee returned an income of Rs. 16,623. The assessments in respect of these two years were taken up at the same time by Sri Ram, Income-tax Officer, Mathurai who had succeeded Sri Rathnaswami. This was completed by an order, dated 22nd December, 1949. The Income-tax Officer found that there had been suppression of income and adding back the items not disclosed in the accounts, the income for 1946-47 was computed in the figure of Rs. 52,270 and that for the succeeding year 1947-48 at Rs. 43,205 and tax on the above basis was demanded. The petitioner did not file any appeal against the assessment orders relating to these two years but applied to the Commissioner in revision. These revisions were disposed of by an order, dated 22nd November, 1950. The result of this order was that in respect of the year 1946-47 the assessee got some relief by the cancellation of an addition of Rs. 7,444 to his income while the revision in respect of his assessment for 1947-48 was completely dismissed.

We have already referred to the fact that in respect of the years 1944-45 and 1945-46, Sri Rathnaswami, the Income-tax Officer, who passed the assessment order on 31st March, 1947, had issued a notice under section 28 (1) (*c*) on 30th March, 1947, calling upon the assessee to show cause why penalty should not be levied. The assessee replied on 16th April, 1947, denying the charge generally and requesting that he might be furnished with particulars of the concealment, etc., with which he was charged. This letter, however, was not attended to immediately. Meanwhile the assessments for 1946-47 and 1947-48, as has been said already, were completed by the Income-tax Officer by an order, dated 22nd December, 1949. Four days before this date, *i.e.*, on 18th December, 1949, the Income-tax Officer, Sri K. Ram, who completed the assessment, issued notices to the assessee to show cause why penalty should not be levied in respect of the returns regarding these two years. The assessee replied on 22nd December, 1949, denying the charges as usual and asking for details. On 24th December, 1949, the Income-tax Officer replied stating that the assessment order itelf was self-explanatory and calling for a reply from the assessee by 1st January, 1950, and this was received on 2nd January, 1950. Meanwhile in respect of the notice issued on 30th March, 1947, in respect of the years, 1944-45 and 1945-46, a further communication was sent to the assessee on 6th November, 1951, requiring him to send a detailed reply which was received

by the Officer on 22nd November, 1951. The penalty proceedings in respect of the four years were then dealt with together and Sri Sowrirajan, who was then the Income-tax Officer, passed an order on 14th February, 1953, whereby he levied a penalty of Rs. 200 for 1944-45; Rs. 60,000 for 1945-46, Rs. 13,000 for 1946-47 and Rs. 12,000 for 1947-48, the variations being due to the difference in the amounts of the tax said to have been evaded by submitting false returns. It is the validity of these levies of penalties in respect of these four years that is challenged as illegal and *ultra vires* in these four writ petitions. We might premise by saying that it is not alleged that the quantum of the penalty imposed is in excess of that prescribed by section 28.

Three points have been raised by learned counsel for the petitioner in support of his contention that the penalty proceedings against him are invalid. (1) Section 28 of the Income-tax Act which enables the Income-tax Officer and other income-tax authorities to levy a penalty in certain circumstances is not within the legislative competence of the Central Legislature under the Government of India Act, 1935. (2) The procedure for the levy of a penalty for concealment of particulars of the income of an assessee which is an alternative to the launching of a prosecution under sections 51 and 52 of the Income-tax Act vests an arbitrary and unguided discretion in the Inspecting Asistant Commissioner to direct either proceedings for levy or a penalty or for the initiation of a prosecution and that the same is therefore violative of Art. 14 of the Constitution of India and that on this ground section 28 (1) (*c*) ought to be struck down. (3) On a proper construction of section 28 of the Income-tax Act the Income-tax Officer should be satisfied that there has been a deliberate concealment of the income of an assessee *during the pendency of the assessment proceedings* and as in the present case the assessment proceedings were completed in regard to the first two years by the dismissal of the assessee's appeals by the Income-tax Appellate Tribunal on 10th December, 1949 and in respect of the later two years by the disposal of the revision by the Commissioner on 22nd November, 1950, the orders passed subsequent thereto on 14th February, 1953, levying penalties are illegal and not in conformity with the requirements of the section. We shall deal with each of these points in that order.

The first contention regarding the subject of penalty not being within the legislative competence does not merit any detailed consideration. The Indian Income-tax Act of 1922 contained provisions for counteracting evasion and imposing penalties in such cases (*vide* section 28 as it then stood). But the Income-tax Amending Act of 1939 replaced the earlier provisions by the present section and this legislative change having been effected by the Central Legislature under the powers vested in it by the Government of India Act, counsel for the assessee naturally canvasses the legislative power to enact the section as it stands now. Entry 54 of the Federal list in Schedule VII of the Government of India Act, 1935, empowers the Central Legislature to enact laws with respect to "taxes on income" and entry 42 of the same list with respect to "Offences against laws with respect to any of the matters in this list". The expression "taxes on income" is of the widest import and would obviously include laws in relation to the taxation of evaded income. Such a law may take the form of an appropriation not merely of the income evaded but even more as the tax or as the reparation for damage caused to the State by such attempted evasion. In this connection it should be borne in mind that we are interpreting the words in an organic instrument designed to endow sovereign legislative bodies with legislative power and the words should not be construed in any narrow or pedantic sense. Apart from this, the power to enact laws to prevent evasion and make it unremunerative to the evader could also be viewed as an incidental or ancillary power necessary to render effective the substantive power conferred by Entry 54. Lastly it is legitimate and proper in determining the scope of the power to have regard to what is ordinarily embraced in the topic in the legislative practice both of the State which has conferred the power, *viz.*, the United Kingdom as well as of the State of whom the power is conferred, *viz.*, India. From the earliest times in every State including the United Kingdom as well as

India, the law relating to income-tax has always included provisions for circumventing evasion by concealment and for the levy of penalty in such cases as well as for the prosecution of the offender for such concealment. In the light of this, it would follow that the content of a law relating to income-tax would comprehend a law designed to prevent evasion of the tax by the levy of suitable penalties. The argument that the penalty which could lawfully be levied under section 28, *viz.*, one and half times the tax evaded might, in certain cases, where the average rate of tax exceeds 10 annas in the rupee, exceed the income, and is therefore not a proper tax legislation proceeds on a misapprehension, for the quantum of the penalty is one for the Legislature and is wholly irrelevant for determining the constitutional validity of the penalty provision.

If we had reached a conclusion favourable to the assessee in his attack on the constitutionality of section 28, as introduced by the Amending Act of 1939, it would have been necessary to canvass a further question as to whether in the circumstances the original section 28 enacted in 1922 when the Legislatures in India were not confined to powers enumerated in lists, is still not in force. But in the view we have expressed above, this need not detain us.

The next point is as regards section 28 offending against the equal protection of laws guaranteed by Article 14 of the Constitution. To understand the objection it would be necessary to set out the circumstances under which the authorities might impose penalties under section 28. Under this section, the authorities empowered to impose a penalty are three in number, *viz.*, (1) The Income-tax Officer (2) The Appellate Assistant Commissioner and (3) the Income-tax Appellate Tribunal. Each of them has the power to levy penalties in the course of proceedings before him or them. The grounds which might give rise to these penalties are enumerated in three clauses (*a*) (*b*) and (*c*) of sub-section (1). They run thus :

" 28. (1) If the Income-tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal in the course of any proceedings under this Act is satisfied that any person

(*a*) has without reasonable cause failed to furnish the return of his total income which he was required to furnish by notice given under sub-section (1) or sub-section (2) of section 22 or section 34 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by such notice or

(*b*) has without reasonable cause failed to comply with a notice under sub-section (4) of section 22 or sub-section (2) of section 23 or

(*c*) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income, he or it may direct that such person shall pay by way of penalty, in the case referred to in clause (*a*), in addition to the amount of the income-tax and super-tax, if any, payable by him, a sum not exceeding one and a half times that amount and in the cases referred to in clauses (*b*) and (*c*) in addition to any tax payable by him, a sum not exceeding one and a half times the amount of the income-tax and super-tax, if any, which would have been avoided, if the income as returned by such person had been accepted as the correct income."

There are certain provisos to the section which are not relevant to the present case and therefore might be ignored. Under sub-section (3) no order is to be made levying a penalty unless the assessee has been heard or has been given a reasonable opportunity of being heard. Sub-section (4) enacts that

" no prosecution for an offence against this Act shall be instituted in respect of the same facts on which a penalty has been imposed under this section."

Finally sub-section (6) imposes a restraint on the Income-tax Officer from levying a penalty under this section without the previous approval of the Inspecting Assistant Commissioner.

Taking now the provisions relating to a prosecution " for an offence against this Act " referred to in sub-section (4) these are to be found in Chapter VIII (sections 51, 52 and 53). We are setting out the relevant portions of these provisions below :

"51. If a person fails without reasonable cause or excuse

(*c*) to furnish in due time any of the returns mentioned in section 19-A, section 20-A, section 21, sub-section (2) of section 22 or section 38 (*d*) to produce or cause to be produced on or before the date

mentioned in any notice under sub-section (4) of section 22, such accounts and documents as are referred to in the notice, ... he shall, on conviction before a Magistrate be punishable with fine which may extend to ten rupees for every day during which the default continues:

52. If a person makes a statement in a verification mentioned in section 19-A or section 20-A or section 21 or section 22 or sub-section (2) of section 26-A, or sub-section (3) of section 30 or sub-section (3) of section 33 which is false and which he either knows or believes to be false, or does not believe to be true, he shall be punishable, on conviction before a Magistrate, with simple imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

53 (a) A person shall not be proceeded against for an offence under section 51 or section 52 except at the instance of the inspecting Assistant Commissioner.

(b) The Inspecting Assistant Commissioner may either before or after the institution of proceedings compound any such offence."

The point that is made on these sections is shortly this. Under both the sections 28 and 51-52 the Inspecting Assistant Commissioner is the pivotal authority. When an Income-tax Officer comes across an assessee about whom he is satisfied that he has concealed the particulars of his income or has deliberately furnished inaccurate particulars thereof, he transmits the information to the Inspecting Assistant Commissioner for the purpose of levying a penalty, for under section 28 (6) he cannot do this except with the previous approval of this officer. When the matter is thus before the Inspecting Assistant Commissioner, there are two courses which are open to him. He might in the case of any particular assessee grant the request of the Income-tax Officer and approve his proposal and permit him to levy a penalty on the assessee. In other cases he might make up his mind to prosecute the assessee under section 52. Which course he shall pursue is left to his unfettered discretion. The enactment gives him no guidance and prescribes no standards. It is not indicated how that choice is to be determined or the circumstances that he might take into account in arriving at his conclusion. The assessee is left to the mercy of the Inspecting Assistant Commissioner who might pursue one of two alternative courses. It is stated that this would naturally result in some assessees being dealt with under section 28 by the Inspecting Assistant Commissioner according approval to the levy of a penalty and in other cases assessees might be prosecuted though their cases might be identical. On this basis it was argued that section 28 contemplates a law of unequal operation brought about by the statute not enacting any guiding principle to which the Inspecting Assistant Commissioner should adhere.

In this connection reliance was placed on the decision of the Suprme Court in the *State of West Bengal* v. *Anwar Ali*[1], as also on the decisions of the Supreme Court rendered on the validity of the provisions of the Income-tax Investigation Commission Act in *Suraj Mall Mohta & Co.* v. *Viswanatha Sastri*[2] and *Meenakshi Mills* v. *Viswanatha Sastri*[3]. As there was considerable amount of overlapping between the provisions of section 28 under which penalty was leviable and the penal provsions in sections 51, 52 under which in respect of identical matters an assessee could be proceeded for the two sets of provisions being somewhat mutually exclusive, we considered the objection *prima facie* tenable and in consequence issued a notice to the Attorney-General to assist us in the disposal of the matter. The learned Advocate-General appeared in response to this notice on behalf of the Attorney-General and we are obliged to him for the assistance he has given us.

The main argument which was addressed to us by the learned Advocate-General was that in the present case the two provisions contained in sections 51 and 52 on the one hand and section 28 on the other were not in their nature mutually exclusive, being directed to secure very different objectives. Sections 51 and 52 had been enacted for vindicating public justice and for the punishment of the offender for the deliberate infraction of the law. It is made clear by the heading of the Chapter VIII in which these provisions appear which is entitled "offences and penalties". In this connection, he invited our attention to the close similarity between the language of section 52 of the Income-tax Act and section 181 of the

1. (1952) S.C.J. 55: A.I.R. 1952 S.C. 75 at p. 84.
2. (1954) S.C.J. 611.
3. (1955) 1 M.L.J. (S.C.) 21: (1955) S.C.J. 62: (1955) An.W.R. (S.C.) 21.

Indian Penal Code. Section 51 deals with recalcitrant assessees who by their deliberate refusal to co-operate with the assessing officers prevent the completion of the assessment. Section 52 deals with wilfully false statements in their returns and other papers submitted by the assessee. If the Income-tax Act had prescribed that the returns or statements referred to in section 52 of the Income-tax Act should be on oath or affirmation before an officer competent to administer such oath or affirmation there could have been a prosecution without any provision therefor in the Income-tax Act. On the other hand, the object and purpose of section 28 is wholly different. It is enacted for the purpose of rendering evasion unprofitable and of securing to the State compensation for damages caused by attempted evasion. Nor is it correct to regard the ingredients of the misconduct under the two provisions as identical. The falsity of a declaration wilfully made is enough to satisfy the requirements of section 52 ; whether that declaration results in concealment is not material for the purpose of that section. On the other hand, section 28 (1) (*c*) is concerned with the effect of the " inaccurate particulars deliberately furnished ", that is, " concealment " and unless this result were achieved, no penalty can be imposed. Undoubtedly there must be overlapping in some concrete instance but every case that falls within section 52 need not necessarily also be within the scope of section 28 (1) (*c*). The function and purpose of section 28 (4) is to make provision for a statutory concession to the assessee in the overlapping cases. The two remedies or proceedings could have been taken at the same time and it is the case for instance in, the United States of America. But a concession has been granted to the defaulting or evading assessee by section 28 (4) the concession being that if a penalty had been levied from an assessee a prosecution on the same facts is not to be launched. Viewed in this light that section 28 (4) is in the nature of a concession there is no question of Article 14 being attracted to invalidate section 28. We find ourselves in complete agreement with this argument. In *Helvering* v. *Mitchell*[1], the Supreme Court of The United States of Amercia had to deal with the question whether an acquittal on a criminal charge of an assessee of having wilfully attempted to evade the Federal Income-tax Law could be pleaded in bar to an action for the recovery of penalties for the same evasion. The argument on behalf of the assessee was the plea of double jeopardy on the ground that the penalty demanded was in truth and substance also a criminal penalty intended as as a punishment for allegedly fraudulent acts. Brandis, J., repelled this contention and said :

" Congress may impose both a criminal and a civil sanction in respect to the same act or omission. The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon a similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the tax-payer's fraud......

The fact that the Revenue Act of 1928 contains two separate and distinct provisions imposing sanctions and that these appear in different parts of the statute, help to make clear the character of that here invoked. The sanction of fine and imprisonment for wilful attempts in any manner to evade or defeat any income-tax introduced into the Act under the heading 'penalties' is obviously a criminal one. The sanction of 50 per centum addition 'if any part of any deficiency is due to fraud with intent to evade tax', introduced into the Act under the heading 'additions to the tax' was clearly intended as a civil one. This sanction, and other additions to the tax are set forth in supplement entitled ' Interest and Additions to the tax '."

In a later decision in *Spies* v. *United States*[2], the same question was involved and *Helverings case*[1], was followed. Jackson, J., said :

"The penalties imposed by Congress to enforce the tax laws embrace both civil and criminal sanctions. The former consist of additions to the tax upon determination of fact made by an administrative agency and with burden on the Government to prove its case beyond a reasonable doubt. The latter consist of penal offences enforced by the criminal process in the familiar manner. Invocation of one does not exclude resort to the other."

If in their nature the two remedies are not mutually exclusive and are concurrent, does the gran of a concession to the assessee in the form of a provision in section 28 (4) alt:r the situation and make the two provisions mutually exclusive for the

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1. 303 U.S. 390 : 82 L.Ed. 917. 2. 317 U.S. 492 : 87 L.Ed. 418.

purpose of attracting the vice of unequal protection of the laws forbidden by Article 14. In our opinion it does not.

There is also one other matter which has to be noted. Though in the case of an Income-tax Officer a prior approval of the Inspecting Assistant Commissioner is necessary befor a penalty can be levied, the same requirement has not been laid down in the case of the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal. Indeed from the status of these authorities as compared to the Inspecting Assistant Commissioner the provision could not be otherwise. Neither the Appellate Assistant Commissioner nor the Appellate Tribunal have any hand in determining whether an offender should be prosecuted or not (*vide* 53 of the Income-tax Act). In their cases therefore the situation of one officer or authority being vested with unguided power to initiate one of two mutually exclusive proceedings does not occur. Therefore when a penalty proceeding is started at the instance of either the Appellate Assistant Commissioner or the Appellate Tribunal the objection now put forward to the validity of section 28 could not obviously be suggested. It would therefore be extremely anomalous to hold that the section violates Art. 14 when its provisions are sought to be applied by the Income-tax Officer but that it is valid and constitutionl when invoked by the higher authorities. On this ground also the argument questioning the validity of section 28 has to be rejected.

Moreover the question has to be answered whether the Inspecting Assistant Commissioner does on a proper construction of section 28 determine the levy of a penalty? For if he does not, the entire argument on behalf of the petitioner breaks down. The learned Advocate-G neral submitted that the prior approval granted by the Inspecting Assistant Commissioner to the levy of a penalty does not render the penalty one levied by the Inspecting Assistant Commissioner. Even after the approval the decision to levy the penalty is till statutorily that of the Income-tax Officer and this Officer cannot initiate the prosecution under section 53. We see considerable force in this argument also. We have therefore no hesitation in overruling this objection raised to the validity of section 28.

The next point that has been raised for argument is as regards the proper construction of section 28 on the basis that the provision is valid. Under section 28 (1) (*a*) the Income-tax Officer or the other authorities named have to be satisfied that the assessee has concealed the particulars of his income or deliberately furnished inadequate particulars of such income before he or they may levy the penalty. This satisfaction must be in the course of any proceedings und r this Act. Under sub-section (3) the assessee should be heard or should be given a reasonable opportunity of being heard before a penalty is imposed. The points made in regard to these provisions are: The penalty proceedings should be "in the course of any proceeding" under the Act. In the context therefore the proceedings referred to in section 28 (1) are proceedings other than penalty proceedings that is assessment, reassessment or refund proceedings. As the penalty pro eedings must be completed "in the course of any proceeding under this Act" the latter proceeding must be pending at the time when the penalty is levied. The attack on the penalty proceedings against the petitioner is grounded upon the assessment proceedings having been completed before the penalty was actually levied by the order of the Income-tax Officer, the contention being (*a*) that there was no "other proceeding" under the Act pending before the Income-tax Officer on the date when he levied the penalty and (*b*) that in any event the other proceedings—the assessment proceedings—had finally terminated by the order of the Income-tax Commissioner or the Income-tax Appellate Tribunal in respect of the two sets of assessments.

Before considering this argument and the difficulty introduced by the language of the section one fact has to be borne in mind. The quantum of the penalty is based—wholly upon the final assessment figures; for under the terms of the section the penalty is not to exceed:

"one and a half times the amount of the income-tax and super-tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income."

This difference could not obviously be ascertained until the assessment is completed. The usual practice, we understand it to be, is that when an Income-tax Officer finds that an assessee has concealed his income or has deliberately furnised inadequate particulars of it, he estimates the concealed income adds it to the income returned and levies the tax on the entirety of the income as thus determined in his assessment order. At the same time he issues notice to the assessee to show cause why a penalty should not be levied under section 28 (1) and (3). But the assessee is not heard and no final conclusion is reached at that stage. The assessment is completed and a demand is made for the tax of course including that as the concealed income which is added to the income returned. The assessee may take the matter on appeal and it is possible that the income as assessed may undergo variations during this process. Until the final asessment figures are known, it is in the nature of things not possible for the Income-tax Officer to determine the exact amount of penalty which might be levied on the assessee. He therefore waits until the appeals as regards the assessment are all over. After obtaining these assessment figures as finally determined, the Income-tax Officer pursues the notice already issued. In cases where the addition of the income discovered by the Income-tax Officer is sustained by the appellate authorities, the Income-tax Officer resumes the penalty proceedings, hears the assessee and being then in possession of figures to enable him to properly assess the penalty leviable passes an order in proper cases under section 28 (1) after obtaining the approval of the Inspecting Assistant Commissioner. This practice appears to us to be fair to the assessee and not contrary to the language of the enactment. If the construction sought to be put forward on behalf of the assessee were accepted, it might result in the penalty provision being wholly unworkable. The Income-tax Officer has to compute the penalty on the basis of the difference in the tax that would have been payable if the original return had been accepted and that which he has been called on to pay by the additions effected. The latte could be known only when the assessment is completed. If by that date the proceedings before him are held to have come to an end he would have no jurisdiction to issue a notice to hea the party or to levy the penalty. To get over this difficulty learned Counsel for the petitioner suggested that the Income-tax Officer might issue a notice even while he was making the assessment and that he might provisionally determine the tax payable and then hear the parties under section 28 (3) and levy the penalty. We are unable to see how this would be in compliance with the requirement that the penalty which he could levy should be based upon the difference between the tax as levied and that which would have been leviable if the return were accepted. The higher figure would not be finally known until the assessment order was issued and the contention is that by that date the Income-tax Officer has lost his jurisdiction to levy the penalty. In our opinion the proceedings for the levy of a penalty must be initiated by an authority when such authority was in *seisin* of the assessment or other proceedings in the course of which it is found that the assessee has brought himself within the mischief of section 28. When once the notice has been issued the jurisdiction of that authority to continue the proceedings is not dependent upon the continuance of other proceedings in the course of which the penalty proceedings came to be initiated. The assessee has to be given notice under sub-section (3) and has to be heard and finally the penalty may be levied notwithstanding that at the date of the actual order of levy the proceedings in the course of which the concealment, etc., took place had terminated. In the present case, all the notices have been issued by the Income-tax Officer when the matter was pending before him. The fact that by the date of the hearing of the assessee under section 28 (3) or of the actual order levying the penalty under section 28 (1) the assessment proceedings had terminated is wholly irrelevant and does not affect the validity of the penalties levied against the assessee.

These Writ Petitions therefore fail and are dismissed with costs. In view of the nature of the question raised which became necessary for the Advocate-General to appear we fix the fee payable to counsel at Rs. 350 for all the petitions together.

R.M. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK AND MR. JUSTICE KRISHNASWAMI NAYUDU.

The Kulitalai Bank, Ltd., Tiruchirappalli, having its Central Office at Bishop Heber High School Buildings, Tiruchirappalli, represented by Managing Director, S. Annadurai Ayyar .. *Appellants**

v.

S. V. Nagamanickam and others .. *Respondents.*

Hindu Law—Joint family—Debts—Business debts—Binding nature—Trading family whose hereditary vocation or kulachara is trade or commerce—Powers of manager to start new trade—Scope and extent of.

Per *Mack, J.*—" A managing member of a Hindu joint family, whether he is the father or a senior coparcener cannot start a new trade or business so as to impose upon the minor members the risk of such business. This limitation on the powers of a manager does not apply to the manager of a trading family or one whose *kulachara* or hereditary vocation is trade. In the case of such a family the borrowings of the father for purposes of the family business he entered upon for the benefit of his family need not be justified on the ground of legal necessity or benefit. The family can extend its enterprise from a shop business into a rice business, which to an extent is of a different kind. Risk or loss is inevitable and expected and except in cases where the business can be shown to be imprudent or rash, in the case of a business family the debts contracted by the father for the business will be binding on the sons."

Per *Krishnaswami Nayudu, J.*—"Even as regards a hereditary trading family the manager of a joint Hindu family has no authority to impose upon a minor member the risk and liability of a new business started by him and it will not make any difference whether the manager is also the father or not." The mere fact that a new business is started by a trading family which may not be the very same identical ancestral business, would not by itself be a sufficient defence to the minor sons to resist any proceedings against their interests in the family properties for debts incurred by their father in such a business. Even in such a case, it may not be open to the father or manager to start a new business which would be attended with risk and not akin to or of the nature carried on by his ancestors. The trade or business carried on need not be the identical one. It will be a question of fact in every case whether even in a trading family a new business started is one which is akin to or of the nature carried on by the family or is one attendant with risk and should not therefore have been started, which might result in detriment to the interests of the minor. An extension of the old business may not be considered to be a new business, but a new business started must be shown to be a business which is not one that would ordinarily lead the members of the family to great risk.''

Appeal against the decree of the Court of the Subordinate Judge of Tiruchirappalli, dated 31st March, 1950 and passed in O.S. No. 237 of 1949.

A. V. Narayanaswami Aiyar and *R. Venkatachalam* for Appellants.

T. A. Anantha Aiyar for Respondents.

The Judgment of the Court was delivered by

Mack, J.—The appellant is the plaintiff, the Kulitalai Bank, Ltd., Tiruchirappalli. They filed the suit against the first defendant and his four sons, three of whom were minors, for recovery of Rs. 20,826 due on a security bond, Exhibit A-3, dated 30th November, 1945, for advances made by the bank. It was executed by the first defendant for himself and as guardian of his four sons, all then minors, who were in existence. The Subordinate Judge passed a preliminary mortgage decree against the first defendant's share in the hypotheca and dismissed the suit against defendants 2 to 5, holding that the mortgage was not binding on their interests. The evidence shows, nor is it disputed, that the first defendant, a Chettiar of the Vysia community, got the hypotheca under a partition deed, Exhibit A-7 (*b*) in 1938 with his younger brother then aged about sixteen. This document refers to a shop business conducted by the first defendant on his own account, the assets and liabilities of which all belonged to him. There can be no doubt that the hypotheca is ancestral joint family property. The first defendant filed a written statement supporting the case of his minor sons who were represented by their mother as guardian, denying that he carried on a shop business as an ancestral joint family business and that he also ran a rice mill as a family business. He did not go into the witness box himself.

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* Appeal No. 902 of 1950. 4th March, 1955.

On behalf of the bank the agent was examined as P.W. 1, the cashier, as P.W. 2 and one Krishnamoorthy Chettiar as P.W. 3. On behalf of the defendants only one witness was examined, one Radhakrishna Chettiar, who claims to have known the family of the defendants for the past thirty five years. According to him, the first defendant's father did a money-lending business and was Secretary of a Bank for a time. The first defendant has run a shop business for the past twenty five years and a rice mill for the past six or seven years. A certificate by the Commissioner of the Karur Municipality relating to profession tax, Exhibi A-12, shows that the first defendant's half-yearly income for the years 1943 to 1949 ranged from Rs. 1,900 to Rs. 3,100 a half year from his shop business. The eldest son, the second defendant, was at the time of the suit a medical student. P.W. 3 produced some accounts showing transactions between the first defendant and a relation of his Exhibit A-11 series, showing transactions relied on to support the fact that the first defendant was a trader and doing a *maligai* business. There appears to be nothing suspicious about Exhibits A.-11 (*a*) and A-11 (*b*), two ledger pages exhibited showing *inter alia* three separate purchases of fifty measures of gingelly. But the ledger page, Exhibit A-11 (*c*) at page 154 which appears to have been written up at one stretch and refers to the jaggery mundy of the first defendant is a most suspicious document on which no reliance can be placed. P.W. 3 admitted that the first defendant had got an eviction order against him. We think the learned Subordinate Judge rightly declined to find these entries conclusive as regards anything.

Had this family not been one whose hereditary vocation or *kulachara* is trade or commerce, the learned Subordinate Judge's finding that the bank has not discharged its onus of proving legal necessity for this mortgage would have been correct and in accordance with settled case law up to date. As expounded in Mayne's Hindu Law, 11th Edition at pages 382 to 385 a managing member, whether he is a father or a senior coparcener, cannot start a new trade or business so as to impose upon minor members the risk of such business. Whether however this limitation on the powers of a manager applies to the manager of a trading family or one whose *kalachara* or hereditary vocation is trade was held to be not free from doubt in view of *Ramnath* v. *Chiranji Lal*[1] and other earlier decisions cited. We would with respect agree with the view expressed by the learned commentator that the better view seems to lie against the imposition of any such limitation ; otherwise there would be an undue curtailment of commercial adventure and enterprise, which is the very life, so to speak, of a hereditary trading family. This distinction has been made in this domain of case law, distinguishing between a family whose hereditary vocation or *kulachara* is trade or commerce and a non-trading family. It is argued that there is nothing to show in the first place that the shop business carried on by the first defendant was ancestral. It does not appear to be necessary that a family whose hereditary vocation is business, trade or commerce, should continue even for more than one generation one particular type of business in order to take the family out of this category. In this connection we must comment on the failure of the first defendant to go into the witness box. He had the best evidence in his possession as to what his father and grandfather did and had withheld his knowledge from the Court. We can take his absence from the witness-box into consideration in drawing an adverse inference against his family that they and their ancestors did business of some kind as their hereditary vocation in the course of which they may have acquired some land.

It is next urged that the first defendant had no right to start a new venture of a rice business which ran for seven years before he got into financial difficulties reliance has been placed on *Nataraja* v. *Lakshman*[2], a decision of Varadachariar and Mockett, JJ., which dealt with the case of a father of a joint Hindu Brahmin family incurring debts by starting a rice mill with a view to give them all comforts. It was held that the father was neither obliged to adopt, nor was justified in adopting this course on the ground of family necessity. I would have felt myself constrained

1. (1934) I.L.R. 57 All. 605 (F.B.). 2. A.I.R. 1937 Mad. 195.

to follow that decision; but I think that this family belonging to a community whose hereditary avocation or *kulachara* is trade or commerce is in a different category and that the borrowings of the father for purposes of the family business he entered upon for the benefit of his family need not be justified on the ground of legal necessity or benefit. By executing this mortgage in favour of the bank by himself and as guardian of his minor sons, he made it irrevocably clear that the business was not his separate one to which he could put forward any claim as his self-acquisition, but that he intended it to be from the commencement a joint family business in accordance with the hereditary vocation of his family and community. It is true that in these days many other communities have entered the fields of business, trade and commerce and that some of the members of the community to which the family of the defendants belong have left their hereditary vocation for other spheres of activity. We appreciate that under case law the onus is on the bank to establish family necessity or benefit. This is a case, in our opinion, of a family whose *kulachara* is business, seeking to extend its enterprise from a shop business into a rice business, one it is true of a different kind. Every new business undertaken must of course carry with it the risk of loss, but in the case of a business of a trading family such risk is inevitable and expected, and it is only where the business can be shown to be imprudent or rash can it be held, to be in the case of a business family, not binding when started by a father, or his sons. For these reasons we would reverse the finding of the learned Subordinate Judge and held that the mortgage is binding on the shares of the sons.

One of the contentions raised was that the interest charged, which was 12 per cent. compound interest, was excessive. The learned Subordinate Judge considered this penal and excessive and reduced it to 9 per cent. compound interest. The defendants pleaded that they were agriculturists entitled to relief under Act IV of 1938. Regarding this as a contention raised only on behalf of defendants 2 to 5, the learned Judge did not think it necessary to consider it, in view of his finding that the mortgage did not bind them. On going into this question of scaling down we find that all the defendants are entitled to have this mortgage debt scaled down under section 13-A of Act IV of 1938 as amended by Act XXIII of 1948. This Act was in force at the time the suit was tried and it would appear that no relief was claimed under this section in ignorance of this amendment. In fact the learned advocates before us, while this question of interest was discussed, were not aware of this relief to which all the defendants appear to be entitled. Under Section 13-A:

> "Where a debt is incurred by a person who would be an agriculturist as defined in section 3 (ii) but for the operation of Proviso (B) or Proviso (C) to that section, the rate of interest applicable to the debt shall be the rate applicable to it under the law, custom, contract or decree of Court under which the debt arises or the rate applicable to an agriculturist under section 13, whichever is less."

The first defendant prior to this amendment would not have been entitled to any relief as he paid a profession tax. Under this section, which now excludes in the categories of tax-payers only those who pay income-tax from relief as an agriculturist, the first defendant would be clearly entitled to relief under section 13, *i.e.* to have the interest reduced to 5½ per cent. simple per annum (*vide* G.O. Mis. No. 2919, Development Department, dated 7th July, 1947, published in *Fort St. George*, dated 29th July, 1947). The lower Court decree will be modified accordingly.

Mr. Narayanaswami has informed us that a review application was filed, I.A. No. 434 of 1950, which was allowed by the Subordinate Judge who made a direction that his judgment would not preclude the liability of the sons on the pious obligation doctrine in subsequent proceedings. As regards this, C.M.A. No. 360 of 1951 has been filed on behalf of the sons. This Civil Miscellaneous appeal is dismissed without any order as to costs.

I wish to make some observations of my own as regards what appears to me to be a cu[illegible]naswami has infor[illegible]t defendant

and in execution brought his one-fifth share to sale, which was purchased by a third party for about Rs. 9,000. He explains that if we were not to allow this appeal, he would have been entitled to proceed by way of attachment of the sons' shares in execution of the personal decree against the father and bring them to sale, in which case the only defence the sons would be able to put forward would be that the father's debt were incurred for illegal or immoral consideration. This procedure appears to be supported by this observation of Varadachariar, J., in *Nataraja* v. *Lakshman*[1] referred to *supra* :

> "It is true that in execution of the personal decree to be obtained against the father after the sale of his share, joint family properties may be brought to sale ; but we think the proper stage for determining the extent to which the family properties may be made liable even on the basis of the sons' liability under the pious obligation doctrine will be when the plaintiff applies for the passing of a personal decree."

Our attention has been drawn to a recent Full Bench decision of our Court in *Abdul Hameed Sait* v. *Provident Investment Co., Ltd.*[2], which held that a mortgage decree for sale simpliciter, without any personal liability obtained against a father alone, on a mortgage of the joint family property created by him for purposes not binding on the family, cannot be made to bind the sons' share by the application of the principle of pious obligation, but that a sale held of the joint family property in execution of such a decree is binding on the sons' share. I am not here concerned with the reasoning which led the learned Full Bench to that conclusion, but with great respect from a practical standpoint the decision represents a practical progressive advance in the classification of a most confused domain of law over which conflict has raged up to, and also since the time of the leading Privy Council decision in *Hanumanpersaud Panday* v. *Mussamat Babooee Munraj Koonweree*[3]. I have found it extremely difficult myself with great respect to appreciate the difference in case law between a debt on a mortgage and any other kind of debt which a Hindu son is under a pious obligation to discharge. The procedure in a promissory note debt is quite simple for the bank or a creditor who lends to a Hindu father. He sues on the promissory note and to avoid subsequent litigation makes the sons parties and the only manner in which they can avoid a decree is by pleading that the debts are not binding upon them on the ground of illegal or immoral consideration. No question of legal benefit or necessity arises. The creditor can then proceed against the joint family property without fear of subsequent litigation. When we enter the domain of mortgage which case law regarded as settled has considered to be primarily an alienation, the position becomes far more complicated for the banker or creditor who lends on security to a Hindu father. The precaution of making the sons parties to the mortgage becomes of little practical avail in case the bank is unable to discharge the onus of proving legal necessity or benefit, if they can question the right of the creditor to bring their shares to sale on other grounds later in execution.

The practical effect of the recent Full Bench decision in *Abdul Hameed Sait* v. *Provident Investment Co., Ltd.*[2], which arose out of a suit by a son who was not impleaded in the mortgage suit after joint family property had in fact been sold in execution of the decree against the father, is that the only defence open to the sons of a Hindu family to save joint family property from being brought to sale for the father's debt is by proving that the debt was for illegal or immoral consideration and indeed had the bank taken an outright sale from the father of the hypotheca or a portion thereof and entered into possession the only remedy by the sons would have been by way of a suit to declare that the sale was not binding on them on this ground. Is it therefore necessary only in the case of a mortgage to force a creditor or expose him to contentious litigation in two different stages even though he may implead the sons to have the liability of their shares to be brought to sale finally determined ? As it appears to me, if the sons are impleaded in the mortgage suit as parties, they must in the suit itself plead that the debt is not binding on them on grounds of illegal or immoral consideration and if they do not do so, it is not open to them

1. A.I.R.
2. (1954)

to raise this plea at any subsequent stage or in any further legal proceedings. With great respect to the opinion of Varadachariar, J., extracted supra in *Nataraja* v. *Lakshman*[1]. I can only regard it as an *obiter dictum* and not a finding on a point for determination in the case decided there which can be regarded as a binding and authoritative pronouncement of law or procedure. Both learned advocates agree that it was open to the sons in this suit on the mortgage on which they have been impleaded to take the defence of illegal or immoral consideration. It necessarily follows, in accordance with principles of ordinary established law and practice, that a defence open in a suit must be taken in the suit and resolved at the trial and cannot be taken as a second alternative defence at some later stage. The different stages of a mortgage suit, preliminary decree, final decree and personal decree do not appear to provide any justification for a deviation from this regular procedure. The mortgage simpliciter Subba Rao, J., referred to in *Abdul Hameed Sait* v. *Provident Investment Co., Ltd.*[2], I understand to be a mortgage decree only against the father in a suit in which the sons have not been impleaded. When the sons are impleaded in such a suit, they must, as it appears to me, take the plea of illegal or immoral consideration or suffer a decree against their shares of the property, the question of antecedent debt or legal necessity being matters, therefore in such a suit of purely academic interest. This is the only practical application to be given to the Full Bench decision in *Abdul Hameed Sait* v. *Provident Investment Co., Ltd.*[2].

The procedure to which the bank has been driven in this case, of selling first the father's one-fifth share only and then later seeking to attach the sons' shares in execution of the personal decree against the father, puts a premium on fragmentation of land and long drawn out contentious litigation which merely opens out avenues for unnecessary suits. The purchaser of the undivided one-fifth share has to file a partition suit against the sons and realise his purchase, and when the shares of the sons ultimately are brought to sale, as indeed they must if they cannot prove illegal or immoral consideration, and bought by a third party, further avenues of litigation are opened out. This is a case in which the hypotheca was of substantial value, greatly in excess of the bank debt which it secured. Judging by the purchase of an undivided one-fifth share for about Rs. 9,000 the sale of a portion of the hypotheca would have liquidated the entire debt and left the family with substantial property. Probably after the cumbrous procedure adopted and the litigation entailed, the family will have little or nothing left. The procedure has it is true enabled the family to hang on to possession for some year but with ultimately deleterious results to themselves, the rural economy of the country and generally speaking, commercial morality.

The appeal is allowed, with costs throughout. Time for redemption three months from this date.

Krishnaswami Nayudu, J.—I had the advantage of perusing the judgment just now delivered by my learned brother and I am in agreement with him that the appeal should be allowed. However, I would like to make the following observations regarding the question of law arising in this case.

My learned brother, referring to the view of the commentator of Mayne's Hindu Law, 11th edition at pages 382 to 385 that a managing member, whether he is a father or a senior coparcener, cannot start a new trade or business, so as to impose upon minor members the risk of such business, observed:

"Whether however this limitation on the power of a manager applies to the manager of a trading family or one whose *kulachara* or hereditary vocation is trade was held to be not free from doubt in view of *Ram Nath* v. *Chiranji Lal*[3] and other earlier decisions cited. We would with respect agree with the view expressed by the learned commentator that the better view seems to lie against the imposition of any such limitation; otherwise there would be an undue curtailment of commercial adventure and enterprise, which is the very life, so to speak of a hereditary trading family."

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1. A.I.R. 1937 Mad. 195.
2. (1954) 2 M.L.J. 416 : I.L.R. (1954) Mad. 939 (F.B.).
3. (1934) I.L.R. 57 All. 605 (F.B.).

I would, however, like to clarify the position even as regards a hereditary trading family. The principle of the Privy Council decision in the *Benares Bank* v. *Hari Narain*[1], that the manager of a joint Hindu family, either governed by the Mitakshara or the Dayabhaga has no authority to impose upon a minor member the risk and liability of a new business started by him and that it will not make any difference when the manager is the father of the minor must be deemed to have set at rest the view taken by some High Courts including the view taken by some learned Judges of this Court that a father can bind his minor sons by starting a new business with the aid of family funds.

In *Venkataswami* v. *Palaniswami*[2], Venkatasubba Rao, J., held that a Hindu father by starting a business with the aid of family funds can make that a family business and in such a case, an alienation made by the father, for raising funds for carrying on that business is binding upon the sons, on the ground that it was for legal necessity.

In *Damodharam Chetti* v. *Bansilal Abeerchand*[3], Coutts Trotter, C.J. and Srinivasa Ayyangar, J., while approving the dictum of Sadasiva Ayyar, J., in the *Official Assignee of Madras* v. *Palaniappa Chetty*[4], to the effect that a Hindu father belonging to a trading community has a right to begin a lawful and ordinary trade business as joint family business in which himself and his minor sons were partners, observed that too narrow a construction should not be allowed to be placed on such expressions as "family trade or business" and that with changes of civilizations and conditions what should be applied is not a rigid rule of law but the principle on which it is based, that it seemed to them absurd to suppose that if a family business should be found to have consisted in the purchase and sale of one commodity, purchase and sale of another commodity should be held to be outside the scope of the family business, that each case will have to be determined only with regard to its particular facts and that the question to be determined in each case should be whether having regard to the recognized business, profession, means of livelihood or what is called the '*kulachara*' of the family, the particular enterprise or embarking was only within the reasonable limits of the exercise thereof or really having regard to its nature or extent, a new speculative enterprise. In that case, however, the father was carrying on business in the purchase and sale of piece-goods; but he ceased to carry it on for some time, and after his death a similar business was started by the son and the fact that the father ceased to carry on the business for a few years was held not sufficient to make a similar business started by the son any the less a family business.

In *Nataraja* v. *Lakshman*[5], Varadachariar, J., observed that the view of Venkatasubba Rao, J., in *Venkataswami* v. *Palaniswami*[2], can no longer be valid in view of the Privy Council decision in the *Benares Bank's Case*[1]. With reference to the contention based on the observations of the Full Bench in *Ram Nath* v. *Chiranji Lal*[6], that it would be open to the creditor to show that apart from the ancestral character of the business the debts themselves were borrowed in circumstances or for purposes that will make them binding on the family by independent evidence, the learned Judge observed that in that case the ancestral character of the business or otherwise would not come into the picture and no difference could turn on the fact that the debts are incurred by the father and not by any other manager and the proof must therefore amount to proof of necessity in the sense ordinarily known to the Hindu Law.

In *Ram Nath* v. *Chiranji Lal*[6], the father in a joint Hindu family consisting of himself and his sons, raised money on a mortgage of the family property, two-thirds of the amount being expressed to be for the purpose of an ancestral lace shop at Muttra and the balance for a cloth shop in Delhi, which has been in existence

1. (1932) 63 M.L.J. 92 : L.R. 59 I.A. 300: I.L.R. 54 All. 564 (P.C.).
2. (1928) 56 M.L.J. 380 : I.L.R. 52 Mad. 227.
3. (1926) 55 M.L.J. 471.
4. (1918) 35 M.L.J. 473 : I.L.R. 41 Mad. 824 at p. 835.
5. A.I.R. 1937 Mad. 195.
6. (1934) I.L.R. 57 All. 605 (F.B.).

for a number of years. In a suit for sale on the mortgage brought against the sons, the father having died, the defence was that there was no legal necessity for the mortgage and it was not binding on the family. Following the pronouncement in *Benares Bank's case*[1], it was held that it is settled law that money borrowed for the purposes of an ancestral family business is *per se* a valid justification for alienation of family property and in such a case no further inquiry on the part of the creditor is required. It was held further that :

"But the question whether a particular transaction, even though the money was required for the purposes of a newly started business, was for legal necessity or for the benefit of the estate and the family is a separate question. If the business though not ancestral, had become a joint family business and was not the separate business of particular members then there may be circumstances under which money required for such business may either be for legal necessity or for the benefit of the family and the family estate. The question whether the transaction was for such benefit or not is a a question of fact depending on the circumstances of each case and it is for the Court to decide whether it was so beneficial and was such as an ordinary prudent manager would have entered into in the interests of the family."

In *Raghunathji Tarachand* v. *The Bank of Bombay*[2], where an adult male member carried on ancestral business in the name of the ancestral firm and a suit was instituted for recovering the amounts due on pronotes from the firm, it was held that the minor coparcener's share in the firm was liable. Chandavarkar, J., observed at page 76 :

"According to Hindu Law givers from Manu downwards, traders formed a part of the Hindu polity and the profession of trade was meant for the third and last of the twiceborn castes, namely, Vaishyas. The Brahmins and the Kshatrias were allowed to trade only in case of necessity and in times of distress. There are special rules laid down for traders. Where a caste or a joint family takes to trading and that is handed down from one generation to the next and so on, it is called a trading caste or a trading family and trade becomes its duty or practice. In that case the duty or practice is called *kulachara*. The Smriti writers and the commentators all lay down the injunction that the king should see that *kulachara* meaning the duty of every family or caste, is properly preserved."

The learned Judge further observed that a joint family, which carries on a trade handed down from its ancestors, becomes a trading family : trade being one of its *kulacharas* as it attracts to itself all the necessary incidents of trade. Then at page 78 :

"The rule of Hindu Law that debts contracted by a managing member of a joint family are binding on the other members only when they are for a family purpose, is subject to at least one important exception. According to a text of *Yajnavalkya*, "among herdsmen, vintners, dancers, washermen and hunters the husband shall pay the debts of his wife, "and the reason is stated to be that "the livelihood of the family depends" upon the wife....In his gloss upon this text Vignaneshvara in the Mitakshara points out that the reason assigned in the text for this exception shown that the rule applies to similar cases. Aparарka states that this is an exception to the general rule relating to families. Balambhatta in his commentary on the Mitakshara points out that the specified cases in the text are not exhaustive but illustrative and that the principle applies to all alike—Brahmins and others similarly situated. That is, the term 'wife', in the text stands for the Karta or Manager of the family and the terms 'herdsmen, etc.' stand for its members carrying on a family business. From this text it follows that where a family carries on a business or profession, and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for irs purposes, and the creditor is not bound to inquire into the purpose of the debt to bind the whole family thereby, because that power is necessary for the very existence of the family. Whether the debt was contracted for the purpose of the family profession or not, it binds the members."

The view of Chandavarkar, J., based on the view of the Hindu Law-givers from Manu downwards is that where the *kulachara* of the family is trade and such a trade had been handed down from the ancestors, the family becomes trading family and when a karta or manager of the family carries on a business or profession, which is the *kulachara* of the family, he is competent to contract debts so as to bind the other members of the family. But the extension of the principle, that whether the debt was contracted for the purpose of the family profession or not, it binds the members, cannot, however, with respect, to the learned Judge he considered to be supported by the texts referred to. The equation of the karta for the 'wife' in the text of Yajnavalkya while apposite in the sense that the karta or manager carries on a family business just as a wife engaged in the professions referred to in the text of Yajnavalkya, cannot be extended to lead to the inference that whenever a karta

1. (1932) 63 M.L.J. 92 : L.R 59 I.A. 300 : I.L.R. 54 All. 564 (P.C.).
2. (1900) I.L.R. 34 Bom. 72.

is engaged in a business, whether it is a family business or not and the family is maintained by that business, the karta is empowered to incur debts and bind the other members of the fam ly. It is only debts incurred in respect of the family trade,profession or avocation, whoever it may be that carries it—the wife in the class of professions referred to in the text of Yajnavalkya and the father or manager in the case of a family trade handed down from its ancestors that can bind the members of the family. The Full Bench in *Ramnath* v. *Chiranji*[1] to a certain extent base its conclusion on the observations of Chandavarkar, J., in *Raghunathji Tarachand* v. *Bank of Bombay*[2].

In *Nataraja* v. *Lakshman*[3] which has already been referred to, the family was a Brahmin family, whose *kulachara* obviously was not trading. The family has an income of about Rs. 1,000 per annum from family lands. The father of the minor sons started a rice-mill business for which he borrowed, which debts were sought to be made binding on the sons. Varadachariar, J., while dealing with the Full Bench case in *Ramnath* v. *Chiranjilal*[1] observed that it might be possible in cases where the other members of the family were adults by conduct of the parties the business started by the father might be regarded as joint business, but not so in cases where the other members were minors. Finding that the starting of a rice mill business by a person situated in the position of defendant 1 (the father) could not be said to be not attended with risk or danger to the family property, the learned Judge was of the opinion that even a family manager, though actuated by the motive of increasing the family income, was neither obligated to adopt nor was justified in adopting a course of that kind with a view to give the minor members more comfort than the normal income of the family properties would make possible and that such a transaction could not be supported either on the ground of family necessity or benefit on the ground that it was executed in connection with an ancestral business in the sense in which the expression was known to Hindu Law.

In so far as ancestral business is concerned, it is competent to the adult son to carry on that business after his father's death and incur debts for the purpose of that business, which would bind the interest of the sons, since ancestral business must be considered to be an asset of the family which the adult son gets into possession and which he is entitled to maintain and carry on and if in the course of carrying on that business he incurs debts, the minor sons cannot escape liability. The difficulty arises only in the case of a new business started. Even here, if the new business is started by a member of a family which had been a trading family in the sense that its ancestors' profession was trade and they actually carried on some business, then the mere fact that a new business is started which may not be the very same identical business started by the father would not be a sufficient defence to the minor sons to resist any proceeding against their interests in the family properties for debts incurred by their father in such a business, Even in such a case, it may not be open to the father or manager to start a new business which would be attended with risk and not akin to or of the nature carried on by his ancestors. The trade or the business carried on need not be the identical one. It may be that the family was doing money-lending business. The father or manager therefore cannot be permitted to start a speculative business in stocks and shares, though the family is a trading family, the reason being that it is a business attendant with grave risks. Though the imposing of limitations on the powers of a manager of a trading family, whose *kulachara* is trade, may amount to a curtailment of the spirit of commercial adventure and enterprice in a trading family on the other hand to hold that in a trading family the father or manager can start any business or trade however risky it may be, would be to hazard the interests of the minors in the joint family property. It will therefore be a question of fact in every case whether even in a trading family, a new business started is one which is akin to or of the nature carried on by the family, or is one attendant with risk and should not therefore have been started, which might result in detriment to the interests of the minor. An extension of the

1. (1934) I.L.R. 57 All. 605 (F.B.).
2. (1900) I.L.R. 34 Bom. 72.
3. A.I.R. 1937 Mad. 195.

old business may not be considered to be a new business, but a new business started must be shown to be a business which is not one that would ordinarily lead the members of the family to great risk. The mere fact however that the business carried on, though started for the first time, is by a member who belonged to a family whose *kulachara* is trade but one of the ancestors of the family at any time engaged themselves in trade, cannot entitle the manager by starting a trade and incurring debts to seek to bind the interests of the other members of the family. Manu in his four-fold classification of Hindus assigns the profession of trade to Vaishyas. Similar professions are assigned to the other three castes. But it is common knowledge that several families belonging to the Vaishya community have not been in fact engaging themselves in trade and have taken to othe avocations. To permit therefore a member of a Vaishya community, whose family at any rate for two or three generations previously had not engaged themselves in trade, to start a business and incur debts so as to bind the minor members of the family on the ground that he belongs to the community of Vaishyas would be placing in jeopardy the minors' interests in the joint family. In order to bind the minors' interests in the property it has to be shown not only that the family was a Vaishya family, but in fact the ancestors engaged themselves in trade.

In the present case, however, there is clear evidence oral and documentary referred to by my learned brother, especially that of D.W. 1 and Exhibit 11 series to show that the 1st defendant apart from his being a member of the Vaishya community, whose *kulachara* is trade, his father was carrying on money-lending business, which the 1st defendant was carrying on even during the lifetime of the father and after his death, in addition to it the 1st defendant started a rice mill. But the representation made to the bank under the security bond Exhibit A-3 was that overdraft facilities to the extent of Rs. 17,000 were required for the family business as shroff merchants. Mr. Anantha Ayyar sought to build up an argument to support a distinction between shroff business and money-lending business, the shroff business being considered to be mainly a business dealing with precious metals. In Ramanatha Ayyar's Law Lexicon, page 1183, "shroff" is understood to mean "banker, a money changer also and more commonly, an expert employed in Banks and treasuries to examine money". A shroff business, according to the Tamil Lexicon, means a business where precious metals are sold and it includes also a busine s of banking. We have, no doubt, however, that the shroff business which the 1st defendant carried on was money-lending and at any rate akin to the business which his father was carrying on. If the decision in the present case depended on the mere fact that the 1st defendant was a Vaishya and it was not shown that the father did any business, much less money-lending business, it would not have been possible for holding that it is a business which could be considered to be a family busine s. On the evidence in this case, I am satisfied that not only that the family is a trading family by birth but also by avocation and as such the carrying on of the shroff business by the 1st defendant for which purpose be borrowed from the plaintiffs in a family business and he was competent to incur debts in the course of the running of the business so as to bind his minor sons.

I am in agreement that the debt is liable to be scaled down in accordance with the sections 13 and 13-A of the Agriculturists Relief Act. I do not wish to express any opinion, however, with reference to the observations of my learned brother as to the procedure adopted in the case and the necessity for the minors to plead in the suit itself as to any illegality or immorality of the debts and the connected questions arising therefrom as it appears to me that they do not arise for determination in this appeal.

R.M. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present.—Mr. P. V. Rajamannar, *Chief Justice*, Mr. Justice Rajagopalan and Mr. Justice Rajagopala Ayyangar.

Messrs. C. Hajee Abdul Shukoor and Company .. *Petitioners**

v.

The State of Madras, represented by Deputy Commissioner of Commercial Taxes, Madras .. *Respondent.*

Madras General Sales Tax Act (IX of 1939)—Turnover and Assessment Rules—Rules 4 and 16—Scope and function of—Tax on sale of hides and skins—Single point taxation—Scheme of.

Though section 3 (1) of the Madras General Sales Tax Act levies a tax on the sale of goods on every dealer on his total turnover, in the cases of hides and skins this provision is subject to the terms of section 5 of the Act enacting a single point taxation in respect of certain specified sales. Section 3 of the Act would therefore be subject to the provisions of among others, section 5 (vi) of the Act relating to hides and skins. The single point of taxation in a series of sales in such cases has to be fixed by the rules. Rule 4 (2) of the Turnover and Assessment Rules does not amount to the taxation of a single point within section 5 (vi) but it is merely designed to determine whether it is the buyer or the seller that shall be liable to be taxed. The single point is fixed and the liability to tax is established only under rule 16. Under rule 16 (2) (i) it is only the sale of untanned hides and skins by a licensed dealer to a licensed tanner who tans the same that gives rise to a tax liability and hence purchases of untanned hides and skins by tanners from persons other than licensed dealers are not within the taxing provision.

Syed Mohammed & Co. v. *State of Madras*, (1952) 2 M.L.J. 598 at page 612, held *obiter*.

Mohomed Zakiria & Co. v. *Government of Madras*, (1954) 2 M.L.J. 668, observations approved.

In computing the purchase turnover of a licensed tanner only the sale to him from licensed dealers should be included.

Quaere : Whether a licensed tanner, who purchases untanned hides and skins from an unlicensed dealer is liable to be taxed on his turnover under rule 16 (2) or under any other provision of the Act and rules framed thereunder?

Petition under section 12-B (1) of the Madras General Sales Tax Act, praying the High Court to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 10th September, 1953 and made in T.A. No. 966 of 1952 preferred against the order of the Commercial Tax Officer, North Madras dated 12th September, 1952 in appeal No. 156 of 1952-53 (Assessment No. A3/333 of 1950-51 dated 31st March, 1952 on the file of the Deputy Commercial Tax Officer, Harbour Division.)

T. T. Srinivasan Advocate for Petitioners.

Assistant Government Pleader (*K. Veeraswami*) for Respondent.

When the petition came for hearing in the first instance before Rajagopalan and Rajagopala Ayyangar, JJ., following order of reference to the Full Bench was made by

Rajagopala Ayyangar, J.—This revision by an assessee relates for consideration among others the scope and function of rules 4 and 16 framed under the Madras General Sales Tas Act in the scheme of taxation of untanned hides and skins. The assessee, which is a firm, was a dealer-tanner in hides and skins, and held a license under section 5 of the Act and the rules framed thereunder. Under the rules the tax is levied on a purchaser and that was the manner that the assessee's turnover was computed. Among the items included in this turnover, as it finally emerged from the Sales Tax Appellate Tribunal, was a turnover in respect of purchases in hides and skins from Bombay by the assessee to the value of Rs. 2,72,205/8/3. In regard to this, the contention of the assessee before us was that the amount was not liable to tax under rule 16 (2) of the Turnover and Assessment Rules, since the provision was, it was contended, so framed as to impose a tax liability only when the purchase was from a dealer who was licensed under the Madras General Sales Tax Act, and that a purchase from an unlicensed dealer was not liable to be included in the turnover of a tanner assessee. The argument was that rules 15 and 16 were the sole charging provisions as regards dealers in hides and skins, and that rule 4 (2) was not a charging section, but merely determined whether it was the seller or the buyer

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that was liable to be taxed. Reliance was placed in this connection on a judgment in *Mahomed Zakiria & Co.* v. *Government of Madras*[1], which, though not a final decision on the point, appears to be inclined to consider favourably such a construction of the provisions. On the other hand, the learned Advocate-General drew our attention to a passage in the decision of this Court in *Syed Mohammad & Co.* v. *State of Madras*[2], which appears to support the interpretation that rule 4 (2) is a charging provision. These observations are really *obiter*, and though this judgment was affirmed by the Supreme Court, no reference is made to this passage in the affirming judgment. In view, however, of the conflicting views expressed in these two decisions and the general importance of this question, we consider that the matter should be decided by a Full Bench ,and we accordingly direct the papers to be placed before the learned Chief Justice for the purpose of answering the following question :

" Whether a licensed tanner, who purchases untanned hides and skins from an unlicensed dealer, is liable t be taxed on his turnover under rule 16 (2) or under any other provision of the Madras General Sales Tax Act and the rules framed thereunder ?"

The other questions can be decided after this reference is answered.

The petition then came on for hearing before the Full Bench.

K. V. Venkatasubramania Ayyar for *T. T. Srinivasan* and *A. N. Rangaswami*, Advocates, for petitioners.

The Advocate-General (*V. K. Thiruvenkatachari*) for the Assistant Government Pleader (*K. Veeraswami*) on behalf of Respondent.

The judgment of the Court was delivered by

Rajagopala Ayyangar, J.—The question of law which has been referred to the Full Bench is,—

" Whether a licensed tanner who purchases untanned hides and skins from an unlicensed dealer is liable to be taxed on his turnover under rule 16 (2) or under any other provisions of the Madras General Sales Tax Act and the rules framed thereunder ?"

The circumstances leading to this reference have been set out in the order of reference and need not be repeated.

It will be convenient to refer to the relevant provisions of the Madras General Sales Tax and the rules framed thereunder and examine the question in the light of these provisions before dealing with the observations in the two decisions adverted to in the order of reference.

Section 3 of the Act is what might be termed the principal charging provision. The relevant portion of this section is in these terms :

" 3 (1) Subject to the provisions of this Act, (*a*) every dealer shall pay for each year a tax on his total turnover for such year ; and

(3) A dealer whose total turnover in any year is less than ten thousand rupees shall not be liable to pay any tax for that year under sub-section (1) or sub-section (2).

(4) For the purposes of this section and the other provisions of this Act, turnover shall be determined in accordance with such rules as may be prescribed :

" Provided that no such rules shall come into force unless they are approved by a resolution of the Legislative Assembly.

(5) The taxes under sub-sections (1) and (2) shall be assessed levied and collected in such manner and in such instalments, if any, as may be prescribed." /

Provided that

(i) in respect of the same transaction of sale, the buyer or the seller, but not both, as determined by such rules as may be described shall be taxed ;

(ii) where a dealer has been taxed in respect of the purchase of any goods in accordance with the rules referred to in clause (i) of this proviso, he shall not be taxed again in respect of any sale of such goods effected by him."

'Dealer' is defined in section 2 (*b*) as any person who carries on the business of buying or selling goods.

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1. (1954) 2 M.L.J. 668.

2. (1952)-2 M.L.J. 598 at p. 612.

Though section 3 (1) levies a tax on the sale of goods on every dealer on his total turnover—subject to exceptions which are not relevant—in the case of hides and skins this provision is subject to the terms of section 5 enacting single point taxation. Section 5 reads :

"5. Subject to such restrictions and conditions as may be prescribed including conditions as to licences and licence fees—

(i) the sale of handspun yarn and of any cloth woven on handlooms wholly with handspun yarn and sold by persons dealing exclusively in such cloth, shall be exempt from taxation under section 3, sub-section (1) ;

(ii) the sale of cotton (including kapas) and of cotton yarn other than handspun yarn shall be liable to tax under section 3, sub-section (1), only at such single point in the series of sales by successive dealers as may be prescribed and only at the rate of one-half of one per cent of the turnover at that point ;

(iii) the sale of any cloth woven on handlooms wholly or partly with mill yarn shall be exempt from taxation under section 3, sub-section (1), if the sale is to a wholesale or retail dealer in the State, or if the sale is for delivery outside the State and delivery is actually so made ;

(iv) the sale of bullion and specie shall be liable to tax under section 3, sub-section (1), only at such single point in the series of sales by successive dealers as may be prescribed and only at the rate of one-fourth of one per cent. of the turnover at that point ;

(v) the sale of tea grown by the seller or grown on any land in which he has an interest, whether as owner, usufructuary mortgagee, tenant or otherwise, shall be exempt from taxation under section 3, sub-section (1), if the sale is for delivery outside the State and delivery is actually so made ;

(vi) the sale of hides and skins, whether tanned or untanned * * * shall be liable to tax under section 3, sub-section (1) only at such single point in the series of sales by successive dealers as may be prescribed."

A. section 3 (1) itself opens with the words 'subject to the provisions of this Act,' section 3 would be subject to the provisions of, among others, section 5 (*vi*). It will be noticed that sub-sections 4 and 5 of section 3 and section 5 refer to "prescription" and under section 2 (*f*) 'prescribed' means prescribed by rules made under the Act. In accordance with these provisions, rules have been made providing *inter alia* whether the buyer or the seller has to be taxed in respect of a transaction of sale under proviso (1) to section 3 (5) for the determination of the turnover of a dealer under section 3 (4), and also generally for the assessment, levy and collection of the tax under section 3 (5) as also in regard to restrictions and conditions including conditions as to licence and licence fees referred to in the opening words of section 5.

The rules are in two sets. The first is Madras General Sales Tax (Turnover and Assessment) Rules dealing with the determination of the turnover, the "prescribing" of the person whose turnover is liable to be taxed, fixation of the points at which the transaction is liable to taxation in respect o those commodities for which a single point taxation is provided for in the Act as also for the levy and collection of the tax. The other set of rules entitled the Madras General Sales Tax Act Rules lays down the procedure for application for licences under the Act, the authority to grant them, the conditions subject to which they are granted, the fees prescribed therefor, the accounts to be maintained by assessees, the hierarchy of officials and authorities who are to carry out the assessment or hear appeals or deal with revisions therefrom and such other procedural matters. In the present case we are concerned with the Turnover and Assessment Rules. Rule 4 of these Rules provides:

"4 (1) Save as provided in sub-rule (2) the gross turnover of a dealer for the purposes of these rules shall be the amount for which goods are sold by the dealer.

(2) In the case of the undermentioned goods the gross turnover of a dealer for the purposes of these rules shall be the amount for which the goods are bought by the dealer—

(*a*) groundnut,

(*b*) Cashew, cotton (including kapas) bought by spinning mill or by dealer who exports outside the State.

(*c*) untanned hides and skins bought by a licensed tanner in the state, and

(*d*) untanned hides and skins exported outside the state by a licenced dealer in hides and skins"

Rule 5 sets out how the net assessable turnover is derived, and rules 6 and 13 lay down the procedure by which the assessing authority determines the turnover and levies the tax. Rule 14 enjoins upon the assessing authority the necessity to record its reasons in writing in cases where it determines the turnover on a figure different from that shown in a return submitted under the provisions of the rules, with a proviso that the same shall not affect the validity of assessments duly made. Rules 15 and 16 are the special rules designed to apply to the assessment and levy of the tax payable on hides and skins. Rule 15 (1) enacts that rules 6 to 13 shall not apply to licensed tanners and other licensed dealers in hides and skins in respect of their dealings in hides and skins but that the provisions of that and the following rule shall apply to them in respect of such dealings. The other sub-clauses of rule 15 are not very relevant in the present context as they relate to the provisional assessments, their collection and the final adjustments in the light of the turnover for the year when finally ascertained. Rule 16 is the crucial rule which determines the points at which the tax on hides and skins is levied. It is necessary, therefore, to set out this rule in full :

"16. (1). In the case of hides and skins the tax payable under section 3 (3) shall be levied in accordance with the provisions of this rule.

(2) No tax shall be levied on the sale of untanned hides or skins by a licensed dealer in hides or skins except at the stage at which such hides or skins are sold to a tanner in the State or are sold for export outside the State.

(i) In the case of all untanned hides or skins sold to a tanner in the State, the tax shall be levied from the tanner on the amount for which the hides or skins are bought by him.

(ii) In the case of all untanned hides or skins which are not sold to a tanner in the State but are exported outside the State, the tax shall be levied from the dealer who was the last dealer not exempt from taxation under section 3 (3) who buys them in the State on the amount for which they were bought by him.

(3) Sales by licensed dealers of hides or skins which have been tanned within the State shall be exempt from taxation provided that the hides or skins have been tanned in a tannery which has paid the tax leviable under the Act. If such hides or skins have been tanned in a tannery which is exempt from taxation under section 3 (3), the sale of such hides or skins shall be liable to taxation as under the next sub-rule below dealing with hides or skins tanned outside the State.

(4) Sales by licensed dealers in hides or skins which have been tanned outside the State shall be exempt from taxation except at the stage of sale by the dealer, who is the first dealer not exempt from taxation under section 3 (3) who sells them within the State. The tax shall be levied from such dealer on the amount for which he sells such hides or skins.

(5) Sale of hides or skins by dealers other than licensed dealers in hides or skins shall, subject to the provisions of section 3, be liable to taxation on each occasion of sale."

Before considering the exact terms of this rule, it is necessary to set out the terms of rule 5 of the General Sales-tax Rules under which dealers have to obtain licence, for the purpose of their dealings. This rule runs thus :

"5. (1) Every person who—

(*a*) deals in cotton and or cotton yarn other than handspun yarn and or handspun yarn, or

(*b*) deals exclusively in cloth woven on handlooms wholly with handspun yarn, or

(*c*) deals in cloth woven on handlooms wholly or partly with mill yarn, or

(*d*) deals in bullion and or specie, or

(*e*) deals in hides and or skins whether as a tanner or otherwise, or

(*f*) for an agreed commission or brokerage, buys and or sells goods of any description on behalf of known principals, shall, if he desires to avail himself of the exemption provided in sections 5 and 8 or the concession of taxation only at a single point or of taxation at the rate specified in section 5, submit an application in Form 1 for a licence in respect of each of his places of business to the authority specified in sub-rule (2) so as to reach him not later than the 30th day of April of the year for which the licence is applied for :

Provided that in the case of a business which is commenced in the course of a financial year the dealer shall submit the application for the license to such authority so as to reach him not later than thirty days from the date of commencement of his business.

Provided further that, where the exemption or concession aforesaid was conferred for the first time by the Madras General Sales-tax (Amendment) Act, 1947 and the dealer had commenced business before the 1st January, 1948, he shall submit the application for the licence not later than the 1st March, 1948."

It will be seen that the licensing provisions are not compulsory and the basis upon which they are worked is that if a dealer desires to avail himself of the exemption provided under sections 5 and 8 or the concession of taxation only at a single point, he has to obtain a licence. In other words, the penalty for not taking out a licence is the deprivation of the concessions named in sub-clauses 5 (1) (*f*). We are not now called upon to consider the exact scope of the concessions as laid down under this provision for the very good reason that the case involved in the present reference relates to a licensed tanner and his liability to taxation under rule 16 of the Turnover and Assessment Rules.

It will now be convenient to consider the terms of rule 16 under whieh in the case of hides and skins the single point in the series of sales by successive dealers has been prescribed. Sub-rule (1) laying down that

"in the case of hides and skins the tax payable under section 3 (1) shall be levied in accordance with the provisions of this rule"

makes it clear that so far as hides and skins are concerned, the levy of the tax under the charging provision, section 3 (1), is to be determined only in accordance with the provisions of rule 16. This really carries out the provisions of rule 15 (1) under which in relation to licensed dealers in hides and skins in respect of their dealings in hides and skins, the provisions of rule 16 shall apply. This reference is concerned with the proper interpretation of rule 16 (2) which runs :

"No tax shall be levied on the sale of untanned hides or skins by a licensed dealer in hides or skins except at the stage at which such hides or skins are sold to a tanner in the State or are sold for export outside the State.

(i) In the case of all untanned hides or skins sold to a tanner in the State, the tax shall be levied from the tanner on the amount for which the hides or skins are bought by him.

(ii) In the case of all untanned hides or skins which are not sold to a tanner in the State but are exported outside the State, the tax shall be levied from the dealer who was the last dealer not exempt from taxation under section 3 (3) who buys them in the State on the amount for which they were bought by him."

We shall now set out the respective arguments submitted on behalf of the assessee and by the learned Advocate-General on behalf of the State as to the proper scope and effect of this sub-rule. The construction which the learned Advocate-General invited us to adopt was his. Under section 3 (1) of the Act a liability is imposed on every dealer to a tax on his total turnover subject only to the condition that in respect of each transaction of sale, the rules would determine whether it is the buyer or the seller hat would be liable but not both. This multi-point levy is not, however, applicable to sales of hides and skins but they are to be taxed only at a single point fixed by the rules. Section 5 (*vi*) postulates a series of sales each of which might be taxable the rule-making authority being given the power to fix a single point in such series of sales at which the tax is to be levied. If, therefore, the rules fixed a single point at which the sale is to be taxed and if they determined whether it was the seller or the buyer that should pay the tax, the charging provision immediately comes into operation, the charge gets levied and the tax becomes exigible. Rule 4 of the Turnover and Assessment Rules satisfies all the requirements of law to bring the charge into operation. Sub-rule (2) specifies, a few commodities in respec of which the tax is payable on the purchase turnover, that is, it is payable by the buyer and among these, hides and skins are included. The prescription, therefore enjoined by section 3 (5) proviso (*i*) is made. Sub-clauses (*c*) and (*d*) perform a double function. They fix the single point for tax tion as required by section 5 (*vi*) and in addition they also specify as required by section 3 (5) as to whether it is the buyer or the seller that should be taxed in respect of a sale in that commodity. Rule 4 (2) (*c*) provides that in respect of untanned hides and skins bought by a licenced tanner in the State, the gross turnover of the dealer is the amount for which the goods are bought by him. There is no doubt that in the present case, it is a licensed tanner who has bought the goods. The expressions 'bought by a licensed tanner' in the context and in the light of the other provisions of the rules should be understood to mean 'bought by a tanner' for the purpose of tanning and is actually tanned by him, that is, the licensed tanner is referred to

not in an occupational sense merely. The forms prescribed under the rules for the returns to be submitted by the dealers in hides and skins effectuate this purpose and enable the tax to be levied on the purchase turnover of hides which are really consumed in a tannery or which are exported outside the State as untanned hides and skins in respect of which also the tax is laid down by the sub-rule. The forms referred to are forms A-4 and A-5 and under these the tanner-dealer returns his purchase turnover but this is deducted from the assessable turnover when the goods are sold to another dealer within the State without being tanned by the tanner-purchaser. The argument is that it is immaterial for the purpose of rule 4 (2) (*c*) as to the person from whom the licensed tanner purchases and that a liability to pay the tax arises on his purchase and it does not matter whether the person from whom he buys is a licensed or an unlicensed dealer. This last argument is put forward in order to sustain the plea that rule 4 (2) (*c*) and (*d*) also serve to fix the single point for the purpose of taxation under section 5 (*vi*) of the Act. It is urged that if rule 4 (2) (*c*) and (*d*) were understood in this sense, there would automatically be only the single point, for there cannot be a series of purchases by tanners for tanning for when the process of tanning is completed, the goods will cease to be untanned skins and hides and in regard to sub-rule (*d*) there cannot be any further sales in the Stat. if the goods have been exported. The further argument is that all dealings in hides and skins not falling within rule 4 (2) (*c*) and (*d*) are comprehended within rule 4 (1) under which the tax is levied on the seller on his sale turnover. This contention about the scope and effect of rule 4 (2) is sought to be reinforced by a reference to the language and form in which the tax liability is dealt with by rule 16. The provision in rule 16 (2), it will be noticed, is in the negative and forbids the levy of a tax on the sale of untanned hides and skins *except* at the stage at which such hides and skins are sold to a tanner or sold for export. It is argued that this negative form was adopted because such sales would have fallen under rule 4 (1) and would have been liable to a tax on their sale turnover. It is urged that after this general declaration which, so to speak, gets rid of the absolute liability imposed by rule 4 (1), the two paragraphs of 16 (2) numbered (*i*) and (*ii*) deal with the exact cl ss of cases which are dealt with by rule 4 (2) (*c*) and (*d*). In other words rule 16 (2) (*i*) merely reproduces and re-enacts rule 4 (2) (*c*) and should not consequently be understood as varying the category of transactions which the language of rule 4 (2) (*c*) is apt to include within its signification. The words therefore in rule 16 (2) 'in the case of all untanned hides or skins sold to a tanner' should be read as meaning untanned skins and hides purchased by a tanner from any person whatsoever and the tax is to be levied on the tanner on the amount for which the hides or skins are bought by him, Similarly, it is said, sub-rule (*ii*) reproduces and re-enacts rule 4 (2) (*d*). On this basis the argument is that there is no specification either in rule 4 (2) (*c*) or rule 16 (2) (*ii*) that the purchase by the tanner should have been from a licensed dealer so that every purchase from whatever source would have to be included in his turnover.

On the other hand, the contention of Mr. K. V. Venkatasubramania Ayyar, the learned counsel for the assessee, is that the charging provision under the Madras General Sales-tax Act, is section 3 (1) but that it becomes operative on the rule prescribing whether it is the buyer or the seller on whose turnover the tax is to be levied in respect of particular commodity. In addition to this general rule, the levy of tax on hides and skins, is subject to a further condition that the rules must prescribe one single point in the series of sales at which the tax is to be levied. The content and scope of rule 4 is merely to prescribe under proviso (1) to section 3 (5), namely the determination as to whether it is the buyer or the seller that should be taxed and rule 4 (2) (*c*) cannot be read as the fixation of a single point for taxation within the meaning of section 5 (*vi*) of the Act. He points out that section 5 (*vi*) requires that in the case of all transactions in hides and skins, the single point for taxation has to be fixed and that even accepting the argument of the learned Advocate-General, a large number of transactions in hides and skins fall within rule 4 (1) under which admittedly there is no fixation of a single point. It is, therefore

unreasonable and not proper to assume that in respect only of particular specified transactions, rule 4 (2) (*c*) and (*d*) operate not merely as prescriptions under the first proviso to section 3 (5) but also fix the single point for taxation under section 5 (*vi*). The other rules in the Turnover and Assessment Rules particularly rules 15 and 16 make it absolutely clear that rule 4 is not designed or apt to fix the single point for taxation. But, on the other hand, it is really one which merely determines whether in respect of particular transactions in any commodity, it is the buyers' or the sellers' turnover that is liable for taxation.

Having considered the matter carefully we are clearly of opinion that the contention raised on behalf of the assessee ought to prevail. In the case of hides and skins no turnover is liable to tax until the single point in the series of sales is fixed by the rules and the turnover represents the total of the transactions in the year. Rule 15 is very clear that the turnover in repect of dealings in hides and skins has to be ascertained and assessed under rule 16. Rule 15, it will be noticed, specifically prescribes that the provisions of that rule apply to the dealings by "licensed" tanners and dealers. Therefore in the absence of any specific indication to the contrary, the dealings referred to in rule 16 would be held to mean only dealings by licensed dealers. It is in that context that the terms of rule 16 have to be understood. Rule 16 (1) is a further declaration which emphasises that in respect of dealings in hides and skins the determination of the taxable turnover would be governed by the other sub-rules. Rule 16 (2) enacts a general rule that in respect of dealings in hides and skins, there shall be no taxation at successive points but only at two mutually exclusive points, thus conforming to the requirements of the prescription called for by section 5 (*vi*). The two mutually exclusive points are set out in sub-clauses (*i*) and (*ii*) which follow the main portion of the sub-rule. The first relates to a tanner which in the context undoubtedly means and can only mean a tanner who has actually tanned those goods. Sub-clause (*ii*) deals with goods exported outside the State. It will be seen that in both these cases this will be the last sale of goods within the State as untanned hides and skins for in the first case, after tanning it will become tanned hides and skins, a matter which is dealt with by rule 16 (3) and in the case covered by sub-clause (ii) the untanned hides and skins would have left the State. Therefore, there could be no further sales of the commodity within the State. The terms of rule 15 as well as those of rule 16 (2) make it clear that it is a dealing by a licensed dealer that is being dealt with under these rules. The argument of the Advocate General is that paragraphs (i) and (ii) of rule 16 (2) have to be divorced from the opening portion of rule 16 (2) which refers to dealings of licensed dealers and should be read as re-enacting the provisions of rule 4 (2) (*c*) which do not specifically refer to the dealer who sells to the tanner as being licensed. An analysis of rule 16 (2) clearly establishes the untenability of the argument of behalf of the State. The opening paragraph consists of two parts. The first is couched in the negative and reads like an exemption of the levy of tax on the sales of untanned hides and skins by licensed dealers thus carrying out the object of rule 15 (1) under which this rule has to provide for dealings in hides and skins by licensed dealers. To this extent it negatives any liability that might arise on sales of hides and skins which might have attached to such sales by reason of the language of rule 4 (1). The second limb of the sub-rule enacts two exceptions and provides for taxability in those two cases. The two types of transactions are indicated as the stages at which the tax would be levied. The first is when such goods are sold to a tanner in the State and the second is when they are sold for export outside the State. Having regard to the form of this rule which deals with sales and not with purchases, the rule has to be read as a sale by a licensed dealer to a tanner in the State. Though the sub-rule if read *in vacuo* might mean "whether the sale is effected to a licensed or an unlicensed tanner" yet read in conjunction with rule 15 (1) there can be no doubt that the tanner who is referred to in the second limb of the opening paragraph of rule 16 (2) is a licensed tanner and this construction would be in accord with the form of rule 4 (2) (*c*) also. In the same manner the sale for export which is referred to in the last portion of this paragraph would necessarily mean a sale by a licensed dealer.

It will be seen that the two paragraphs numbered (*i*) and (*ii*) that follow the opening paragraph of rule 16 (2) really deal with the two exceptions which have been indicated by its second limb. Read in the light of this context there can be no room for doubt that the dealings of the tanner which are liable to tax under (i) are sales by licensed dealers which words are to be found in the opening portion of rule 16 (2). The expression 'sold to a tanner' in 16 (2) (*i*) is a repetition of what is contained in the opening paragraph of rule 16 (2) and a continuation of the same idea. On the other hand the form of expression used in rule 4 (2) (*c*) is entirely distinct. The pattern of rule 16 (2) (*ii*) is exactly identical and does not need separate consideration. We are, therefore, unable to accept the argument of the learned Advocate-General that rule 16 (2) (i) should be read as identical with rule 4 (2) (*c*) and that the purchse turnover of a licensed tanner would include purchases from unlicensed dealers.

Rule 15 (1) specially declares that the provisions of that and the following rule shall apply to dealings in hides and skins by licensed dealers alone, and this has been consistently carried out by rules 16 (2), (3) and (4). This scheme is emphasised by the provisions made by rule 16 (5) under which in the case of unlicensed dealers, the rule of single point taxation gives place to multi-point tax. It may be mentioned that this Court has held in *Syed Mohammed & Co* v. *State of Madras*,[1] rule 16 (5) to be *ultra vires* of the rule-making power as contravening the provisions of section 5 (*vi*) of the Act and the decision of this Court has been affirmed by the Supreme Court on appeal. What the effect of this is upon the liability of an unlicensed dealer to taxation does not arise for consideration in the present case because the assessee whose case is referred is a licensed dealer. But in considering the scheme of taxation enacted by rule 16, we cannot ignore the existence of sub-rule 5.

The conslusion we have reached as a result of the above discussion is that (1) the charging provision, section 3 is subject in the case of transactions in hides and skins, to the terms of section 5 (*vi*) under which a single point of taxation in a series of sales has to be fixed by the rules ; (2) rule 4 (2) is not the fixation of a single point within section 5 (*vi*) but it is merely designed to determine whether it is the buyer or the seller that shall be liable to be taxed ; (3) the single point is fixed and the liability to tax is established only under rule 16 ; and (4) that under rule 16 (2) (*i*) it is only the sale of untanned hides and skins by a licensed dealer to a licensed tanner who tans the same that gives rise to a tax liability and that purchases of untanned hides and skins by tanners from persons other than licensed dealers are not within the taxing provision.

We might now refer to the two decisions which are mentioned in the order of reference. The first of them is a decision of this Court in *Syed Mohamed & Co.* v. *State of Madras*[1], and the passage relevant to the present context is at page 612. It runs thus :

> "To appreciate the true position it is necessary to examine the scheme of taxation which has been adopted in the rules with reference to untanned hides and skins.
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> In broad outline, the scheme of taxation adopted by the rules is to levy the tax at the stage when the articles are tanned in the State or exported to foreign countries for tanning. Thus, under rule 4 (2) (*c*) when a licenced tanner purchases untanned hides and skins for tanning, the amount for which he purchases the goods is to be included in his turnover and he is taxed thereon : and under rule 4 (2) (*d*) when a licenced dealer purchases untanned hides and skins for export, the amount for which he purchases would be included in his turnover and he would be taxed thereon. Then comes rule 16 which has come in for considerable criticism. Rule 16 (2) fixes in accordance with rule 4 the points of taxation at the stage of tanning or at the stage of export. But then, it limits the operation of this rule to sales by licenced dealers. It is this limitation that furnishes the ground for attack on the rules. To understand the object it will be useful to analyse the possible cases which might arise on the application of rule 16 (2). Taking first the case of hides and skins which are tanned within the State, four possible situations might arise. There might be a sale by a licensed dealer either to a licensed tanner or to an unlicensed tanner ; or there might be a sale by an unlicensed dealer either to a licensed tanner or to an unlicensed tanner. When the sale is by a licensed dealer, rule 16 (2) (*i*) prioivides for a tax being levied on the tanner whether he is

1. (1952) 2 M.L.J. 598 at 612.

licensed or unlicensed. But where the sale is by an unlicensed dealer, there is a difference in the incidence of taxation. If the sale is to a licensed tanner, then under rule 4 (2) (*c*), the purchaser has to pay the tax. But where the sale is to an unlicensed tanner rule 4 (1) will apply and the tax will fall on the seller. Rule 16 (5) provides that sale by dealers other than licensed dealer will be "liable to taxation on each occasion of sale." Under this sub-clause when there are successive sales by unlicensed dealers the tax will be leviable on such occasion of sale and that will be inconsistent with section 5 (*vi*) which provides for taxation at a single point."

On the facts of the case before this Court, it is clear that the question as to the liability to taxation by licensed tanners of goods purchased from unlicensed dealers did not arise for consideration at all. The case was one which related to a licensed tanner who had also purchased from licensed dealer and the point raised for consideration of the Court was the constitutional validity of the provision of rule 4 under which the tax was leviable on a purchaser in certain cases. The contention raised was that as Government of India Act, 1935, under which the Madras General Sales-tax Act was enacted enabled the levy of a tax on sales of goods, the power did not comprehend legislation by which tax was imposed on a buyer. There were other certain subsidiary points arising under Article 14 of the Constitution of India and also an attack upon rules 15 and 16 of the Act. But the point in the present form was never before the Court and these observations arose merely incidentally in discussing the scheme of taxation and are wholly in the nature of an *obiter*, the Court's attention not having been directed to the particular point which has now arisen for discussion.

In the light of the elaborate argument which has been addressed to us upon the relative scope of rule 4 (2) and rules 15 and 16 we are unable to agree that the single point for taxation is fixed under rule 4 (2) (*c*) or that sub-rule by itself imposes a liability to tax divorced from the conditions laid down in rule 16 of the Turnover and Assessment rules.

The other decision is the one reported in *Mohd. Sakiria & Co.* v. *Government of Madras*[1]. The point was stated by Satyanarayana Rao, J., in these terms :

" The short point, that has been raised by the learned counsel for the assessees, is that under rule 16 a tanner may be taxed on the purchase price only if his purchase was from a licensed dealer of untanned hides and skins, and if his purchase was only for the purpose of tanning by him. Until these two conditions were satisfied, the levy of the tax by the Department could not be justified. As regards the second of the two conditions, it is stated, that the language of the rule 'sold to the tanner' and the language of the return, Form A-4 prescribed by the rules in which the assessee is required to state the amount for which hides and skins were purchased for tanning by the assessee as well as the exemption under sub-c use (3) of section 16 undoubtedly support the contention of the learned counsel for the assessee for otherwise there is the possibility of successive tanners being taxed under this rule. If the tanner purchases from a licensed dealer and then sells it without tanning to another ta ner, who is also a licensed tanner and so on, all these tanners could be taxed under this rule and unless a limit of the nature suggested, namely, that the purchase must be for tanning by the tanner himself, is imposed, the multi-point tax cannot be avoided.

As regards the other contention, that the purchase must be from a licensed dealer, with reference to the turnover in dispute, the assessee did not no doubt make any attempt either before the Department or before the Appellate Tribunal to raise the question and substantiate the point by placing material before any of them. This was explained by the assessee as due to the fact, that until the law was settled by the Supreme Court and also by this Court that rule 16 (5) was *ultra vires*, it was assumed that even purchases from unlicensed dealers by a tanner could be made liable and that, therefore, there was the omission to draw the distinction between purchase from a licensed dealer and purchase from an u licensed dealer. Having regard to the fact, that there was some confusion in the mind of the assessee and also the Department till the law was settled recently, we think there is justification for the contention of the assessee, that his omission was not wilful but was due to this circumstance."

In the light of these observations the learned Judge remitted the case to the Tribunal for disposal after the assessee was given an opportunity to prove his contention that his purchases were from an unlicensed dealer. We do not read this judgment as deciding the point now under reference. The utmost that could be said is that it considered the point now raised in favour of the assessee under reference as *prima facie* tenable. As would be seen from our discussion of the point referred we are in agreement with the view which the learned Judges in this case were inclined to accept. The only reservation which we desire to make is that the conclusion does

1. (1954) 2 M.L.J. 658.

not really flow by reason of the invalidity of rule 16 (5) but because of the proper construction of rule 16 (2) for rule 16 (5) has to do with the taxation of unlicensed dealers whereas the question now under issue is the transactions of licensed dealers though their purchases are from unlicensed dealers. Rule 16 (5) could have no bearing either as imposing or exempting any tax liability in such a case.

Our answer to the question referred to us therefore is that in computing the purchase turnover of a licensed tanner only the sales to him from licensed dealers could be included.

The petition came on for final orders before the Bench after the expression of opinion by the Full Bench.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This is a revision filed by the assessees against the order of the Sales-tax Appellate Tribunal. The assessees are a registered firm carrying on business a dealers in hides and skins with a tannery at Red Hills and office at 31, Angappa Naicken Street, Madras. They hold a licence in respect of their dealings in hides and skins as dealers-cum-tanners. The assessment now in question relates to the year 1950-51. The firm consists of two partners Hajee Abdul Shukoor and Hajee Muhammad Ibrahim and carries on business in the name and style of C. Hajee Abdul Shukoor & Co. The Deputy Commercial Tax Officer, Harbour Division, who is the assessing authority, determined the net turnover of the assessees at Rs. 19,82,235-14-5. The assessees filed an appeal to the Commercial Tax Officer and there raised a contention that as the bulk of the goods tanned by them were sold for export they were entitled to exemption under Article 286 (1) (*b*) of the Constitution. They further urged that barring the purchase of a total value of Rs. 8,65,210-2-6 which represented local purchases the rest of the goods were purchased outside the State and therefore not liable to be included in their turnover. These purchases fell under three categories: (1) purchases through their agents at Secunderabad totalling Rs. 95,630-13-6. (2) purchases from merchants in Bombay aggregating to Rs. 2,72,205-8-3 and (3) purchases from Bangalore totalling Rs. 7,49,179-6-2. The Commercial Tax Officer rejected the contention put forward on behalf of the assessees that none of these categories of purchases were affected outside the Madras State and dismissed their appeal. The matter was then taken up to the Sales-tax Appellate Tribunal by a further appeal by the assessees. Before the Tribunal besides the point urged before the lower authorities, certain additional points which we shall deal with presently were also raised. The Tribunal accepted the contention of the assessees that the purchases from Secunderabad had been effected outside the State and that therefore they could not be included in the turnover of the assessees but after excluding this item held the assessees liable to pay the tax on the turnover of (1) local purchases regarding which no controversy was raised and (2) purchases from Bangalore and purchases from Bombay. In regard to the Bangalore purchases, the points raised were these: These purchases were effected by the partner Hajee Muhammad Ibrahim who was resident of Bangalore and who besides being a partner of the assessee-firm was also independently carrying on a business at Bangalore in hides and skins. Two alternative contentions were raised as regards these purchases. The first was that the purchase by the partner Ibrahim was a purchase on behalf of the assessee-firm. If the assessees had been able to establish this, undoubtedly they would have proved that the purchase had been effected outside the State and the purchase price could not have been included in their turnover. The tribunal, however, found that the goods were purchased not by the assessee-firm but by Ibrahim himself and that Ibrahim had subsequently effected a sale of the goods to the assessee firm, the latter sale having been effected and completed within the State. On this finding of fact there can be no basis for the contention that the sale was outside the State and as a result learned counsel for the assessees has not repeated this argument before us. The other was a legal contention accepting the finding that the purchase from the Bangalore merchants was made by Ibrahim individually but that as Ibrahim was a partner in the assessee-firm there could not legally be a sale by him to the assessee

firm because a person cannot contract with himself and another. The Tribunal rejected this argument and in our opinion rightly. For supporting this point learned counsel for the assessees relied on the decision in *Rustomji* v. *Sheth Purshotamdas*[1].

The actual question which arose for decision does not bear on the point we have to consider. This was whether where an individual was a common partner in two firms, any suit could be brought by one firm against the other on any transaction between them, a procedural problem which has been solved by the enactment of Order 30, rule 9, Civil Procedure Code (*vide* also Order, 48, A.R.S.C.). In the absence of any legislative guidance, we would have had to consider the very interesting question as to how far the mercantile concept of a firm being invested with juristic personality effected by the combined operation of the terms of the Partnership Act and Order 30, Civil Procedure Code, has rendered a partner sufficiently distinct from the firm of which he is a member as to render it possible for contracts being concluded between them. In this connection reference may be made to a passage in the judgment of Sir John Beaumont in *B. M. Goculdas* v. *Alembic Chemical Works Co. Ltd.*,[2] where he said :

> " The Indian Partnership Act goes further than the English Partnership Act of 1890 in recognising that a firm may possess a personality distinct from the persons constituting it ; the law in India in that respect being more in accordance with the law of Scotland than with that of England."

We are, however, relieved of this necessity by reason of the Explanation to section 2 (*b*) of the General Sales-tax Act which runs :

> " A co-operative society, a club, a firm, or any association which sells goods to its members is a dealer within the meaning of this clause."

It follows that a transfer of the property in goods by a member of a firm to the firm is a sale within the meaning of the General Sales-tax Act.

In the case of purchases from Bombay the assessees made an attempt before the Tribunal to prove that the sale transactions were completed outside the State but the Tribunal held against them on the facts and so the point is no longer open to the assessees in this Court.

In regard to both the Bombay and Bangalore purchases a further point was raised before the Tribunal that even assuming that the purchases took place within this State, they were purchases from unlicensed dealers, and that on a proper construction of the Sales-tax Act and the rules framed thereunder, particularly rules 15 and 16 of the Turnover and Assessment Rules, these purchases could not be included in their taxable turnover. This contention which was negatived by the Tribunal was raised before us, and having regard to the importance of the point and certain conflicting observations in decisions of this Court, it was referred by us to a Full Bench. The Full Bench has now answered the reference in favour of the assessees. The result is that these purchases both from Bangalore and Bombay which are purchases from unlicensed dealers are not liable to be included in the taxable turnover of the assessees. We might mention in passing that though the partner Ibrahim was the seller in Bangalore, as he was not individually licensed under the Madras General Sales-tax Act, the purchase from him by the assessee firm should be treated as a purchase from an unlicensed dealer. The result is that the assessees are entitled to succeed and the order of the Tribunal including the Bangalore and Bombay purchases in the turnover of the assessees is set aside.

In view, however, of the assessees having failed in the other contentions raised by them before us, we direct that there should be no order as to costs in this revision case.

R.M. *Petition allowed.*

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1. (1901) I.L.R. 25 Bom. 606.
2. (1948) 2 M.L.J. 237: L.R. 75 I.A. 147 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAJAGOPALAN.

N. M. Rayaloo Iyer & Sons, Mathurai .. *Appellant**

v.

The Commissioner of Income-Tax, Excess Profits Tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 10 (2) (x) and (xv) and Excess Profits Tax Act (XV of 1940) schedule 1, rule 12—Permissible deductions under—Tests—Payment to employees of salaries, bonus and commissions—When deducted in computation of assessable income—Calculation of net profits—If should be made after deducting excess profits tax.

Excess Profits Tax Act (XV of 1940), schedule 1, rule 12—Scope and effect.

As there is a specific provision in section 10 (2) (*x*) of the Income-tax Act, circumscribing the limits under which a commission or bonus paid t an employee is to be allowed as a deduction, that specific provision must prevail and resort cannot he had to section 10 (2) (*xv*) of the Act. Under section 10 (2) (*x*) the bonus or commission is subject to the test of reasonableness and the department has jurisdiction under that section to determine a reasonable amount as deduction. But in doing so, it has to take note of the three circumstances or considerations specified in the proviso to section 10 (2) (*x*). It is the cumulative effect of these considerations which should govern the determination of a reasonable amount under that clau e. The only considerations therefore are the pay of the employee, the conditions of his service, the profits of the business for the year in question and the general practice in similar business. The scope of section 10 (2) (*xv*) is entirely different from that of section 10 (2) (*x*) of the Income-tax Act. Neither the test prescribed in section 10 (2) (*xv*), that the amount is wholly and exclusively laid out or expended for the purpose of such business, nor the ancillary test of commercial expediency is strictly germane to the consideration of the reasonableness of the deduction claimed for amounts paid out as bonus or commission to an employee.

Claims for deduction under section 10 (2) (*x*) of the Income-tax Act have to be considered over again, if they are to be allowed as deductions under the Excess Profits Tax Act by the application of rule 12 of schedule 1. Under rule 12, the Excess Profits Tax Officer is permitted to allow as a deduction such amount of expenses which, in his opinion, is reasonable and necessary having regard to the requirements of the business. Had the claim under section 10 (2) (*x*) of the Income-tax Act been considered reasonable, that by itself should have justified the test of commercial expediency and the test prescribed by section 10 (2) (*xv*) to allow the claim put forward by the managing agents in respect of commissions paid to the agents.

In applying the test of commercial expediency to determine whether the expenditure is wholly and exclusively laid out for the purpose of the business, the reasonableness of the expenditure should be considered from the point of view of the businessman and not from the point of view of outsiders including the Income-tax Officer. The same principles have to be applied in considering the "requirements of the business" as laid down in rule 12 of the first schedule to the Excess Profits Tax Act. 'Wholly and exclusively' in section 10 (2) (*xv*) would appear to be even more exacting in its requirements than the test of reasonableness and necessity prescribed by rule 12 of Schedule 1 of the Excess Profits Tax Act.

Even if a claim fails to satisfy the requirements of section 10 (2) (*x*) of the Income-tax Act, it is for the Excess Profits Tax Officer to decide whether it satisfies the requirements of rule 12 of the schedule 1 of the Excess Profits Tax Act.

Excess profits tax is a tax on profits and 'net profits' should be calculated without deducting excess profits tax and percentage of commission paid by the assessee on the basis of such net profits should be allowed as deduction both under the Income-tax Act and the Excess Profits Tax Act.

Case Referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939).

M. Subbaraya Ayyar, V. Sethuraman and *S. Padmanabhan* for the Appellant.

C. S. Rama Rao Sahib for the Respondent.

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* R.C. Nos. 53 of 1952 & 44 of 1953. 11th January, 1954.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—These two Referred Cases relate to the same assessee. Referred Case No. 44 of 1953 relates to income-tax, and Referred Case No. 53 of 1952 relates to excess profits tax. Questions 2 and 3 are common in the two Referred Cases, and Question 1 in Referred Case No. 44 of 1953 is :

"Whether in all wing a deduction under section 10 (2) (*xv*) of the Income-tax Act, the Income-tax Officer is precli ded from going into the question whether the amount was paid wholly and exclusively for the purpose of the assessee's business."

Question 1 in the connected Reference is :

" Whether the Appellate Tribunal erred in law in holding that in accordance with the terms of the letter, dated 17th April, 1940 and 30th March, 1943 and the conduct of parties, the excess profits tax payable by the assessee should be deducted from the profits before the commission of twelve and a half per cent. payable to N.M.R.V. Mahadevan is calculated."

Question 2 is :

"Whether there was any material before the Tribunal to hold that the commission payment to N.M R. Mahadevan at twelve and a half per cent. before deduction of excess profits tax or business profits tax was not wholly and exclusively laid out for the purpose of the assessee's business."

and Question 3 is :

"Whether the commission payments to the branch managers and other employees, is an expenditure laid out wholly and exclusively for the purpose of the business."

Question 2 in Referred Case No. 53 of 1952 is :

" Whether there is any material on evidence sufficient in law for the Appellate Tribunal to hold that the commission of twelve and a half per cent. on profits paid to Mahadevan was unreasonable within the meaning of Rule 12 of Schedule I of the Excess Profits Tax Act."

Question 3 relates to the payment of commission to branch managers.

In both the References, on ultimate analysis, the questions really are, whether the commission payable to Mahadevan under the agreement of 30th March 1943, is a permissible deduction under the Income-tax Act and under the Excess Profits Tax Act, and whether in arriving at the commission of twelve and a half per cent. payable to Mahadevan the amount is to be calculated on the profits with or without deducting excess profits tax. The second question both under the Income-tax Act and the Excess Profits Tax Act is whether the commission paid to branch managers and sub-managers is a justifiable deduction under the Income-tax Act and the Excess Profits Tax Act.

The facts relevant and as found in the statements of the case in the two references may be stated as follows : The assessee is Rayaloo Iyer and Sons, Mathurai. We are concerned in these References with the assesement years 1943-1944 to 1948-1949, the accounting year being the corresponding Tamil year ; and under the Excess Profits Tax Act, we are concerned with the chargeable accounting periods ending with 13th April, 1943, 12th April, 1944, 12th April, 1945, and 31st March, 1946, and under the business profits assessment with chargeable accounting periods, 1st April, 1946 to 12th April, 1946, 13th April, 1946 to 31st March, 1947, 1st April, 1947 to 13th April, 1947, 14th April, 1947 to 31st March, 1948 and 1st April, 1948 to 12th April, 1948. The excess profits tax and the business profits tax were treated as consequential to the income-tax.

The assessee firm consists of three partners, who are divided brothers, and it came into existence after the partition in the family between the members on 13th April, 1940. On 13th April, 1946, Subbaraman, one of the brothers, ceased to be a partner, and the partnership continued with the two partners. With effect from 14th April, 1947, the share of Venkatakrishna Ayyar was taken over by Venkatakrishna Ayyar and Sons, Limited, which became a partner in the assessee firm. The partnership carried on business in dyes and chemicals in the name and style of Colours Trading Company, for which separate books of account were maintained. They were the agents for the Imperial Chemical Industries, Ltd., Bombay, and were paid a commission in the first instance varying from seven and a half per cent. to twelve per cent. on different products. On 17th April, 1940, Mahadevan, the

son of one of the brothers, who received special training for two years in the Imperial Chemical Laboratory at Bombay, was appointed as General Manager of Colours Trading Company. On the same date, there was an agreement of employment executed by one of the partners in favour of Mahadevan. The terms of his employment were that he should get Rs. 1,800 per annum as remuneration, besides five per cent. of the net profits of the concern, calculated by deducting from the gross profits of the business the salaries and wages and other outgoings without making any deduction from capital. The agreement was to take effect from 13th April, 1940, the commencement of the partnership. After some time, on the representation of Mahadevan, that his remuneration was inadequate and was not commensurate with the responsibilities, which he undertook, his remuneration was increased with effect from 13th April, 1943, as evidenced by the letter of the company, dated 30th March, 1943. Under this arrangement he was to get an increased salary of Rs. 250 per mensem or Rs. 3,000 per year "for the present," and a commission at twelve and a half per cent. on the net profits of the Colours Trading Company section from 13th April, 1943. He was required by this agreement to devote all his attention to the development of the business, with a promise of further increment in course of time.

* * * *

After discussing the facts their Lordships continued :

With the increase of emergency allowance in 1945, by the Imperial Chemical Industries, Limited, in the subsequent year, the employers increased the commission payable to the branch managers and sub-managers to seven and a half per cent. and in some cases a little more, and revised agreements providing for the increased rate of commission were also entered into between the employees and the employers. With effect, however, from 1st September, 1946, the Imperial Chemical Industries reduced the percentage of commission to ten per cent. For the first year under the arrangement of 1944, *i.e.*, for the assessment year 1945-46 for the corresponding previous year ended 12th April, 1944, the total of the commission payable to the employees other than Mahadevan came to Rs. 1,00,715 as against the extra commission received by them from the Imperial Chemical Industries which was Rs. 1,28,533. In the next year of assessment 1946-47, for the previous year ending with 12th April, 1946, the claim increased to Rs. 2,44,688 as against the extra commission which the assessee received from the Imperial Chemical Industries, which was Rs. 3,20,391. In the subsequent assessment year 1947-48, they received from the Imperial Chemical Industries Rs. 3,15,934 and paid to the employees Rs. 1,28,506, and in 1948-49, the assessment year, they received Rs. 3,70,964 and paid to the employees Rs. 1,75,079.

As regards Mahadevan, under the agreement of 17th April, 1940, the commission as per the agreement was paid and was claimed as a deduction in the assessment to income-tax and also in the excess profits tax proceedings, *i.e.*, the assessment year 1941-42, and the chargeable accounting period 12th April, 1941. The Income-tax Officer and the Excess Profits Tax Officer disallowed the payment of salary and commission as not *bona fide*. But on appeal, the Appellate Assistant Commissioner by his order, dated 28th July, 1942, upheld the deduction holding that the agreement was genuine, and that the amount of salary and the rate of commission were reasonable and should be allowed. There was no further appeal by the department to the Tribunal, and in the subsequent assessment year 1942-43 and in the excess profits tax assessment for the corresponding chargeable accounting period ending 12th April, 1942, the salary and commission were allowed by the Income-tax Officer and the Excess Profits Tax Officer.

During the assessment year 1943-44 and 1944-45, the increased commission payment to Mahadevan, calculated at twelve and a half per cent. of the net profits of the Colours Trading Company, was disallowed by the Income-tax Officer, and the same was disallowed also by the Excess Profits Tax Officer in the chargeable accounting periods ended 12th April, 1944, 12th April 1945 and 31st March, 1946.

The amounts claimed as deduction during these periods were Rs. 13,815, Rs. 28,768 and Rs. 14,205 respectively. When the matter finally reached the Appellate Tribunal, on a reference under the Excess Profits Tax Act, the Tribunal held that, so far as Mahadevan was concerned, there was no justification for the entire disallowance of the commission by the Excess Profits Tax Officer, but that at the same time there was no justification for the claim of the assessee for an increase in commission from five per cent. to twelve and a half per cent. They, however, directed that Mahadevan should be paid five per cent. of the net profits before the deduction of the excess profits tax or twelve and a half per cent. after deduction of the excess profits tax, whichever was better. Following this order in the income-tax proceedings, the commission payable to Mahadevan was allowed to the extent indicated by the Tribunal as aforesaid.

The commission payable to the branch managers and assistant managers during the assessment year 1945-46, 1946-47, 1947-48 and 1948-49, was disallowed by the department, and the same was followed under the Excess Profits Tax Act for the chargeable accounting periods ending with 12th April, 1945 and 31st March, 1946. This decision was confirmed by the Appellate Assistant Commissioner and also by the Appellate Tribunal. So that, the main questions that arise for consideration in the case of Mahadevan are, whether the disallowance of the commission, to the extent to which it was disallowed by the Appellate Tribunal paid to Mahadevan, is justified in law both under the Income-tax Act and under the Excess Profits Tax Act, and the mode in which the net profits on which twelve and a half per cent. is to be calculated are to be arrived at. The Tribunal following the decision of the Bombay High Court in *Walchand & Co., Ltd.* v. *Hindustan Construction Co., Ltd.*[1] held that the excess profits tax should be deducted before the net profits were arrived at, and on that alone the twelve and a half per cent. should be calculated. They did not, however, find that the twelve and a half per cent. was unreasonable. The second set of questions relates to the commission paid to the branch managers and the assistant managers, and whether it is permissible deduction under the Income-tax Act and the Excess Profits Tax Act.

The questions raised have to be decided on a proper interpretation of the three provisions, sections 10 (2) (*x*) and section 10 (2) (*xv*) of the Income-tax Act and rule 12 of the First Schedule of the Excess Profits Tax Act. Their inter-connection has also to be determined with a view to find out to what extent the deduction of commission is permissible under law. Section 10 (2) (*x*) is a specific provision, which relate to the bonus or commission paid to an employee for services rendered by him. It is as follows :—

"Any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission :

Provided that the amount of the bonus or commission is of a reasonable amount with reference to

(*a*) the pay of the employee and the conditions of his service ;

(*b*) the profits of the business, profession or vocation for the year in question ; and

(*c*) the general practice in similar businesses, professions or vocations."

Section 10 (2) (*xv*) of the Income-tax Act is as follows :—

"Any expenditure (not being an allowance of the nature described in any of the clauses (*i*) to (*xiv*) inclusive, and not being in the nature of capital expenditure or personal expenses of the assessee) laid out, or expended wholly and exclusively for the purposes of such business, profession or vocation."

Rule 12 of Schedule I of the Excess Profits Tax Act, 1940, is as follows :

" (1) In computing the profits of any chargeable accounting period no deduction shall be allowed in respect of expenses in excess of the amount which the Excess Profits Tax Officer considers reasonable and necessary having regard to the requirements of the business and, in the case of directors' fees or other payments for services, to the actual services rendered by the person concerned :

Provided that no disallowance under this rule shall be made by the Excess Profits Tax Officer unless he has obtained the prior authority of the Commissioner of Excess Profits Tax.

1. (1944) 12 I.T.R. 104.

(2) Any person who is dissatisfied with the decision of the Excess Profits Tax Officer under this rule may appeal in the prescribed time and manner to the Appellate Tribunal."

It must be remembered even at the outset that profits have to be calculated under the Excess Profits Tax Act on the principles on which the profits of a business are computed for purposes if income-tax under section 10 of the Indian Income-tax Act, subject, however, to the provisions of the First Schedule of the Excess Profits Tax Act. Section 10 of the Income-tax Act was expressly made applicable to computations under the Excess Profits Tax Act by section 21 thereof. The profits of a business computed for purposes of income-tax under section 10 of that Act will be the primary basis for arriving at the profits of that business under the Excess Profits Tax Act; but that determination, as stated in rule 1 of Schedule 1 of the Excess Profits Tax Act, is subject to the provisions of the First Schedule which contains rule 12. We shall deal later with the question to what extent rule 12 of the First Schedule of the Excess Profits Tax Act affects the determination of the profits with reference to section 10 of the Income-tax Act.

As there is a specific provision in the Income-tax Act, circumscribing the limits under which a commission or bonus paid to an employee is to be allowed as a deduction, that specific provision, in our opinion, must prevail, and resort cannot in those circumstances be had to section 10 (2) (*xv*) of the Income-tax Act. This is also the view taken by the Bombay High Court in *Subodhchandra Popatlal* v. *Commissioner of Income-tax*[1]. It is an accepted canon of construction of statutes that a specific provision always prevails and excludes a general provision. This aspect of the case, however, was not kept in mind by the income-tax authorities and the Appellate Tribunal in considering the claims for deduction put forward by the assessee. The departmental authorities and the Appellate Tribunal dealt with the claims as falling within the purview of section 10 (2) (*xv*) of the Income-tax Act.

Under section 10 (2) (*x*) of the Income-tax Act, the bonus or commission is subject to the test of reasonableness, and the department has jurisdiction under that section to determine a reasonable amount as deduction. But in doing so, it has to take note of the three circumstances or considerations specified in the proviso to section 10 (2) (*x*). It is the cumulative effect of these considerations which should govern the determination of a reasonable amount under that clause. The only considerations therefore are the pay of the employee, the conditions of his service, the profits of the business for the year in question and the general practice in similar business. The scope of section 10 (2) (*xv*) is entirely different from that of section 10 (2) (*x*) of the Income-tax Act. Neither the test prescribed by section 10 (2) (*xv*), that the amount is wholly and exclusively laid out or expended for the purpose of such business, nor the ancillary test of commercial expediency is strictly germane to the consideration of the reasonableness of the deduction claimed for amounts paid out as bonus or commission.

If under section 10 (2) (*x*) of the Income-tax Act the commission or bonus paid to an employee is held to be a lawfully claimable deduction in whole or in part, what the effect of such a decision is on the application of rule 12 of Schedule 1 of the Excess Profits Tax Act is the further question for consideration. Rule 1 and rule 12 of Schedule 1 of the Excess Profits Tax Act are comprehensive in their scope, but we are not concerned in this case with the effect of these rules on the deductions permitted by the sub-sections of section 10 (2) of the Income-tax Act other than 10 (2) (*x*).

It is, however, necessary to examine the scope of the test prescribed by section 10 (2) (*xv*) of the Income-tax Act, because, in our opinion, there is not much difference in principle between the test laid down there and that laid down by rule 12 of the Excess Profits Tax Act. Claims for deductions allowed under section 10 (2) (*x*) of the Income-tax Act have to be considered over again, if they are to be allowed as deductions under the Excess Profits Tax Act by the application of rule 12 of Schedule 1.

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1. (1953) 24 I.T.R. 566.

Under section 10 (2) (*xv*), the test is whether the expenditure was wholly and exclusively laid out for the purpose of such business. Under rule 12, the Excess Profits Tax Officer is permitted to allow as a deduction such amount of expense which, in his opinion, is reasonable and necessary having regard to the requirements of the business. As we said before, the two tests do not differ very much in their scope. Both the tests include commercial expediency. Under each of these two provisions the test laid down by the Supreme Court in *Eastern Investments Ltd.* v. *Commissioner of Income-tax, West Bengal*[1], in considering section 12 (2) of the Income-tax Act, where the language employed is similar, may well be applied. The Supreme Court approved of the principles laid down in *Atherton's case*[2], where Viscount Cave L.C., observed :

"It was made clear in the above cited cases of *Usher's Wiltshire Brewery, Limited* v. *Bruce*[3], and *Smith* v. *Incorporated Council of Law Reporting for England and Wales*[4], that a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade."

After reviewing the facts of the case the learned Judges of the Supreme Court observed at page 7 :

"On a full review of the facts it is clear that this transaction was voluntarily entered into in order indirectly to facilitate the carrying on of the business of the company and was made on the ground of commercial expediency."

The same view was taken by the Bombay High Court in *Tata Sons, Ltd.* v. *Commissioner of Income-tax, Bombay*[5], which was a case under section 10 (2) (*xv*) of the Income-tax Act. The question that arose for consideration was whether the voluntary payment by the managing agent of a certain sum of money as his share of the bonus, which the managed company paid to some of its officers, was a permissible deduction under section 10 (2) (*xv*) of the Income-tax Act. As the assessee, the managing agent, did not directly pay the bonus to the employees, the claim could not naturally be considered under section 10 (2) (*x*). The bonus was directly paid by the managed company to its employees, but the managing agent was required to contribute his share of the payment under the terms of the arrangement between the managed company and the managing agent. Chagla, C.J., observed at page 467 :

"Now, the decided cases show that one has not got to take an abstract or academic view of what is proper expenditure laid out or expended wholly and exclusively for the purposes of one's business. One has got to take into consideration questions of commercial expediency and the principles of ordinary commercial trading and the main consideration that has got to weigh with the Court is whether the expenditure was a part of the process of profit-making. If the expenditure helps or assists the assessee in making or increasing the profits, then undoubtedly that expenditure would be expended wholly and exclusively for the purposes of business."

The fact that it was a voluntary payment should not really matter, if the payment was made for reasons of commercial expediency, and if it was shown that the payment was intended for making or increasing the profits of the assessee company. Had the managed company claimed the deduction, it would have been under section 10 (2) (*x*). It was the managing agent that claimed deduction, and the claim had to be investigated only under section 10 (2) (*xv*). Had the claim under section 10 (2) (*x*) been considered reasonable, that by itself should have justified the test of commercial expediency and the test prescribed by section 10 (2) (*xv*) to allow the claim put forward by the managing agent.

In applying the test of commercial expediency to determine whether the expenditure is wholly and exclusively laid out for the purpose of the business, the reasonableness of the expenditure should be considered from the point of view of the businessman and not from the point of view of outsiders including the Income-tax Officer. The department might consider that such a large amount as in *Tata's case*[5] was wholly unreasonable, viewing it purely from the point of view of a layman.

1. (1951) S.C.R. 594: (1951) S.C.J. 420.
2. 1923 A.C. 205 at 211, 212.
3. 1915 A.C. 433.
4. (1914) 3 K.B. 674.
5. I.L.R. (1951) Bom. 9.

The view-point of the businessman is all the more important under the present set-up, when the difficulties of running a business are more pronounced. The bonus that is paid to employees is no longer treated as payment *ex gratia*, and the percentage of commission under the managing agency agreements is intended to give an inducement to the managing agent to exert to the best of his ability to increase the volume of business so as to bring into the business more profits. The necessity to keep the employees in good humour and to keep them above want with a view to deter them, if possible, from becoming corrupt or even disloyal could be appreciated and realised only by a person who actually runs a huge growing concern, like the business of the Tatas in the case above referred to, and may not always be fully appreciated and sypmathetically viewed by one unconnected with business. The "requirements of the business," as laid down in rule 12 of the First Schedule of the Excess Profits Tax Act are, in our opinion, also to be judged against the same background, and the same principles have to be applied as under section 10 (2) (*xv*).

We have already pointed out that there is not much difference in principle between the requirements of section 10 (2) (*xv*) and those of rule 12 of Schedule 1 of the Excess Profits Tax Act. Both attract the justification of expenditure on grounds of commercial expediency, and to that extent, at any rate, there should be no difference at all. We find it rather difficult to envisage a position where an expenditure satisfied the test of section 10 (2) (*xv*), an expenditure incurred wholly and exclusively for the purpose of the business, not satisfying the test of rule 12 (1), an expenditure reasonable and necessary having regard to the requirements of the business. In our opinion, "wholly and exclusively" in section 10 (2) (*xv*) would appear to be even more exacting in its requirements than the test of reasonableness and necessity prescribed by rule 12.

We had to consider at some length the scope of section 10 (2) (*xv*) of the Income-tax Act only to explain the scope of rule 12. We now came back to the question, to what extent a deduction that satisfies the requirements of section 10 (2) (*x*) of the Income-tax Act can be allowed or disallowed, in the assessment of the excess profits by the application of rule 12 of Schedule 1 of the Excess Profits Tax Act.

Mr. Rama Rao Sahib, the learned advocate for the Commissioner, contended that, even if a claim for deduction satisfied the requirements of section 10 (2) (*x*), it would be open to the Excess Profits Tax Officer to disallow that amount on the ground that the expenditure was not reasonable and necessary, having regard to the requirements of the business, and that it would be open to the Excess Profits Tax Officer to consider what amount was reasonable in the circumstances of the case. To that statement no exception could be taken; but Mr. Rama Rao Sahib contended further that under rule 12, the Excess Profits Tax Officer could only cut down, if necessary, the deductions already allowed under section 10 (2) (*x*) of the Income-tax Act. We are unable to accept this contention, though it night receive some support from the observations of the learned Judges of the Bombay High Court in *Jethabhai Hirji and Co.* v. *Commissioner of Income-tax, Bombay*[1]. Mr. Rama Rao Sahib pointed out that the proviso to rule 12 (1) requires the previous sanction of the Commissioner of Excess Profits Tax before any claim is disallowed under rule 12, and the learned advocate urged that it could apply only when a claim for deduction allowed under the Income-tax Act had to be disallowed under the Excess Profits Tax Act. It is not clear to us that that is the only basis for prescribing the previous sanction of the Commissioner under rule 12 (1). Suppose the Income-tax Officer arrives at the conclusion that the bonus and commission are not wholly reasonable and disallows them either *in toto* or in part, would it not be still open to the assessee before the excess profits tax authorities to claim this deduction on the ground that, though in view of the considerations laid down by the proviso to section 10 (2) (*x*) it might not be a reasonable expenditure, still it might be an expenditure which was reasonable and necessary, having regard to the requirements of the business within the meaning of rule 12 (2). We have already pointed out that the test of commercial

1. (1949) 17 I.T.R. 533, 543.

expediency is not germane to an enquiry into a claim under section 10 (2) (*x*); but it is a very relevant consideration in the application of rule 12 of Schedule 1 of the Excess Profits Tax Act. If it is open to the Excess Profits Tax Officer under rule 12 to disallow what was already allowed under section 10 (2) (*x*) it should be equally open to him to allow what was once disallowed, because the test in rule 12 is not identical with that prescribed by section 10 (2) (*x*) of the Income-tax Act. We are therefore unable to accept the contention of Mr. Rama Rao Sahib that the only jurisdiction of the Excess Profits Tax Officer under rule 12 is to disallow what was allowed under section 10 (2) (*x*) of the Income-tax Act. Even if a claim fails to satisfy the requirements of section 10 (2) (*x*) of the Income-tax Act, it is for the Excess Profits Tax Officer to decide whether it satisfies the requirements of rule 12 of Schedule 1 of the Excess Profits Tax Act.

It is in the light of the discussion above that the questions raised in these two references have now to be considered. The case of Mahadevan, in our view, does not present much difficulty. The salary and the commission under the agreement of 1940 were upheld and there was no dispute about it. The increased salary and the commission were agreed to in 1943, not on the ground that Mahadevan was called upon to discharge any extra duties or render additional service, but on the representation made by him that the remuneration previously granted to him under the arrangement of 1940 was inadequate and was not commensurate with the responsibilities which he undertook. The Company, after trying him for a period of about two years, thought fit to increase the salary to Rs. 3,000 per year, and increased the share of the profits from five per cent. to twelve and a half per cent. The Tribunal did not consider the salary to be unreasonable; nor did they consider the 12½ per cent. allowed as unreasonable. But on the interpretation which they placed upon "net profits," they arrived at the conclusion that he should be paid either five per cent. of the net profits before deduction of excess profits tax or twelve and a half per cent. after deduction of excess profits tax, whichever was better from his point of view. Though no express reference was made in the proceedings either before the department or the Appellate Tribunal under section 10 (2) (*x*) of the Act, in view of the conclusion that so much was reasonable, it is unnecessary to send the case back for reconsideration under section 10 (2) (*x*) of the Act. The question in the case of Mahadevan, therefore, is whether the interpretation, placed upon "net profit" by the Tribunal, is correct.

The agreement of 1940 provided for a commission of five per cent. of the net profits of the concern, calculated by deducting from the gross profits of the business, the salaries, and wages and other outgoings. The deductions contemplated were only from the gross profits and not from the net profits. Under the agreement of 1943 the twelve and a half per cent. is to be paid on the net profits, and as this arrangement is merely a modification of the previous one, it can be taken that the expression "net profits" in this is used in the same sense as under the arrangement of 1940. The Tribunal was of opinion that in order to arrive at the net profits the excess profits tax must be excluded and twelve and a half per cent. must be calculated on the balance, while the contention of the assessee was that the excess profits tax should not be deducted in order to arrive at the net profits. We have to decide which of the contentions is correct. The Tribunal followed the decision of the Bombay High Court in *Walchand & Co., Ltd.* v. *Hindustan Construction Co. Ltd.*[1] That decision was based upon the majority view of the House of Lords in *L. C. Ltd.*, v. *G. B. Olivant, Ltd.*[2], Viscount Simon, L.C., took a different view.

It cannot now be disputed that in arriving at net profits, they ought to be calculated inclusive of and not exclusive of the amount payable for the year in respect of income-tax. This is settled by the House of Lords in *Ashton Gas Company* v. *Attorney-General*[3]. As observed by Earl of Halsbury, L.C., in that case,

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1. (1944) 12 I.T.R. 104.
2. (1945) 13 I.T.R. (Supp.) 23.
3. (1906) A.C. 10.

"Now the profit upon which the income-tax is charged is what is left after you have paid all the necessary expenses to earn that profit. Profit is a plain English word; that is, what is charged with income-tax. But if you confound what is the necessary expenditure to earn that profit with the income-tax, which is a part of the profit itself, one can understand how you get into the confusion which has induced the learned counsel at such very considerable length to point out that this is not a charge upon the profits at all. The answer is that it is. The income-tax is a charge upon the profits; the thing which is taxed is the profit that is made, and you must ascertain what is the profit that is made before you deduct the tax—you have no right to deduct the income-tax before you ascertain what the profit is. I cannot understand how you can make the income-tax part of the expenditure. I share Buckley, J.'s difficulty in understanding how so plain a matter has been discussed in all the Courts at such extravagant length."

The majority view of the House of Lords was based upon the interpretation that "net profits" mean "divisible profits," *i.e.*, profits out of which the taxes are deducted and thereafter distributed between the sharers, whether they are partners in a firm or shareholders in a company. But with great respect to the majority view, we think that the view of Viscount Simon, L.C., is correct. The purpose and the incidents of a profit and loss account were fully explained by the Lord Chancellor at page 27. The main object or the purpose of a profit and loss account is to ascertain the balance of profit or loss of the enterprise during the year. Normally the first step in the account is to cast a trading account in which the receipts of the business are set off against the expenses directly incurred in earning those receipts. Then we arrive at the gross profit in the trading account, which will be carried to a profit and loss account as its opening item. To the credit side are added interest on investment, rents or the like and on the debit side the overhead expenses of the business are entered. The balance represents the net profits. The net profits thereafter are carried over to an appropriation account where against the net profits the various charges for which the profits are appropriated are debited; that is, for tax, for reserve, for dividends. The divisible profits are thus arrived at. Until the net profits are determined, the excess profits tax is not deducted or appropriated as an item of expenditure in the account. It was observed by the Lord Chancellor at page 26, after referring to the decision relating to income-tax in *Ashton Gas Company* v. *Attorney-General*[1].

"Why is not the same thing true about excess profits tax? Varying a famous phrase of Lord Macnaghten in *London County Council* v. *Attorney-General*[2], I venture to observe that excess profits tax, if I may be pardoned for saying so, is a tax on profits. It is a tax (very elaborately calculated it is true) on profits, for it is a tax on excess profits, it seems the cream of profits so far as they are in excess of the standard profit."

From an examination of the provisions of the Excess Profits Tax Act, it will be seen that it is a tax on profits. That is a share in the profits is taken by the State as a tax. The net profits must therefore be ascertained in accordance with the principles of commercial accountancy and the principles laid down under the Excess Profits Tax Act. It is from that that the tax is taken by the State.The distributable profits are arrived at only after the tax is appropriated from the net profits. For the reasons given by Viscount Simon in the decision referred to above, we think, with great respect to the majority opinion, that the principle to be followed is that expressed by Viscount Simon, L.C., in that decision. It is unnecessary to examine at length the reasoning underlying the decision in *Walchand & Co., Ltd.* v. *Hindustan Construction Co., Ltd.*[3]. The same view was taken by a Full Bench of the Punjab High Court at Simla in *Commissioner of Income-tax* v. *Delhi Flour Mills Co., Ltd.*,[4] after an elaborate examination of the decisions. We respectfully agree with the view taken by the Punjab High Court.

We are therefore of opinion that the net profits should be calculated without deducting excess profits tax and that, in the case of Mahadevan twelve and a half per cent of that should be allowed both under the Income-tax Act and under the Excess Profits Tax Act.

There is then the question regarding the commission paid to the branch managers and assistant managers. Unfortunately, the question was considered only

1. (1906) A.C. 10.
2. (1901 A.C. 26 (35).
3. (1944) 12 I.T.R 104.
4. (1953) 23 I.T.R. 167 (F.B.).

under section 10 (2) (*xv*) of the Income-tax Act and under rule 12 of the Excess Profits Tax Act, First Schedule. The Appellate Tribunal should have considered the question of the commission payable to them only under section 10 (2) (*x*) of the Income-tax Act. The reasonable amount has to be determined under that provision having regard to the test laid down in it. The commission was allowed only after the emergency allowance was granted to the assessee by the Imperial Chemical Industries. When it was increased in 1945, they also increased the commission to the employee. The agreement under which the emergency allowance was allowed by the Imperial Chemical Industries required that the distributors should pass on a minimum percentage of the commission to the sub-distributors. It is no doubt true that the branch managers and assistant managers were not sub-distributors; but practically the business in those branches was carried on by them on behalf of the Colours Trading Company. The object of the Imperial Chemical Industries was that the allowance should not be retained *in toto* by the Colours Trading Company. Whether the percentage allowed, which was above the minimum permitted by the Imperial Chemical Industries, is reasonable or not in the circumstances, and also having regard to the other remuneration allowed to the employees, is a matter for consideration by the Tribunal.

One aspect of the matter was not adverted to in the order of the Appellate Tribunal though in the statement of the case it was referred to. The Ordinance against Hoarding and Profiteering was in force at that time and black market trade was rampant. The prices soared up, and there was a temptation on the part of everybody to make a profit by trading in black market. In the statement of the case, the Tribunal adverted to the contention, on behalf of the assessee, that the additional commission was intended to be passed on to sub-dealers,

> "that such additional commission was paid by the Imperial Chemical Industries (India), Limited, with the avowed object of keeping and retaining in the market their good reputation that in accordance with the spirit of the letters of the Imperial Chemical Industries (India), Limited, and in order that the other employees of the various branches may not resort to illegal or other shady dealings to the detriment of the assessee, it had agreed to pass on a portion of the additional commission so received to the branch managers and other employees who were virtually in the position of sub-dealers and as such the commission payments were expenditure laid out wholly and exclusively for the purposes of the business."

This background should also enter into the consideration in deciding the reasonableness of the commission allowed to the employees both under section 10 (2) (*x*) of the Income-tax Act and rule 12 of the Excess Profits Tax Act. As there is no consideration of the question from this point of view, we are constrained to remit the case of branch managers and assistant managers to the Tribunal for further consideration and for a better statement of the case.

K.S. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

The Newtone Studios, Ltd., Madras .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 10 (2) (xv)—Permissible deductions under—Tests—Nature of—Commercial expediency—Decision of the assessee—If could be questioned by the taxing authorities.

In deciding whether a claim for deduction under section 10 (2) (*xv*) of the Income-tax Act should be allowed the departmental authorities could and should consider whether the expenditure could be justified on the grounds of commercial expediency. There is no room for any subjective standard of reasonableness to be adopted by the taxing authorities in applying the test of commercial expediency.

Under our taxing system, it is for the assessee to conduct his business and in his wisdom or otherwise to fix the remuneration to his staff. The Income-tax Act does not clothe the taxing authority with any power or jurisdiction to determine the reasonableness of the amount so fixed and paid by the assessee.

* Case Referred No. 23 of 1952. 11th April, 1955.

If the reality of the payment is challenged or is in dispute or if the authorities are able to point to some consideration other than the purpose of the business as accounting for any portion of the payment made, different considerations arise. But any claim of expenditure incurred solely and exclusively for the business cannot be disallowed on the ground that in the opinion of the Income-tax Officer or other Taxing Authority the remuneration is unreasonably high—either because the employee does not in the authority's opinion, deserve so much or because the assessee could have secured other employees on more favourable terms.

Eastern Investments, Ltd. v. *Commissioner of Income-tax, West Bengal*, 1951 S.C.J. 420 : (1951) S.C.R. 594 : (1951) 20 I.T.R. 1 (S.C.) ; *Royaloo Iyer & Sons* v. *Commissioner of Income-tax, Madras*, (1955) 2 M.L.J. 505 : I.L.R. (1955) Mad. 613 : (1954) 26 I.T.R. 265.

Craddock v. *Zevo Finance Company, Ltd.*, 27 Tax Cases 267 : (1946) 1 All E.R. 523 (H.L.), Referred.

Case referred to the High Court by the Income-tax Appellate Tribunal, Bombay, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) in 66 R.A. No. 744 (Madras Bench 'A') of 1949-50 (I.T.A. No. 4330 of 1947-48—Assessment year 1947-48) on its file for decision in the following question of law, *viz.* :

"Whether on the facts and in the circumstances of the case the disallowance of a sum of Rs. 23,100 out of the expenses incurred by the assessee for payment of remuneration to the Managing Director and the other technician directors is permissible under the provisions of section 10 (2) (*xv*) of the Income-Tax Act."

S. Swaminathan, Advocate for Applicant.

C. S. Rama Rao Sahib, Advocate for Respondent.

The judgment of the Court was delivered by

Rajagopalan, J.—This reference under section 66 (2) of the Income-tax Act arose out of the proceedings for the assessment year 1947-48 ; the accounting year ended on 31st December, 1946.

The assessee was a private limited company owning a studio and engaged in the production of motion pictures. There were six shareholders. Of these Ramanathan Chettiar was the managing director and Banerjee and Tehrani were directors. Banerjee, Tehrani and Nagoor were employed respectively as Chief Cameraman, Chief Sound Engineer and Art Director in the Studio. The managing director and the three technicians were remunerated by payments of what were called honoraria, which really meant salaries as pointed out by the Appellate Tribunal itself, and also by payments of commission on a fixed percentage basis. In addition each of them got a car allowance, and when the profits justified it, payment of a month's salary as bonus. In 1944 and 1945 what was paid as honoraria, that is, salary, to these four amounted to Rs. 18,000 a year. Their scale of salaries was revised for 1946 by a resolution passed by the shareholders on 30th March, 1946, and the total came to Rs. 59,100 for 1946. The genuineness of the payment of that amount of Rs. 59,100 was never in dispute. The assessee claimed this payment as a deduction under section 10 (2) (*xv*) of the Act. The Income-tax Officer held :

"I consider that the reasonable course will in the circumstances be to limit the admissible deduction under this head to an amount not exceeding twice the amount allowed in each of the preceding years."

The difference between Rs. 36,000 allowed and the sum of Rs. 59,100 claimed, that is, Rs. 23,100 was disallowed. That disallowance was confirmed by the Appellate Assistant Commissioner and by the Appellate Tribunal. It was on these facts that the following question was referred to this Court for determination :

"Whether on the facts and in the circumstances of the case the disallowance of a sum of Rs. 23,100 out of the expenses incurred by the assessee for payment of remuneration to the Managing Director and the other technician directors is permissible under the provisions of section 10 (2) (*xv*) of the Income-tax Act."

Though the question refers to the remuneration paid to the managing director and the technician directors, it should be noted that one of the technicians, Nagoor, who was also paid a remuneration, was not a director though he was also a shareholder. That however, does not affect the real question at issue.

Section 10 (2) (*xv*) provides for the deduction of any expense (not being in the nature of a capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of the business of the assessee."

In *Eastern Investments, Ltd.* v. *Commissioner of Income-tax, West Bengal*[1], the Supreme Court referred to section 12 (2) of the Act, which provides for the deduction of an expenditure incurred " solely for the purpose of making or earning such income, profits or gains " and summarised the principles to be kept in view :

'(1) Though the question must be decided on the facts of each case, the final conclusion is one of law.

(2) It is not necessary to show that the expenditure was a profitable one or that in fact any profit was earned.

(3) It is enough to show that the money was expended ' not of necessity and with a view to direct and immediate benefit to the trade, but voluntarily and on the ground of commercial expediency, and in order indirectly to facilitate the carrying on of the business.'

(4) Beyond that no hard and fast rule can be laid down to explain what is meant by the word ' solely.'

In *Rayaloo Iyer & Sons* v. *Commissioner of Income-tax, Madras*[2], a Bench of this Court held that the principles laid down by the Supreme Court with reference to section 12 (2) of the Act should also be applied in deciding under section 10 (2) (*xv*) whether the expenditure was incurred wholly and exclusively for the purpose of the business of the assessee and the Court pointed out that the test prescribed by section 10 (2) (*xv*) of the Act included that of commercial expediency. At page 292 the learned Judge pointed out :

" In applying the test of commercial expediency to determine whether the expenditure is wholly and exclusively laid out for the purpose of the business the reasonableness of the expenditure should be considered from the point of view of the businessman and not from the point of view of outsiders including the Income-tax Officer."

It was the same principle to which Lord Wright referred in *Craddock* v. *Zevo Finance Company, Ltd*[3].

" The transaction here being a perfectly straightforward and honest bargain between the two companies, it seems to me that if the present claim were upheld it would amount to a precedent enabling the Revenue to revise every such bargain and to defeat what the parties had agreed on. The Revenue in a case under Schedule D has no power to examine what they think was reasonable or to say what expenditure was necessary."

It is with reference to these principles we have to decide whether the Appellate Tribunal was justified in disallowing the sum of Rs. 23,100 out of the total amount of Rs. 59,100 that was actually expended by the assessee company in the year of account 1946 as payment of salaries to four of its employees. That these employees were also shareholders of the assessee company and that three of them were also directors are not relevant at all. Nor did the Tribunal itself treat it as a relevant consideration. The findings of the Tribunal were that the amount of Rs. 59,100 though called honorarium really represented salary, (2) the entire amount was paid during the accounting year, (3) this payment was authorised by the resolution of the shareholders on 30th March, 1946, and (4) that these four persons turned out substantial work in the year of account.

In deciding whether the claim for deduction under section 10 (2) (*xv*) should be allowed, the departmental authorities could and should consider whether the expenditure could be justified on grounds of commercial expediency. Certainly that does not provide for any subjective standard of reasonableness to be adopted by the taxing authorities. In this case, however, nothing more than such a subjective standard of the Income-tax Officer appears to have been considered by the Appellate Tribunal. The Income-tax Officer at least considered as a relevant factor the facts that while the gross receipts of the assessee firm in 1945 was Rs. 2,26,962, the receipts for the year of account were Rs. 3,73,734 and that did not justify a three-fold increase in the honoraria (salaries) paid in the year of account. The Tribunal dismissed the increase in the gross receipts as virtually irrelevant with the observation, that " that in itself can be no guide because there is no evidence to show what was the real cause for the increase in the receipts." We agree that the gross receipts of the assessee firm would not be a relevant factor at all, though not

1. (1951) S.C.J. 470 : 1951 S.C.R. 594.
2. (1955) 2 M.L.J. 505 : I.L.R. (1955) Mad. 613 : (1954) 26 I.T.R. 265.
3. 27 Tax Cases 267 at 290 : (1946) 1 All E.R. 523 (H.L.).

for the reason given by the Appellate-Tribunal. In the statement of the case, the Tribunal referred to the fact, that the net profits of the company increased from Rs. 41,541 in 1945 to Rs. 1,05,871 in the year of account. That again may not be a relevant factor, because as pointed out by the Supreme Court in *Eastern Investments Case*[1], it is not necessary for the assessee to show that the expenditure was a profitable one or that in fact any profit was earned. If the gross receipts, which the Income-tax Officer took into account, and the net profits, which the Appellate Tribunal did not take into account, are left out of consideration, the position remains that it was only with reference to an apparently subjective standard of what constituted a reasonable expenditure that the Income-tax Officer disallowed the claim of the assessee ; and it was that view that was ultimately upheld by the Tribunal. We need hardly point out that there is no room for such a subjective standard in applying the test of commercial expediency.

That means there was really no basis at all on the evidence placed before the Tribunal for the conclusion it reached that the whole of Rs. 59,100 expended as salaries during the year of account could not be claimed as a legitimate deduction under section 10 (2) (*xv*). The increase in salaries, it should be remembered, was in March, 1946, long before the assessee company was even in a position to know whether there would in fact be a substantial increase in the gross receipts or net profits. We are stressing this only to show that it was an item of proof of good faith on the part of the assessee company in revising the salaries payable to the four persons, who between them virtually helped to earn the profits of the company. There was certainly nothing to indicate that the increase in salaries the shareholders authorised was a colourable devise to divert a portion of the anticipated profits of the company to four of its shareholders. In fact there was no occasion for taxing authorities or for the Tribunal even to consider such a possibility.

Under our taxing system, it is for the assessee to conduct his business, and in his wisdom or otherwise to fix the remuneration to his staff. The Income-tax Act does not clothe the taxing authority with any power or jurisdiction to determine the reasonableness of the amount so fixed and paid by the assessee. The only test for the deductibility of such remuneration is whether the expenditure has been incurred solely and exclusively for the purpose of the business If the reality of the payment is challenged or is in dispute different considerations arise : So also in cases where the tax authorities are able to point to some consideration other than the purpose of the business as accounting for any portion of the payment made. In such cases of course such portion of the amount claimed, which is either not held to have been paid or is held to have been paid for reasons other than business expediency, could and should be disallowed ; but the reason for the disallowance is because either the portion disallowed is not paid, or because the expenditure is not *solely and exclusively* for the business, and not on the ground that in the opinion of the Income-tax Officer or other taxing authority the remuneration is "unreasonably" high either because the employee does not, in the authority's opinion deserve so much, or because the assessee could have secured other employees on more favourable terms.

The assessee certainly satisfied the third of the tests postulated by their Lordships in the *Eastern Investments Case*[1] that the money was expended

"not of necessity and with a view to direct and immediate benefit to the trade but voluntarily and on the ground of commercial expediency, and in order to facilitate the carrying on of the business."

Even necessity for the expenditure does not enter this test.

The question referred to us is answered in the negative and in favour of the assessee. The assessee will be entitled to the costs of this reference. Counsel's fee Rs. 250.

R.M. *Reference answered in favour of the assessee.*

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1. (1951) S.C.J. 429; 1951 S.C.R. 594.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE KRISHNASWAMI NAYUDU.

Kuppanna Goundan .. *Appellant**

v.

Palaniammal .. *Respondent.*

Madras (Hindu Bigamy Prevention and Divorce) Act (VI of 1949), section 5 (1) (e)—Desertion as a ground for dissolution of marriage—Decree of a competent civil Court under Hindu Married Women's Right to Separate Residence and Maintenance Act (XIX of 1946) granting separate maintenance and right of separate residence to a wife who had already deserted her husband—Effect of.

Divorce—Principles of English Law—Applicability to cases of divorce under Indian Law.

Divorce being a new remedy granted to married people in India to get themselves separated and statutorily recognised under Madras Act (VI of 1949), in the absence of Indian decisions the principles of the law of divorce as understood in England may be applied. But their application must be consistent with Indian notions and ideas of the rights and duties of the spouses to one another and also with the notion of marriage under the personal law of the parties.

In granting dissolution of marriage under the Madras (Hindu Bigamy Prevention and Divorce) Act (VI of 1949) on the ground of desertion the acquisition of right by the wife under the previous enactment, Hindu Married Women's Right to Separate Residence and Maintenance Act (XIX of 1949) has to be given due consideration. Both the enactments, *viz.*, Act (XIX of 1946) and Madras Act (VI of 1949) have been introduced with a view to protect and enlarge the rights of married persons, and being enactments making inroads into the law of marriage as prevailing among the Hindus must be carefully and cautiously applied so that unreasonable and unjust results may not follow. Desertion is not defined in the Madras Act (VI of 1942). Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse. Two elements are required to be present on the side of the deserting spouse to constitute desertion, *viz.*, the factum of desertion and the *aminus deserendi* or the intention to bring cohabitation permanently to an end.

Pratt v. *Pratt*, (1939) 3 All E.R. 437 ; *Pardy* v. *Pardy*, (1939) 3 All E.R. 779 ; *Williams* v. *Williams*, (1939) 3 All E.R. 825, Referred.

It is also well established that desertion is a continuing offence and once the state of desertion has arisen it will continue until it is terminated and it is not incumbent on the deserted spouse to show that he or she was at all times, during the statutory periocd immeditately preceding the petition, ready and willing to receive back the deserting spouse.

But where by an order of Court under the provisions of the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, a wife has been permitted to live apart from her husband, her separate living could not be said to be without just cause and by such separate living she could not be considered to have committed an act of desertion.

In cases where there has been a desertion a long time prior but a subsequent order of Court granting the wife right of separate residence and maintenance has intervened, though there may be a presumption that the same state of mind continues on the part of the deserting spouse, it is the duty of the other spouse to give the deserting spouse an opportunity to express his or her state of mind after the order of Court for separate residence. If in spite of a lawful demand made by the husband asking his wife to live with him, the wife continues to live separately, the continuation of her mental frame could not be said to be for any just cause.

Quaere : Whether Act XIX of 1946 is retrospective in effect and whether the provisions of the Act apply to cases where a husband has taken a second wife prior to the commencement of the Act.

S.A. No. 556 of 1947, doubted.

Sidda Setti v. *Muniammal*, (1953) 1 M.L.J. 649, referred.

Appeal against the Order of the Subordinate Judge's Court, Coimbatore, dated 23rd August, 1951, in O.P. No. 313 of 1950.

P. S. Balakrishna Aiyar and *P. S. Ramachandran* for Appellant.

T. K. Subramania Pillai for Respondent.

The Judgment of the Court was delivered by

Krishnaswami Nayudu, J.—This appeal arises out of a petition by a husband against his wife under section 5 (1) (*c*) of the Madras (Hindu Bigamy Prevention and Divorce) Act, VI of 1949.

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* A.A.O. No. 404 of 1952. 11th November, 1954.

The husband is the appellant. He sued his wife, the respondent for dissolution of marriage on the ground of desertion. The parties were married in about 1940 and they had a daughter above 9 years old on the date of the petition. There was a partition in the family of the petitioner in 1943 and differences arose between the respondent's father and the petitioner over the allotment of properties to a deaf and dumb brother of the petitioner and the respondent left the house of the petitioner and lived with her father. The respondent filed a suit against the petitioner for maintenance in O.S. No. 171 of 1943 on the file of the District Munsif's Court, Erode. On the intervention of mediators, the suit was compromised on 20th October, 1943 and the respondent agreed to go back to the petitioner and live with him. But apparently she did not join in pursuance of the compromise and the petitioner caused lawyer notice to be sent to her in 1943 and again in 1944 demanding her to come and join him. His case is that since she refused to join him he was obliged to marry a second wife. The second marriage took place in 1944. The respondent then filed another suit O.S. No. 433 of 1944 on the file of the District Munsif's Court, Erode, for maintenance for herself and her minor daughter. She charged the petitioner of not providing any maintenance or taking her back to live with him but on the other hand married a second wife ; and she therefore claimed to be entitled to separate maintenance. The trial Court held on the evidence that the respondent was at fault in not having joined the petitioner and rejected her claim for maintenance. She appealed against that decision and in A.S. No. 191 of 1946 on the file of the Principal Sub-Court, Coimbatore, the dismissal of the suit was confirmed on 22nd August, 1946. During the pendency of the appeal, the Hindu Married Women's Rights to Separate Residence and Maintenance Act, XIX of 1946, became law on 23rd April, 1946. A further contention was then raised in appeal that by virtue of the second marriage the respondent would in any event be entitled to separate maintenance as the petitioner had taken a second wife. The learned Subordinate Judge took the view that the Act was not retrospective and as the second marriage took place prior to that enactment, the respondent would not be entitled to any relief. As against that judgment, Second Appeal No. 556 of 1947 was filed in this Court and Raghava Rao, J., held that the Act had retrospective effect and that the respondent was entitled to separate maintenance and residence and remanded the suit for fixing the maintenance and accordingly on remand a sum of Rs. 10 for separate residence and maintenance was directed to be paid by the petitioner.

The petitioner in the present petition for dissolution of marriage relies on the finding in O.S. No. 436 of 1944 that the respondent was at fault in not joining the petitioner and his case is therefore that she has deserted him ever since the middle of 1943 and for a continuous period of more than three years before the petition and he has become entitled to dissolution of marriage on that ground. The respondent in her counter statement denied that she went away to her parents' house but stated that on the contrary it was the petitioner who drove her out after ill-treatment, that he refused to take her to his house, that under Act XIX of 1946 she is entitled to separate residence, that the second marriage by the petitioner is just cause for her to leave the petitioner and that therefore it would not constitute desertion in law so as to entitle the petitioner to ask for dissolution. The learned Subordinate Judge accepted the contention of the respondent that she was living separately as she is entitled to do so by virtue of the decree in O.S. No. 433 of 1944 and her living separately from her husband could not be said to be without just cause and refused to grant the dissolution of marriage. The present appeal is against that order and it came up before our learned brother, Basheer Ahmed Sayeed, J., and this appeal is posted before us, as the learned Judge considered that the point that arises in this appeal is of some importance and there is no decision as to what exactly is the effect of the order or decree of Court granting separate maintenance to the wife who had already deserted the husband and in respect of which there has been a finding of two Courts.

The petitioner would be entitled to dissolution of marriage under section 5 (1) (*c*) if he shows that the respondent has without just cause, deserted the petitioner for a continuous period of not less than three years immediately preceding the pre-

sentation of the petition. "Desertion" has not been defined in the Act. In Rayden on Divorce, 5th Edn. at page 101, the learned author defines "divorce" as the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse. He derives his definitions from the decisions in *Williams* v. *Williams*[1], and *Pratt* v. *Pratt*[2]. In Lately on Divorce, 14th Edn., it is observed at page 104 that there is no judicial definition of desertion that can be applied to meet the facts of every case, but it is in essence the abandonment of one spouse by the other with the intention of forsaking him or her without just cause. The learned author also referred to the decision in *Frowd* v. *Frowd*[3], where desertion has been defined as "the cessation of cohabitation brought about by the fault or act of one of the parties". In section 3 (9) of the Indian Divorce Act, "desertion" has been defined as implying an abandonment against the wish of the person charging it. As pointed out by Sir Wilfrid Greene, M.R., in *Pardy* v. *Pardy*[4], the two elements required to be present on the side of the deserting spouse to constitute desertion are the factum of separation and the *animus deserendi* or intention to bring cohabitation permanently to an end. There is therefore possibility of cases arising where there may be a *de facto* separation, but the *animus* in the deserting spouse to desert may be absent in which case it cannot be held that the spouse who is charged with desertion can be considered to be guilty of desertion. In English law, desertion may be terminated in several ways. In Raydon on Divorce at page 115, it is provided that desertion may be terminated in the following ways :

"(1) the factum of return to cohabitation ; (2) Supervening insanity on the part of the deserting spouse rendering him or her incapable of continuing on *animus deserendi* ; (3) A supervening *animus revertendi*, coupled with a *bona fide* approach to the deserted spouse with a view to resumption of cohabitation ; but not a mere *animus revertendi* unaccompanied by some notification to the deserted spouse ; (4) a supervening consensus to live apart ; for example, under a separation agreement *bona fide* made ; (5) supervening conduct on the part of the deserted spouse which is an effective and reasonable cause in preventing the deserting spouse from returning to cohabitation ; (6) a supervening order of a Court of competent jurisdiction precluding the deserting spouse from returning to cohabitation."

It is also well established that desertion is a continuing offence and once the state of desertion has arisen it will continue until it is terminated, and a spouse who has been deserted is in the position that the presumption is in his or her favour and against the deserting spouse, and it is not incumbent on the deserted spouse to show that he or she was at all times during the three years immediately preceding the petition ready and willing to receive back the deserting spouse. This is the view of the learned author Rayden based on English decisions referred to at page 141.

Divorce being a new remedy granted to married people in India to get themselves separated and statutorily recognised under Act VI of 1949 in the absence of Indian decisions the principles of the law of divorce as understood in England may be applied ; but their application must be consistent with Indian notions and ideas of the rights and duties of the spouses to one another and also the parties in this case being Hindus—the notion of a Hindu marriage being a sacrament and not a contract. There is no doubt in the present case a finding in O.S. No. 433 of 1944 that the wife was at fault in not having joined the petitioner. It can therefore safely be taken that it is the wife that deserted the husband in this case and applying the English principles as to the continuance of a state of desertion unless terminated by conduct on the part of the wife and showing an *animus revertendi* the position would be that the respondent continued to be guilty of desertion ever since she left her husband's protection in 1943 and that state of desertion must therefore be deemed to have continued until the date of the presentation of the present petition for the dissolution of marriage by the husband.

But the question still remains whether in view of the passing of the Hindu Married Women's Rights to Separate Residence and Maintenance Act, XIX of 1946, and the recognition of the respondent's right by the judgment of the High

1. (1939) 3 All E.R. 825 (C.A.).
2. (1939) 3 All E.R. 437.
3. 73 L.J. 60.
4. (1939) 3 All E.R. 779 (C.A.).

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... petitioner rushed to Court with a petition for dissolution ... living separately as furnishing a cause of action for dissolution of marriage under section 5 (1) (*c*) of Act VI of 1949. Admittedly, the husband did not send any notice of demand asking her to live with him or permitting her his company without the company of the second wife. In the counter statement of the respondent, she denied that she refused to live with him. The cause of action is solely based on the previous proceedings between the parties and not on any conduct of the respondent after the judgment of the High Court in the second appeal, whereby she has shown any disinclination to have the company of the petitioner. The cause of action on which the dissolution is asked for is her staying away from the petitioner, which staying has now been shown to be fortified by an order of Court based on the rights which a wife has acquired under Act XIX of 1946 consequent on the husband taking a second wife. It must therefore be held that the separate living in the present case is not without just cause since it has not been shown that the *animus deserendi* continued. It also appears to us that the petition is not a *bona fide* one and is filed only with a view to escape the liability of paying separate maintenance to the respondent ordered in the previous proceedings. To rely upon the act of desertion in 1943 and to hold that such state of desertion continued right up to the date of the filing of the present petition, ignoring the intervening proceedings and the judgment of the High Court in second appeal and basing a decree for dissolution on desertion would amount virtually to negativing the right of the wife to the benefits of Act XIX of 1946. If the mere fact of separate living as a result of an order obtained by the wife for separate residence and maintenance under Act XIX of 1946 could be considered as a ground for dissolution, that may furnish an easy handle to husbands to resort to Act VI of 1949 and seek to get rid of the first wife. In granting dissolution of marriages under Act VI of 1949, the acquisition of right by the wife under the previous enactment, Act XIX of 1946, has to be given due consideration

1. (1953) 1 M.L.J. 649.

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...need not resort to a suit but could appeal against such an order unde... rule 1 (3). The test will be whether a stranger who objects to the order is a person that could be said to be one against whom such an order is made or is otherwise affected by such order and if it is shown that he is a person affected by the order, the order should necessarily be considered to be one under Order 40, rule 1 and therefore appealable.

Atta Ullah Khan v. *Bala Mal*, A.I.R. 1927 Lah. 190; *Asabeg* v. *Mussamat Sundari*, (1918) 48 I.C. 133; *Ramswarup* v. *Raghunandan*, (1923) 78 I.C. 1031; *Hudson* v. *Morgan*, (1909) I.L.R. 36 Cal. 713; *Hemendra Nath* v. *Prakash Chandra Ghosh*, (1931) I.L.R. 59 Cal. 205; *Vishnu Embradri* v. *Tazakat Manayul Narayana*, (1928) M.W.N. 390; *Shridevi Amma* v. *Valia Narayana*, A.I.R. 1929 Mad. 20, referred.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Kumbakonam, dated 13th December, 1952 and made in C.M.A. No. 37 of 1952 (E.P. No. 52 of 1952, in O.S. No. 187 of 1942, D.M.C., Valangiman).

M. R. Narayanaswami and *K. Tirumalai* for Petitioner.

K. Raja Aiyar, *N. R. Govindachari* and *S. K. Ahmed Meeran* for Respondents.

The Court delivered the following

JUDGMENT.—This revision arises out of an Execution Petition No. 52 of 1952 in O.S. No. 187 of 1942 on the file of the District Munsiff's Court, Valangiman. The petitioner was the garnishee and the execution petition was filed by the plaintiff for attachment by issue of a prohibitory order in respect of a sum of Rs. 3000 out of Rs. 45,000 in the hands of the four garnishees of whom the petitioner was the first garnishee under Order 21, rule 46, Civil Procedure Code. The 1st defendant-judgment-debtor died and in his place his legal representatives were impleaded as defendants 6, 7, and 8 and the prohibitory order asked for seeks to restrain the garnishees from paying the sum of Rs. 3000 in their hands to defendants 6 to 8 and directing them to deposit the amount into Court, and there is a prayer for appointing the plaintiff as a receiver for realisation of the amount.

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* C.R.P. No. 2523 of 1952. 28th April, 1955.

Three objections were raised to the execution. One of the objections raised apart from denying the debt was that there are other heirs of the 1st defendant by his Malayan wife who are not impleaded in the Execution Petition, in effect, that the amount even if payable is payable not only to defendants 6, 7 and 8 but also to others who are not parties to the execution. The learned District Munsif held that in view of the denial by the garnishee of any liability to the judgment-debtor the only course was to have a receiver appointed for the collection of the debt and accordingly appointed the plaintiff as receiver for collection of the debt and also made absolute the interim order of attachment.

An appeal was preferred against that order by the first garnishee which came up before the Subordinate Judge of Kumbakonam before whom a preliminary objection was raised as to the maintainability of the appeal. It was also urged that the attachment which was made absolute by the learned District Munsiff was illegal and not valid. The learned Subordinate Judge upheld the contention about the invalidity of the attachment but took the view that no appeal lay against the order and dismissed the appeal. The view taken by the learned Subordinate Judge about the invalidity of the attachment is however correct, since under Order 21, rule 46, Civil Procedure Code, an attachment can be made of a debt due to the judgment-debtor alone and not a debt due to a judgment-debtor and another (vide *Hajee Abdulla* v. *Abdul Lathiff*[1], and *Siluvaimuthu Mudaliar* v. *Muhammad Sahul and others*[2]). But notwithstanding the order of the learned District Munsiff making the attachment absolute being invalid, the appointment of the plaintiff as receiver cannot, however, be challenged as it is the only course open to the Court in a case where the garnishee denies his liability under a debt alleged to be due to the judgment-debtor. This will be sufficient to dispose of the revision petition and the order of the learned District Munsiff can be upheld in so far as the appointment of a receiver is concerned. But the question as to the maintainability of the appeal has been elaborately argued before me and it therefore becomes necessary to express an opinion as to the correctness of the view taken by the learned Subordinate Judge about the non-maintainability of the appeal before him.

The execution petition is presented under Order 21, rule 11, Civil Procedure Code and the reliefs asked for are : (1) attachment by issue of a prohibitory order under Order 21, rule 46, Civil Procedure Code and for directing the garnishee to deposit the amount and (2) in default, for appointment of a receiver. Order 21, rule 11 describes the mode of preferring an application for execution and the particulars which if the execution petition is in writing should be given. Being a written application under Order 21, rule 11 (2), the application shall state among others the mode in which the assistance of the Court is required, and in stating the particular mode in which the assistance of the Court is required in the present case attachment is asked for under sub-clause (*j*) (ii) and for the appointment of a receiver under sub-clause (*j*) (iv). Order 21, rule 46, provides that the attachment shall be made by a written order prohibiting in the case of a debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court. In so far as the appointment of a receiver is concerned, though it is prescribed as one of the modes in which the assistance of the Court can be asked for under Order 21, rule 11, there is no specific provision under Order 21 prescribing the circumstances under which and the manner by which such an appointment of a receiver could be made. Order 40, rule 1, is the provision relating to appointment of receivers. The substantive provision empowering the Court to order execution of the decree is section 51 of the Code, which says that subject to such conditions and limitations as may be prescribed the Court may, on the application of the decree-holder, order execution of the decree by the several modes including appointment of a receiver. The power of a Court to appoint a receiver in execution is derived from section 51 of the Code, but the procedure to be adopted in such an appointment not being provided for in Order 21, relating to execution, the provisions of Order 40, rule 1, have therefore to be applied by the Court, if it decides to appoint

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1. (1920) 39 M.L.J. 91.
[illegible]L.J. 648.

a receiver in execution. The question is that an order for appointment of a receiver having been made as in the present case in an execution petition seeking to attach a debt and recover the same from garnishee, such an order being primarily made in execution and the Court relied on Order 40, rule 1, in making the appointment whether an appeal would lie against such an order. Since a garnishee is not a party or a representative of the parties to the decree, section 47 of the Code has no application and it would be open to the aggrieved person, in this case the garnishee, to agitate any question arising in execution by a separate suit and as such it is not open to the garnishee to have a right of appeal. It is, however, contended that the order appointing a receiver under section 51 (*d*), Civil Procedure Code, being by way of equitable execution would come under Order 40, rule 1, Civil Procedure Code and therefore would be appealable under Order 43, rule 1 (*s*) which provides for an appeal against an order under rule 1 or rule 4 of Order 40. The point therefore crystallises into the determination as to whether the order in question could be held to be an order under Order 40, rule 1, notwithstanding that the same is primarily an order in execution under section 51 (*d*), Civil Procedure Code.

The executing Court for the purpose of appointing a receiver could only act in pursuance of Order 40, rule 1, which prescribes the grounds and the circumstances under which a Court may make an order appointing a receiver. Order 40, rule 1, provides that where it appears to the Court to be just and convenient, the Court may by order appoint a receiver of any property, whether before or after decree, and also pass other orders as to remove any person from the possession or custody of the property, commit the same to the possession, custody or management of the receiver and confer upon the receiver other powers regarding the property and clause (2) provides that the Court has no power however to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove. The appointment being in execution the Court has power to appoint a receiver under Order 40, rule 1, since a receiver could be appointed after decree, but the Court must find that it is just and convenient to appoint a receiver. In this case the receiver is appointed for the collection of the debt and, the power to institute a suit and recover the amount is what is conferred on the receiver under clause (*d*). The Court has therefore acted under Order 40, rule 1 (*a*) and (*d*). Though primarily the order is one in execution, could it be held that the order of appointment of a receiver is solely made under section 51 (*d*), Civil Procedure Code and not under Order 40, rule 1 as well of the Code?

In support of the appealability of the order reliance is placed on *Atta Ullah Khan* v. *Bala Mal*[1], where it was held that Order 40, rule 1, is a general provision relating to appointment of receivers and even if an order appointing a receiver is made in execution proceedings it cannot be said that it does not fall within the purview of Order 40, rule 1, and that the person affected by such an order has no right of appeal under Order 43, rule (1) (*s*), Civil Procedure Code. This decision refers to a judgment of the Patna High Court in *Asabeg* v. *Mussamat Sundari*,[2] and of the Nagpur Judicial Commissioner's Court in *Ramswarup* v. *Raghunandan*[3], In *Asabeg* v. *Mussamat Sundari*[2], where a receiver was appointed in execution directing the receiver to take possession of the estate and the person who was sought to be dispossessed objected to such an appointment and order passed dismissing such an objection, it was held that the order was appealable under Order 43, rule 1 (*s*) of the Code. It is, however, urged that in that case the objector's possession was disturbed and he applied to the Court appointing the receiver objecting to such appointment which had the result of dispossessing him and such an application is one that could be made under Order 40, rule 1, clause (2) and as such the appealability of that order could be supported on that ground. But it must be noted that the order was, however made in an execution petition and notwithstanding that circumstance

1. A.I.R. 1927 Lah. 190.
2. (1918) 48 I.C. 133.
3. (1923) 78 I.C. 1031.

ted and in consequence when any reference is made to the assessee, it is the Chandra Prabha Cinetone that is intended. Sri T. Sadasivam and his wife Srimathi M.S. Subbulakshmi were partners of a firm called Chandra Prabha Cinetone. The firm was started in or about 1939 for the production of a Tamil picture called " Sakunthala". After the production had gone on for a while and the partners had spent nearly half a lakh of rupees, they found that they could not find the entire finance necessary for completing the picture. Accordingly they entered into an agreement on 21st July, 1939, with another firm called Messrs. Rayal Talkie Distributors, Mathurai. The terms of this agreement were reduced to writing and this agreement had been appended as annexure A to the statement of the case by the Appellate Tribunal. This agreement is recited to have been made between Chandra Prabha Cinetone by their partners Mr. T. Sadasivam and Srimathi M.S. Subbulakshmi both residing at Madras hereinafter called the party of the first part and Messrs. Rayal Talkie Distributors hereinafter called the party of the second part. The material terms of this agreement run thus :

"*Clause* 2: The picture shall be treated as the joint production of both the parties for all purposes. Both the parties shall have equal rights and powers of supervision and management in the matter of the production of the picture.

Clause 3 : The cast of the picture shall be selected by the parties of both parts and shall include Srimathi M. S. Subbulakshmi as Sakunthala and Serukulathur Sama as Kanvar. Srimathi M. S. Subbulakshmi hereby agrees to act in the said picture to the best of her ability and complete the same.

Clause 5 : The party of the second part shall provide finance to the extent of Rs. 60,000 for the production of the said picture.

Clause 6 : Whatever amount the party of the first part might have already spent or might spend in future towards the production of the said picture, it is hereby definitely understood and agreed between the parties that the total cost of the production is to be treated as the sum of Rs. 1,00,000 (Rupees one lakh only) for the purpose of the adjustment mentioned in paragraph 11 *infra*."

The agreement then proceeds to deal with the commission to which the party of the second part would be entitled and then clause 11 provides :

" So soon as the entire amount due to the party of the second part is repaid, the party of the second part shall thereafter pay the party of the first part the net amount after deducting the commission mentioned in clauses 8 and 13 herein, in repayment of the amount advanced by the party of the first part for the production of the said picture and which amount is hereby fixed by mutual agreement as the difference between the actual advance of the party of the second part and the sum of Rs. 1,00,000 (rupees one lakh only) mutually fixed as the total cost of the production of the said picture.

Clause 12 : Out of the net collections over and above the sum of Rs. 1,00,000 (rupees one lakh only) mentioned in paragraph 11 *supra* and after deducting the commissions due to the party of the second part mentioned in paragraphs 8 and 13 and the expenses in connection with the replacement of the films mentioned in paragraph 15 *infra* (fifty per cent.) shall be given to the party of the first part towards the remuneration for the services rendered by them in the production of the picture and the party of the second part shall have the balance."

A kind of pre-emption was provided between the two parties by clause 14 which runs thus :

" There shall be no transfer or sale of the rights of the parties except as between the parties *inter se* as may be mutually agreed upon.

Clause 17 : The copyrights in the songs and dialogues of the picture shall vest in both the parties and the benefits of any contracts with gramophone companies for the recording of the same shall be equally divided between them. The royalty or remuneration payable to the artists for the gramophone recording shall be paid to them directly by the gramophone company concerned."

Even the amount which the Rayal Talkie Distributors advanced under this agreement namely a sum of Rs. 60,000 was found insufficient for completing the production. There was a further and fresh agreement between the same parties on 24th February, 1940, which is appended as annexure B to the statement of the case. The preamble to the agreement recites after referring to the earlier agreement, dated 21st July, 1939.

"....whereas more money is required for the completion of the picture 'Sakunthala'; and whereas at the request of the party of the first part, the party of the second part have agreed to supply the necessary additional amount of not less than Rs. 40,000 (rupees forty thousand only) ; and whereas in consequence certain terms and conditions have to be added to or altered or amended in the prior agreement."

The agreement then proceeds to replace clauses 6, 10, 11, 12 and 17 of the previous agreement and the new clauses 4 to 8 were substituted therefor.

Clause 4 is in these terms.

"Irrespective of the amounts, the party of the first part might have already spent, or might spend in future towards or in connection with the production of the said picture, it is hereby definitely understood and agreed between the parties that the total cost of the production of the said picture is to be treat d as the sum of Rs. 1,00,000 (Rupees one lakh only) or the actual amount advanced by the party of the second part therefore, whichever amount is greater, for the purposes of the adjustment mentioned in clause 6 hereunder."

Clause 6 which is referred to here runs thus :

"So soon as the entire amount due to the party of the second part is repaid or realised as aforesaid, the party of the first part shall be entitled to get in full discharge of whatever amounts they might have spent for the production of the said picture, out of the total collections referred to in sub-clause (a), (b) and (c) of clause 5 above, such amounts if any, as to make up the actual advance by the party of the second part of Rs. 1,00,000 (one lakh rupees only) if in case the same has not been advanced by them.

Clause 7 : Out of the net surplus collections as per sub-clauses (a), (b) and (c) of clause 5 remaining as balance in the hands of the party of the second part, after the appropriations mentioned in clause 5 or 6 above and after defraying the expense in connection with the replacement of the films mentioned in paragraph 15 of the prior agreement, 50 per cent. shall be given to the party of the first part towards remuneration for the services rendered by them in the production of the picture and the party of the second part shall have the balance."

Clause 8 deals with copyrights corresponding to clause 17 of the previous agreement and is in these terms :

"The copyrights in the songs and dialogues of the picture shall vest in both the parties and the royalty or the benefits of any contracts with the gramophone companies for the recor ng of same shall be equally divided between them subject to the provisions of clause 5 herein. The remuneration or royalty payable to the artists shall be paid to them directly by the gramophone companies concerned."

With the finances provided by the Rayal Talkie Distributors the film "Sakunthala" was completed and was exhibited. The partners of Chandra Prabha Cinetone were being paid sums from time to time on account by the Rayal Talkie Distributors. An account was made up by them upto 12th April, 1942, in respect of the collections from the picture as well as the royalties from gramophone records. These amounts came to Rs. 3,21,241-2-1 and Rs. 9,205-3-9 respectively. The total cost of the picture, making the necessary allowance for expenses incurred by the Chandra Prabha Cinetone was computed at Rs. 2, 59,168-14-10 leaving a net profit of Rs. 71,277-7-0. The half share of this profits due to the partners of Chandra Prabha Cinetone was Rs. 35,638-11-6. But these partners had before that date drawn to the extent of Rs. 64,417-14-5 and when the account was struck on that day, the Chandra Prabha Cinetone were in debit to the extent of Rs. 28,779-2-11. On 24th June, 1942, a release deed was executed by the partners of the Chandra Prabha Cinetone to the Rayal Talkie Distributors which has been appended as annexure (C) to the statement of the case. Under this document in consideration of the Rayal Talkie Distributors remitting the sum of Rs. 28,779-2-11 which the assessees had already overdrawn as per accounts taken on 12th April, 1942, the Chandra Prabha Cinetone relinquished and released all its rights in the said picture to which it was entitled under the previous agreements including the right to receive a share in the future profits so that as and from that date the Rayal Talkie Distributors became the sole owners of the picture and became solely entitled to the copyrights, songs dialogues, etc., to which the assessee was entitled before that date.

As it is on the basis of this deed of release that the Chandra Prabha Cinetone gave up its rights to the picture, and got the payment of Rs. 28,779 the subject of the reference it is necessary to set out the relevant clauses of this deed. After reciting the earlier agreements, the preamble to the deed proceeds to state:

"Whereas under the terms of the said two agreements Messrs. Rayal Talkie Distributors are entitled to appropriate towards the discharge of the amounts actually advanced by them for the production of the picture, the net amounts realised by the sale or lease of the said talkie picture "Sakunthala" ....and after such appropriation and full realisation of all the amounts actually

advanced by them, out of the surplus collections fifty per cent. shall be given to us (Chandra Prabhat Cinetone) as remuneration for the services rendered in the production of the said picture and the other half of fifty per cent. shall be appropriated by the Royal Talkie Distributors."

It further recites that

> "whereas the parties have gone into the accounts and found that a sum of Rs. 28,779-2-11 had been overdrawn by the releasors in excess of their remuneration on the proceeds of the picture hitherto realised and they are now desirous of relinquishing and releasing all their rights in the said picture including the right to receive a share in the future proceeds and the Royal Talkie Distributors have now agreed to take over the said rights."

The operative part of the deed provided that Sri T. Sadasivam and Srimathi M. S. Subbulakshmi as partners of the Chandra Prabha Cinetone and in their individual capacity release and relinquish in favour of the Royal Talkie Distributors all and every of their rights in the said talkie picture "Sakunthala" including the rights to share in the future proceeds of the picture by sale of lease or exhibition in any part of the world and all their rights in the songs, scenario, dialogues, etc., and in the negatives, copies, etc., of the said picture and in the royalty to be received by the Royal Talkie Distributors from time to time from the Gramophone company. This was followed by the declaration by the releasors whereby they agreed that the Royal Talkie Distributors were the sole proprietors of the talkie picture "Sakunthala" without any claim or right subsisting or in future on the part of the releasors as and from 13th April, 1942.

It would thus be seen that the assessee had received in respect of this picture a sum of Rs. 64,417-14-5 made up of 50 per cent. of the profits which had accrued due to the partners under clause 7 of the annexure B and Rs. 28,779-2-11 for which they relinquished all their future rights in the picture.

In respect of the assessment for 1943-44 and in the case of the assessee the accounting period was being the 12 months ended 30th June, 1942, the assessee contended before the Income-tax Officer that out of Rs. 64,417 which had been received from the Royal Talkie Distributors no doubt a sum of Rs. 35,638 was a revenue receipt but the balance of Rs. 28,779 represented merely compensation for giving up their (partners') rights in the picture and for future remuneration and possibly future profits and that it was therefore a capital receipt not liable to tax. The Income-tax Officer however overruled this contention and after referring to the terms of the release deed which recited that 50 per cent. of profits allowed to the partners of the Chandra Prabha Cinetone was in consideration of their share of remuneration for services rendered held that the sum received by the assessee for the release deed was in the nature of a revenue receipt and so liable to be assessed, and on this basis treated the entire amount of Rs. 64,417 which had been received by the assessee from the Royal Talkie Distributors as assessable income. From this receipt he deducted a sum of Rs. 50,182 which was the expenses which had been incurred by the assessee in the production of the picture. The balance of Rs. 14,235 was treated as the net share of income received by the assessee in the joint production of this picture "Sakunthala" and making some allowances for some small items, the rest was treated as assessable income under this head and tax was demanded on the basis. The assessee appealed to the Appellate Assistant Commissioner raising the same question but with the same result. Before the Appellate Tribunal also a contention that this sum of Rs. 28,779 represented the capitalised value of the estimated future profits was not accepted and the appeal was dismissed. It is in these circumstances that the following question has been referred to this Court for its decision, namely :

> "Whether the sum of Rs. 28,779 represents remuneration for services rendered and is a revenue receipt?"

The first contention raised by the learned counsel for the assessee is that though under this document it is recited that the consideration therefor is giving up of the right to remuneration, still, if the document were viewed as a whole, in the background of the agreements which preceded the release, there is no question of Rs. 28,779 having been paid to the assessee as and on account of remuneration due.

In this connection reliance is placed on a passage in the judgment of Viscount Simon in *Inland Revenue Commissioners* v. *Wesleyan General Assurance Society*,[1] which runs thus :

" First, the name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction. To call a payment a loan if it is really an annuity does not assist the tax payer, any more than to call an item a capital payment would prevent it from being regarded as an income payment if that is its true nature. The question always is what is the real character of the payment, not what the parties call it."

We do not however see how this passage assists the assessee. It is not denied that the document appended as annexure (C) is a deed of release. Its true nature as a release is not now in dispute. That recites the earlier transactions under which the releasors obtained rights which they ultimately relinquished. In doing so it refers to their right to 50 per cent. of the net profits as attributable to that consideration. In this respect it really repeats the words and the terms contained in the earlier agreements while setting them out in the preamble. If at the time when the agreements were concluded, the parties expressly stipulated for moneys being paid to them as and for remuneration for services rendered we are unable to see how the legal effect of such a contract could be obliterated by now starting a theory that they had not rendered any service or it could not be deemed to be remuneration for those services or that it was payable to them in some other character than for remuneration. We are not aware of any rule of interpretation by which when parties to a contract stipulate that any benefit flowing to one of them stems from some consideration furnished by the other a Court of construction could say that it was not so. (*Vide* Simon Income Tax, Vol. I, p. 51, citing *I. R. Commissioner* v. *Fleming*.)

Before leaving this part of the case an argument put forward by learned counsel for the assessee may be noticed. It is said that when Srimathi M. S. Subbulakshmi by her labour produced a capital asset, namely, the film which became the joint property of the Chandra Prabha Cinetone as well as Royal Talkie Distributors, there was no element of contract of service which might lead to the consideration paid to her being regarded as remuneration. In other words the argument was that it could in no sense be said that under the agreement of 1939 or 1940 the Royal Talkie Distributors employed Srimathi M. S. Subbulakshmi but that the true view was that both the parties to the agreement, one contributing labour and the other capital produced a capital asset in the shape of a film. It is therefore urged that the 50 per cent. of the profits even if they were for services rendered were not in the nature of remuneration and therefore not of a revenue nature. We are unable to appreciate this contention. Neither the agreement of 1939 nor that of 1940 created any partnership between Chandra Prabha Cinetone and the Royal Talkie Distributors. In pursuance of the obligation undertaken by the Chandra Prabha Cinetone under these agreements, Srimathi Subbulakshmi acted in the picture and the consideration payable to her out of the net collections was fixed at 50 per cent. of the net profits. The consideration paid to her is in essence only remuneration for services rendered and cannot be viewed in any other light. The fact that the services rendered resulted in the creation of an asset in the nature of a film is wholly irrelevant for considering the nature of the payment made to her for her services.

The next head of the learned counsel's argument was that the Rs. 28,779 received by the assessee as consideration for the release was merely a surrender of a right to future payments, and was therefore a stabilisation of a capitalised asset and so a capital receipt. Reliance was particularly placed on the judgment of of Finlay, J. and the House of Lords affirming him in *Van Den Berghs, Ltd.* v. *Clark*[2], and the several cases in which the principle laid down in that case have been followed. What the Court had to consider in *Van Den Bergh's case*[2], was the nature of a sum of £450,000 received by the assessee in full settlement of all claims and counterclaims which existed between the assessee and a Dutch Company. Both the companies had been engaged in the business of manufacturing and dealing in margarine and similar products. They had entered into pooling arrangements at as early a date

1. 1948 I.T.R. (Suppl.) 101 at 103. 2. (1935) 19 T.C. 390 (H.L.).

as in 1908 under which they bound themselves to work in friendly alliance and to share their profits of their respective business in margarine in specified proportions. This basic agreement of 1908 was being added to and varied from time to time particularly in 1913 and 1920 and under this, the agreement was to subsist until 1940. In 1922 the assessee made a claim against the Dutch Company for about £450,000 as the amount due to it by the Dutch Company under the agreement recited just previously. This was however repudiated and the Dutch Company claimed that far from owing any moneys to the assessee, moneys were owing to them. One of the methods suggested for putting an end to the dispute was by a termination of the agreement between the two companies but this was resisted by the assessee company. A settlement was however reached in 1927 whereby in consideration of the payment by the Dutch Company of £ 450,000 to the assessee as damages, the agreements were determined as at 31st December, 1927 and each party released the other from all claims thereunder. The question was whether this sum of £ 450,000 was a revenue receipt on which the income-tax could be levied against the assessee. Finlay, J., held against the Crown that the sum received was not a revenue receipt, a view which was confirmed by the House of Lords. He formulated the question to be considered by him in these terms at page 410 :

> "I agree with Mr. Latter that there are three questions here. The first is : What was this payment for? The second is : If a payment for future rights, is it assessable? The third question is : Ought it to go into the year 1927".

The answer by the learned Judge to the first question was that it was a payment for future rights. That is, it was really a payment for cancelling such rights as subsisted in the assessee between 1928 and 1940. Having answered the first question in this manner the learned Judge held on the second that it was not assessable. His reasoning is to be found in the passage at page 413 :

> "Not without hesitation, I have come to the conclusion that it is not liabile to assessment. I think that the agreement being an agreement whereby this company had a share in th profits of another company, was a capital asset. I think that the case is to be distinguished from the case where there is a cancellation of a contract made in the ordinary course of the company's business ....But it seems to me that where one gets, as one does here, not a contract made in the course of the company's business—for it is not the business of this company to make pooling agreements or to make agreements whereby they acquired shares in the business of another company—it seems to me that where one gets a payment made in respect of the cancellation of that agreement, that, truly, is a sum received by way of capital and not an income receipt at all."

This decision was reversed by the Court of Appeal but was restored on further appeal to the House of Lords. Lord Macmillan who delivered the leading judgment in the case said at p. 431.

> "Now what were the Appellants giving up? They gave up their whole rights under the agreements for thirteen years ahead. These agreements are called in the stated cases 'Pooling agreements' but that is a very inadequate description of them, for they did much more than merely embody a system of pooling and sharing profits. If the Appellants were merely receiving in one sum down aggregate of profits which they would otherwise have received over a series of years, the lump sum might be regarded as of the same nature as the ingredients of which it was composed. But even if payment is measured by annual receipts, it is not necessarily in itself an item of income........The three agreements which the appellants consented to cancel were not or inary commercial contracts made in the course of carrying on their trade ; they were not contracts for the disposal of their products or for the engagement of agents or other employees necessary for the conduct of their business ; nor were they merely agreements as to how their trading profits when earned s ould be distributed as between the contracting parties. On the contrary, the cancelled agreements related to the whole structure of the appellants' profit-making apparatus. They regulated the Appellants' activities, defined what they might and what they might not do and affected the whole conduct of their b siness. I have difficulty in seeing how money laid doubt to secure, or money received for the cancellation of so fundamental an organisation of a trader's a tivities can be regarded as an income disbursement or an income receipt........In my opinion that asset, the congeries of rights which the appellants enjoyed under the agreements and which for a price they surrendered was a capital asset."

The argument advanced before us on behalf of the assessee based upon this and other decisions following this case to which we shall presently refer was that the assessee in the present case surrendered its half proprietary interest in the film which was a capital asset. It had a number of rights under the agreements which might be compendiously described as a half share in an asset. For instance, this included the right to a share in the royalty. There was also a right in the nature

of pre-emption conferred on both the parties by paragraph 14 of the first agreement which was continued without alteration by the second. It was for giving up the assessee's interest in the "congeries of rights" that the payment of Rs. 28,779 was made. It was therefore urged that it was not open to the Income-tax Authorities to separate the component elements of this single payment and relate any particular portion to any specific item of right which was released. This argument however we are unable to accept. In the first place, a distinction should be drawn between payments made for past services or in discharge of past liabilities. Such payments do not lose their revenue nature merely because they also form part of a transaction by which future rights are released and a single consideration is recited for the two sets of items. This distinction is made clear both by Finlay, J. and Lord Macmillan in *Van Den Bergh's case*[1], Finlay, J., posed the question whether the finding of the Commissioners was that the payment of Rs. 4,50,000 was one in respect of sums due in the past to the assessee and regard being had to the ambiguity of the language used, he took it that it was a payment in respect of future rights so as to be consistent with the inference which he was inclined to draw. Dealing with the alternative contention he said at page 413 :—

"But the case is one of undoubted difficulty and it is, I think, proper that I should say something, though quite shortly, upon the other view, which is that this was a sum paid in respect of the past; that is to say, that it was a sum paid in order to make an end of, by way of payment, for the claim which the appellant company said they had in respect of the past. If it was that, it was clearly a revenue receipt in some way or other and at some time liable to pay tax."

Lord Macmillan dealing with this point at page 431 said :

"If the payment had been in respect of a balance of profits due to the appellants by the Dutch Company for the years 1914 to 1927, different considerations might have applied, but it is agreed that it is not to be so regarded."

We have therefore to examine whether Rs. 28,779 or any portion of it was received for a consideration, which so far as the assessee was concerned, had been fully executed but in respect of which it had stipulated for remuneration payable in future.

This distinction between payment for a past consideration and for services to be rendered in the future has been explained in the later decision also; *Van Den Berghs, Ltd.* v. *Clark*[1], was applied in *Barr, Crombie & Company, Limited* v. *Commissioners of Inland Revenue*[2], where a sum received as damages or compensation for the termination of an agreement was held to be a capital asset. A shipping company appointed the assessee to act as its manager by an agreement, dated 25th May, 1937, on terms of receiving a management fee of £500, a commission fee of one per cent. on the price of any vessel built, purchased or sold and a commission of 5 per cent. on the profits with a further stipulation that the remuneration to be paid should not be less than £2,000 per annum. The shipping company went into liquidation on 5th November, 1942 and as this contract was prematurely terminated it paid to the assessee a sum of £16,306 as compensation. The Court of Sessions held that this sum was a capital receipt and not a trading receipt on revenue account. Lord President Normand analysed the facts and said at page 60:

"It has been truly said that every case must be considered on its own facts, and that no legal criterion for distinguishing between capital payments and income payments is readily applicable."

Referring to the facts of that case the learned Lord said :

"In the present case, virtually the whole assets of the appellant company consisted in this agreement was surrendered or abandoned practically nothing remained of the company's business."

Referring to the words of Lord Macmillan in the case of *Van Den Berghs, Ltd.* v. *Clark*[1], the learned Lord said that

"after the liquidation of the shipping company and the payment to the appellant company of this sum of money, the structure of the company was radically affected and its whole character as a business was decisively altered."

Lord Moncrieff drew a distinction between payments in liquidation of past obligations and those for the termination of rights in future and said at page 62.

1. (1935) 19 T.C. 390 (H.L.). 2. (1947) 15 I.T.R. 56 (Suppl.).

"If that fourth article had provided, as the Commissioners had evidently thought, that there should be on liquidation an immediate prepayment of all the remuneration for services which would eventually have fallen due under the agreement had liquidation not taken place, then the fact that the remuneration for services was prepaid in a lump sum might not have protected it from income-tax."

The conclusion reached by the learned Judges was that the sum paid was in respect of remuneration for future services which were dispensed with and not remuneration for past services though payable in the future.

The decision in the *Commissioner of Income-tax* v. *South Indian Pictures, Ltd.*[1], referred to by learned counsel for the assessee does not really assist him. The point decided was that the money received as compensation for the termination of three contracts under which the assessee was to render service was not a receipt of a revenue nature. The decision of the Bombay High Court in the *Commissioner of Income-tax* v. *Asiatic Textile Company, Limited*[2], holding that the sum received by the assessee as damages, compensation or solatium for premature termination of a managing agency was a capital receipt, does not lay down any different principle.

We have therefore to examine the several items of rights which the assessee possessed under the agreements of 1939 and 1940 which were surrendered in consideration of the payment received in 1942 and on account of which the release was executed and see how far any of them satisfied the tests which we have formulated above. The first item to be considered is that contained in clause 3 of the first agreement, namely, the promise by Srimathi M.S. Subbulakshmi to act in the picture to the best of her ability and complete the same. The picture was completed long before 1942 and had been released and exploited so that the assessee-firm had completely performed its part of the bargain under this clause and in so far as any share or portion of the 50 per cent. of the profits was payable to the assessee after 1942, it was certainly remuneration for past services. The second item which was pressed upon us were the expenses incurred by the assessee in the production of the film up to the stage of the first agreement. Up to that stage the assessee firm had spent about Rs. 50,000 and the terms of the first agreement provided that the financier was to advance not more than Rs. 60,000 and that the total cost of production should artificially be deemed to be Rs. 1,00,000 and that the assessee was to be repaid the amount expended by him in the production after the financier was paid off what he had advanced. In other words, provision was made for the refund of Rs. 40,000 out of Rs. 50,000 and odd which they had expended on the picture. This was to be in addition to the 50 per cent. of the profits which the assessee was to obtain, the primary consideration being of course the acting of Srimathi M. S. Subbulakshmi provided by clause 3. When however we come to the second agreement, which superseded the first in this regard, the financier undertook to advance at least another Rs. 40,000 and the notional cost of production of the picture being kept at the same figure of one 1,00,000. The result was that as the parties contemplated the financier advancing the entire one lakh of rupees, which was treated as the notional cost of the picture so far as the assessee was concerned, he could not have any refund of his initial expenses. Of course there was a provision that if the financier had expended more than Rs. 1,00,000 he could appropriate such sum as he had actually advanced without reference to this notional figure. The position after the second agreement was that the assessee was not entitled to a refund of any portion of the moneys originally advanced by him and yet the share of profits payable to the assessee was not altered so that the 50 per cent. of the profits stipulated as in consideration of the services rendered by the Chandra Prabha Cinetone towards the production of the picture could relate only to items of service other than its original expenditure.

The next item to be considered is that contained in clause 17 of the original agreement reproduced in clause 8 of the second. Under this clause copy-rights in the songs and dialogues of the picture was to vest in both the parties and the royalty and the benefits of any contracts with gramophone companies was to be equally divided between the assessee and the financier. This was of course in

1. (1951) 20 I [illegible]

addition to the 50 per cent. of the profits referred to earlier. This is one of the items in respect of which the assessee firm released its rights. In regard to this, there is no question of any remuneration being payable in future in respect of services rendered in the past. Mr. Rama Rao Saheb, learned counsel for the Commissioners, does not contest that, so far as the assessee gave up his rights to this item of asset, the sum received is a capital receipt.

Lastly under clause 14 of the first agreement which is left untouched by the second, each of the two contracting parties was given a right of pre-emption. Any sum received in consideration of the surrender or release of this item cannot by any means be a trading or a revenue receipt. The position as it emerges from the above analysis is that the consideration for the receipt of Rs. 28,779 was made up of three components (1) the surrender or release of the 50 per cent. of the future profits attributable to past service rendered by the assessee which is a revenue receipt; and a release of (*a*) the right to royalties; and (*b*) the right of pre-emption, both of which are capital receipts. The sum attributable to all these three items, *viz.*, Rs. 28,779 is however treated by the Revenue authorities as wholly due to the surrender of the 50 per cent. of the profits in future. This was not justified.

When during the course of the arguments the position was analysed as above, learned counsel for the assessee put forward two contentions. The first was that if a consolidated payment was received for a mixed consideration compounded of elements some of a trading or revenue nature and others being the realisation of a capital asset, the tax authorities could not and ought not to split up the components but as there was at least some item of a capital nature included in the receipt, the whole of it shoud be treated as other than revenue. We are unable to accept this argument which is not supported by any authority and appears to us to rest on no principle. When Lord Macmillan spoke of a congeries of rights which were given up by the assessee in *Van Den Berghs' case*[1], the learned Lord could not be deemed to have intended that if the consideration received for giving up of one of those rights was in the nature of a trading profit or a revenue receipt, the same should be ignored because it was mixed up with other items which undoubtedly were of a capital nature. The opposite was exactly the decision which was rendered in *Carter* v. *Wadman*[2]. The assessee was a resident manager of certain licensed premises on a salary of £ 10 a week and one-fourth share of the net profits. His employment was for a term which was to continue in force until June, 1949, but was terminated on 2nd December, 1942, when the employer, assigned the lease of the licensed premises, and transferred his licence. In consideration of the assessee's consent to his termination of the employment he was paid £2,000 in "full settlement of all past, present and future claims." The question raised in the case was whether this sum of £2,000 was paid as compensation for loss of management and was therefore not assessable. It was found that during the period of his service, though the assessee had received his salary he had not received anything in respect of his share of the profits. This was ascertained at £1,090. The Crown contended that out of £2,000 paid to the assessee £1,090 was assessable since it represented payments for service rendered. Atkinson, J. and Lord Greene, M.R., on appeal held that there should be an apportionment between the sum attributable to remuneration due on the date of the termination and that which could be attributed to damages for termination of the employment which would be in the nature of a capital receipt. Atkinson, J., said at page 48:

> "It is clear from the case of *Wales* v. *Tilley*[3], that where a lump sum payment is made in respect of two different matters, one of which would lead to an assessment for tax and the other would not, the Commissioners have to apportion the sum. I do not think I need refer in detail to *Wales* v. *Tilley*[3]. There a big sum was paid in respect of surrendering the rights of future salary, and also for giving up pension rights. In so far as it was attributable to the giving up of the pension rights, it was not assessable and it was sent back to the Commissioners to apportion."

In affirming this decision Lord Greene, Master of the Rolls said at page 52:

1. (1935) 19 [illegible]
2. (1946) 2 [illegible]

“Mr. Mustoe sought to argue that, as the consideration was one lump sum of £2,000, it was impossible to point to any portion of the £2.000 and say that it was a profit arising from his employment; but the Crown might equally well have argued that, as it was impossible to fix any sum which represented a capital payment, the whole must be income. Indeed, that was in effect the argument which prevailed in the Court of appeal in the case of *Wales* v. *Tilley*[1]. The House of Lords took a different view. It is true that before the House of Lords the Attorney-General either conceded that the sum in question was apportionable. . . . . or only faintly argued that a division was not practicable. . . . . . But we respectfully agree with their Lordship that in principle there must be apportionment and we think that on the facts of the present case, though the calculation of the value to the appellant of the unexpired portion of the agreement must be a matter of estimate, there is no insuperable difficulty in estimating its value.”

We consider that the present case falls within this principle and that there should be an apportionment on the basis that three rights were surrendered and released in consideration of the payment of Rs. 28,799, namely, (1) giving up the right to 50 per cent. of the profits. The amount apportionable to this item would be a revenue receipt. (2) The surrender of the right to royalty and (3) the surrender of pre-emption right. The consideration received for the surrender of these latter two items of rights would be a capital receipt not assessable to tax. The Appellate Tribunal should apportion the sum received, to these three items and on that basis determine the assessable portion of the same.

Our answer to the question referred to is that the sum of Rs. 28,779 represents not merely remuneration for services rendered but also other items of a capital nature and cannot therefore be wholly treated as a revenue receipt. As neither side wholly succeeded in this reference, there will be no order as to costs.

Reference answered.

R.M.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

E. M. Muthappa Chettiar .. *Appellant**

v.

Salem Rajendra Mills, Ltd., .. *Respondent.*

Company Law—Refusal of a company to register the transfer of shares in the name of the transferee—When justified—Discretion of the directors—If could be interfered with by Court—Reasons for the refusal—If should be given.

If a discretion as to registering transfers of shares of a Company is given by the Articles of Association of the Company to the Directors, a Court will not control the exercise of such discretion unless it is proved that the Directors are not exercising the discretion *bona fide* or are acting in other ways oppressively, capriciously or corruptly or in some way *mala fide*.

Palmer's Company Law, 19th Edition, page 109, In re *Gresham Life Assurance Society*[2] and Buckley's Companies Act, 22nd Edition, page 175, referred.

A Court will not draw an unfavourable inference against the Directors because they did not give their reasons for refusing to pass a particular transfer; for they are under no obligation to disclose their reasons either in Court or out of Court. It is enough that they in fact fairly considered the question of transfer but that in exercise of the discretion given to them by the articles they have not passed it.

In re *Coal Port China Company*, (1895) 2 Ch. D. 404 at 407, referred.

But if the Directors do give their reasons the Court must consider whether they are legitimate or not, that is, with a view to find out whether the Directors acted on right or wrong principles.

In re *Bell Brothers, Ltd.*, (1891) 7 Times Law Reports 446.

If a person who applies for transfer of shares in his name is of such a character as to throw the company into confusion (*e.g.*) by indulging in unnecessary litigation and if he is not a desirable one, the Board of Directors would certainly be acting in the best interests of the company in refusing to register the share in his name and such a reason is quite a valid one.

Appeal against the decree of the Court of Subordinate Judge of Salem, dated 30th December, 1949, in O.S. No. 54 of 1946.

R. Gopalaswami Aiyangar and *R. Sundaralingam* for Appellant.

V. Thyagarajan, Alladi Kuppuswami and *K. Subramaniam* for Respondent.

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1. (1943) 25 T.C. 136.
2. (1872) L.R. 8 Ch. App. 446.

* Appeal No. 296 of 1950. 22nd April, 1955.

The Judgment of the Court was delivered by

Somasundaram, J.—This is an appeal by the plaintiff against the dismissal of his suit by the Subordinate Judge of Salem.

The plaintiff purchased 2,030 shares of the Salem Rajendra Mills, Ltd., (the first defendant in the suit and respondent herein) and applied to have the same transferred in his name. As the transfer was refused, the plaintiff filed the suit for a declaration that he is entitled to have his name entered in the books of the company as transferee of the above shares and also asked for a mandatory *injunction* directing the first defendant to enter his name in the books of the company. The plaintiff purchased the shares from defendants 2 and 3 and therefore they were also added as parties. The other defendants were added as *pro forma* parties. This appeal is only against the first defendant in the suit.

The circumstances which led to the refusal of the transfer and which resulted in the suit are these. The plaintiff and one Karimuthu Thyagaraja Chettiar entered into a partnership in 1939 for the purpose of carrying on business as the managing agents of textile mills at Coimbatore and later took up the managing agency of the respondent-company, the Rajendra Mills at Salem, by entering into an agreement with the Salem Balasubramaniam & Company, who were then the managing agents of the Rajendra Mills at Salem. In connection with the managing agency of Rajendra Mills, with which alone we are concerned in this appeal, both the plaintiff and Thyagaraja Chettiar incurred certain financial responsibilities. In 1941, in consequence of a letter written by the plaintiff to Thyagaraja Chettiar stating that he has nothing to do with the Rajendra Mills and that Thyagaraja Chettiar alone is responsible for the debts and liabilities of the business and that he can do what he likes without the plaintiff's connection, there was an agreement between the plaintiff and Thyagaraja Chettiar by which the plaintiff was relieved of all his financial responsibilites in respect of the managing agency of the Rajendra Mills. Thyagaraja Chettiar then called upon the plaintiff to transfer the 100 shares of Balasubramaniam & Company which the plaintiff had taken; and he also called upon the plaintiff to execute an agreement to evidence the severance of his connection with the managing agency of Rajendra Mills. After the plaintiff was relieved of his financial responsibilities in respect of the managing agency of Rajendra Mills in pursuance of the agreement, the plaintiff changed his mind and refused to do what he was called upon to do by Thyagaraja Chettiar. Consequently misunderstandings arose between them resulting in several suits being filed by the plaintiff against the respondent company. The suits relating to the Rajendra Mills alone will be referred to here.

The plaintiff filed Original Suit No. 128 of 1942 in the District Munsiff's Court, Salem, for a permanent injunction restraining Thyagaraja Chettiar from holding a certain meeting by Balasubramaniam & Company to consider a special resolution for allotting the un-allotted shares of Balasubramaniam & Co., to Manickavachakam Chettiar, a divided son of Thyagaraja Chettiar. As the proposed meeting was not held and the proposed allotment of the shares was dropped, the suit became infructuous and was dismissed on 31st July, 1943, by the Sub-Court to which Court the suit was transferred to be tried along with another suit. In that suit Thyagaraja Chettiar filed a written statement alleging that there was an agreement between himself and the plaintiff, according to which the plaintiff had severed his connection with the managing agency of the Rajendra Mills and therefore the plaintiff had no longer any interest in the same. The plaintiff thereupon filed Original Suit No. 26 of 1942 in the Sub-Court, Salem, for a declaration of his status as a subsisting partner owning a half share in the managing agency of the Rajendra Mills. On the same day, he filed Original Suit No. 34 of 1942 in the same Court for a decree directing rectification of the share register of Balasubramaniam & Company by deleting therefrom the name of one Sundaram Chettiar, another divided son of Thyagaraja Chettiar; O.S. No. 26 of 1942, when it came up for hearing on 31st July, 1943, along with Original Suit No. 128 of 1942, was withdrawn by the plaintiff as some difficulty was felt in getting the reliefs claimed by him, since the partnership had not been registered under the Partnership Act.

In Original Suit No. 34 of 1942, the Court found that the plaintiff had severed his connection with Balasubramaniam and Company on 17th May, 1941 and that he was therefore not entitled to question any acts done by Thyagaraja Chettiar after that date. The suit was therefore dismissed on 20th March, 1944. This was taken up in appeal to this Court and it was heard by a Bench of this Court. The learned Judges confirmed the finding of the lower Court and held that the plaintiff's " repudiation of the agreement was certainly open to grave criticism ".

The Original Suit No. 55 of 1942 was filed by Thyagaraja Chettiar, in the Sub Court, Madurai, for declaring that the plaintiff had no manner of interest in the managing agency of Rajendra Mills and for directing him to execute a transfer deed in respect of the 100 shares standing in his name in the books of Salem Balasubramaniam and Company. Though the trial Court did not give a decree, in the appeal, the District Judge upheld the plea of Thyagaraja Chettiar and directed the plaintiff to execute the transfer deed in respect of the 100 shares standing in his name in favour of Thyagaraja Chettiar. The second appeal preferred by the plaintiff resulted in its dismissal. Certain other suits were filed by the plaintiff against Saroja Mills at Coimbatore, all of which were dismissed and he was ultimately turned out of the managing agency of both the Rajendra Mills as well as the Saroja Mills.

It was after these proceedings, in all of which he was worsted, the plaintiff started purchasing shares of Rajendra Mills. The shares in question—the subject-matter of this case, were purchased on 31st January, 1944. On 19th June, 1944 he applied to the Company for registration of the transfers in his name. As the transfer deeds were not stamped they were returned on 3rd July, 1944. On 31st August, 1944 the plaintiff re-presented the application with a cheque for Rs. 500 for the purpose of purchasing stamps. On 8th September, 1944 the Secretary of the Company informed the plaintiff of the insufficiency of stamps and asked for a further sum to cover the transfer fees and stamp fees. That was sent on 12th September, 1944. On 15th September, 1944 the plaintiff was informed that the application would be placed before the Board of Directors for their consideration. The Board met on 22nd September, 1944, considered the application and refused to register the shares in the plaintiff's name, without giving any reasons. The resolution of the Board was communicated to the plaintiff on 27th September, 1944. The plaintiff protested against this by his letter dated 31st May, 1945. The suit itself was filed only on 30th March, 1946, nearly one and a half years after the communication to the plaintiff about the refusal to register. The plaintiff asked for certain other reliefs against defendants 2 and 3, but we are not concerned with them in this appeal as the appeal is preferred only against the first defendant.

The plaintiff alleges that the Board of Directors acted *mala fide* in refusing to register the transfer of his shares in his name and that under the Articles of Association they have no power to refuse.

The respondent-company in their written statement denied that they ever acted *mala fide* in refusing to register the plaintiff's name. They stated that under the Articles, the Board of Directors had absolute discretion in the matter of refusal of registration of the transfer of shares and that the discretion of the Board cannot be questioned either by the transferor or the transferee. They also stated that, under the Articles of Association, the Board need not give any reasons for their refusal. The case of the defendants is that the Board was acting with the best of motives and in the interests of the Company and that the refusal was for good and sufficient reasons. The first defendant-company, though they stated that they need not give any reason for refusing to register the transfer, still in the written statement gave the reasons and set out the circumstances relied on by them to show that the plaintiff is a cantankerous litigant and an undesirable person and that it was in the best interests of the company that the application was rejected. The fact of the purchase of the shares by the plaintiff and the refusal by the first defendant to register were not disputed.

The lower Court after considering the evidence and the law on the subject, found that the plaintiff cannot be called a cantankerous litigant merely from the

circumstances of the number of suits filed by the plaintiff, almost all of which being decided against him. It held that it was not unusual for partners to fall out and seek their remedies in a Court of law in respect of rights arising from the partnership. The lower Court, however, held that the decision of the Board had been arrived at in the best interests of the company, as the plaintiff is an undesirable person and the refusal was justifiable on that ground. The suit was, therefore, dismissed.

In appeal the only question is whether the first defendant was justified in refusing to register the transfer. Article 56 of the Articles of Association on which the respondent relies for the exercise of its power is as follows :

> "If there be any mortgage on the share, or if there be any dues in respect of the instalments of share amounts, instalment amount, interest, or any other dues in respect of the share, or if any amount whatever is due from that member (either severally or jointly along with others) or if the transferee of the share is not approved, the Board of Directors may without assigning any reason whatever for their refusal, refuse to register the share in the exercise of their discretion and independence. . . . .
>
> Board of Directors may refuse to register the transfer even without giving any reason therefor."

It is clear from the above article that it mentions certain grounds on which the transfer may be refused. One of the grounds is 'if the transferee of the share is not approved.' The Articles also give a power to the Board of Directors to refuse to register the transfer even without giving any reasons therefor. The first respondent though they take their stand under the Articles that they need not give any reason for the refusal, still in the written statement, have come out with the reasons for refusal. The question is whether the defendant can refuse to register without giving reasons and when they give reasons in Court, it is open to the Court to find that they are legitimate or not.

Under the Articles of Association that a discretion is given to the Directors to refuse to register the transfer cannot be disputed. It is well-settled that

> "If a discretion as to registering transfers is given by the Articles to the Directors, the Court will not control the exercise of such discretion unless it is proved that the Directors are not exercising it *bona fide* or are acting in other ways oppressively, capriciously or corruptly or in some way *mala fide*." (*Vide* Palmer's Company Law, 19th Edn. Page 169).

In In re, *Gresham Life Assurance Society*, Ex parte *Penny*[1], James, L.J., states the position as follows at page 450 :

> "I cannot conceive that any director would choose to accept office, or exercise the power entrusted to him if he were liable to be called upon to say what the particular reasons were or the particular motive was which influenced him in coming to the conclusion that any person was not eligible as a shareholder."

Earlier at page 449 the learned Judge says :

> "No doubt the Directors are in a fiduciary position both towards the company and towards every shareholder in it. It is very easy to conceive cases such as those cases to which we have been referred, in which this Court would interfere with any violation of the fiduciary duty so reposed in the directors. But in order to interfere upon the ground it must be made out that the directors have been acting from some improper motive, or arbitrarily or capriciously."

Mellish, L.J., who concurred with James, L.J., observed as follows at page 451 :

> "It appears to me that it is very important that directors should be able to exercise the power in a perfectly uncontrollable manner for the benefit of the shareholders ; but it is impossible that they could fairly and properly exercise it if they were compelled to give the reason why they rejected a particular individual."

And then he points out how in certain circumstances the directors will be perfectly entitled and justified to refuse to register and adds finally :

> "I am, therefore, of opinion that, in order to preserve to the company the right which is given by the articles, a shareholder is not to be put upon the register if the board of directors do not assent to him, and it is absolutely necessary that they should not be bound to give their reasons, although I perfectly agree that if it can be shown affirmatively that they are exercising their power capriciously and wantonly that may be ground for the Court interfering."

The above decision is also an authority for the position that :

> "Where the articles authorise the directors to reject transfers to transferees of whom they do not approve, the directors must, before rejecting a proposed transferee, fairly consider the question at

1. (1872) 8 L.R. Ch. App. C. 446.

a board meeting. Provided that they do so, however, they are not bound to disclose their reasons for rejecting any particular individual, as to compel them to do so would be to deprive the power of half its efficacy." (*Vide* Buckley on the Companies Act, 12th Edition, page 175).

It is also well-settled that the Court will not draw an unfavourable inference against the directors because they did not give their reasons for refusing to pass a particular transfer; for they are under no obligation to disclose their reasons either in Court or out of Court. It is enough that they in fact considered the transfer but that in exercise of the discretion given to them by the Articles they have not passed it.

In In re, *Coalport China Company*[1], at page 407 Lindley, L.J., observed as follows :

" Under the articles the directors have a power to refuse a transfer, I will not say at present for what reasons. I will allude to them presently. They do refuse a transfer they do not say why. The argument, is, and the view taken by the learned Judge is, that it is for them to justify their conduct. Now, that appears to me to be wrong. It is for those who say that the directors have exercised their power improperly to give some evidence to that effect."

The other two Judges concurred with Lindley, L.J. and Rigby, L.J., added :

" The fact that they have resolved must be taken, in the absence of positive evidence sufficient to satisfy the Court to the contrary, to mean that they have resolved within their jurisdiction and for right reasons."

It is thus clear from the above decisions that if the Articles of Association give power—and in this case Article 56 undoubtedly gives such a power—the respondent is not bound to give any reasons for not registering the transfer. That the Board considered the application at its meeting on 22rd September, 1944 is not disputed. As already stated though the respondent did not give any reasons at the time of the refusal and took the stand that they are not bound to give any reasons they have, however, in the written statement, come forward with the reasons for refusing. Now the question is whether the reasons given by the respondent are legitimate or not.

It has been held that :

" If the directors do give their reasons, the Court will then consider whether they are legitimate or not, *i.e.* whether the directors have proceeded on a right or wrong principle, and will overrule their decision if their reasons are not legitimate, but not, if they are legitimate, merely because the Court would not have come to the same conclusion." (See Buckley on Companies Act, page 175).

In re, *Bell Brothers, Ltd.*, Ex parte *Hodgson*[2], Chitty, J., states the law as follows:—

" The discretionary power is of a fiduciary nature, and must be exercised in good faith : that is, legitimately for the purpose for which it is conferred. It must not be exercised corruptly, or fraudulently, or arbitrarily, or capriciously, or wantonly. It may not be exercised for a collateral purpose. In exercising it, the directors must act in good faith in the interests of the company and with due regard to the shareholder's right to transfer his shares, and they must fairly consider the question of the transferee's fitness at a board meeting. When the Court once arrives at the conclusion that the directors have in good faith rejected a transfer on the ground that the transferee is not a fit person to become a member of the company, it will not review the directors' decision. The directors are not bound out of Court to assign their reasons for disapproving. If they decline to do so, or if their decision is challenged in Court and they refrain from giving evidence, upon which a cross-examination may take place as to their reasons, or if, giving such evidence, they refrain from stating their reasons, the Court will not, merely on that account, draw unfavourable inferences against them. In these articles there is an express provision protecting the directors agai st any liability to disclose their reasons. They are, however, at liberty, if they think fit, to disclose them, and if they do, the Court must consider the reasons assigned with a view to ascertain whether they are legitimate or not ; or, in other words, to ascertain whether the directors have proceeded on a right or wrong principle. If the reasons assigned are legitimate, the Court will not overrule the directors' decision merely because the Court itself would not have come to the same conclusion. But if t ey are not legitimate, as for instance, if the directors state that they rejected transfer because the transferor's object was to increase the voting power in respect of his shares by splitting them among his nominees, the Court would hold that the power had not been fully exercised. So, also if the reasons assigned is that the transferee's name is Smith, or is not Bell. Where the directors do not assign any reason, it is still competent for those who seek to have the transfer registered to show affirmatively if they can, by proper evidence that the directors have not duly exercised their power. These principles are deducible from the authorities, among which the more important are In re: *Gresham Life Assurance Company* Ex parte *Penny*[3], *Moffat* v. *Farquhar*[4], etc.

It is clear from the above decision that if the reasons are not given, the Court will not merely on that account draw an unfavourable inference against the Board.

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1. (1895) 2 Ch. D. 404 at 407.
2. (1891) 7 Times Law Reports, page 689.
3. (1872) 8 L.R. Ch. App. Cases, 446.
4. (1877) L.R. 7 Ch. D. 591.

They are, however, at liberty to disclose the reasons, and if they do, the Court must consider the reasons assigned with a view to find out whether the defendants acted on a right or wrong principle. The learned advocate relies on this decision in support of his contention that the defendants acted on a wrong principle and the only object of refusing was that the plaintiff would oppose the domination of Thyagaraja Chettiar in the mills. The learned advocate also relied on the decision in *The Muir Mills Company, Ltd.* v. *T. H. Condon*[1] and *Kaikhosro Muncherji Heeramaneck* v. *The Coorla Spinning and Weaving Company*[2]. There is not doubt that in In re, *Bell Brother Ltd.*, Ex Parte *Hodgson*[3], the reason for opposing the registration had nothing to do with the person, but it was for some other reason, namely, to increase the voting power in his own hands. In the *Muir Mills Company, Ltd.*, v. *T. H. Condon*[1], also the real objections were not against the transferees as such, but their connection as employees of some other mills and the desire of the Directors was that the person concerned should not add to his voting power at the meetings of the company. The learned Judges held that as the objections were not personal to the transferees they did not constitute legimate reasons for refusing to transfer. In *Kaikhosro Muncherji Heeramaneck* v. *The Coorla Spinning and Weaving Company*[2], also there was no objection to the person and as it was for other reasons, the transfer was ordered.

In this case the facts set out earlier and the evidence show that the plaintiff after expressing his desire to have no share whatsoever in the company filed several suits in all of which he was worsted and the finding, as already stated, is that his conduct is 'open to grave criticism'. It is in evidence that he went about purchasing shares at thrice the value of the shares and when it would fetch only 6 per cent. at face value, he had paid for his share three times the face value, which would give him only two per cent. This is certainly not for investment. There must be some other ulterior object. According to the evidence of P.W. 1 the Secretary, the various cases filed by the plaintiff affected the Rajendra Mills, and the managing agency could not raise funds for financing the mills. P.W. 1 says that the shareholders of the mills lost confidence in the mills and wanted to sell their shares. Many of the prominent directors sold their shares, and the number of directors was reduced; and it was because the directors said that the plaintiff was litigious and quarrelsome person, that he would discredit and obstruct the management and create factions among the share-holders and act against the interests of the company, the directors decided not to have him and invite trouble. The lower Court has dismissed the suit, holding that the decision of the Board had been arrived at in the best interests of the company and that the refusal to recognise the assignment on the ground that the plaintiff is an undesirable person is valid.

In *Moffat* v. *Farquhar*[4], Malins, V.C., observed as follows at page 605:

> "In my opinion, therefore, it is perfectly clear that there can be no justification for refusing the transfer unless they have an objection to the person of the transferee. That they should have such a power seems reasonable; because, this being a limited company, and it being very desirable that they should have res ectable men and solvent men as members, and persons who would be able to pay the calls which should be made, it is reasonable that they would have the power of objecting to the person, and not have introduced among them insolvent persons, or it might be, if you like, *disagreeable persons who would throw them into confusion* and therefore the directors have the power of objecting to the person." *Italics* are (ours).

This shows that if a person is of such a character as to throw their company into confusion and if he was not a desirable one, then the Board of Directors would certainly be acting in the best interest of the company in refusing to register the shares in his name and such a reason is quite a valid reason. The evidence justifies the finding of the lower Court and it cannot be said that the directors did not act *bona fide* or that they acted arbitrarily or capriciously.

In our opinion no case has been made out for intereference in appeal. The appeal, therefore, fails and is dismissed with costs.

R.M. ——— *Appeal dismissed.*

1. (1900) I.L.R. 22 All. 410.
2. (1891) I.L.R. 16 Bom. 80.
3. (1891) 7 Times L.R. 446.
4. (1877) L.R. 7 Ch. Div. 591.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Krishnaswami Chettiar *Appellant**

v.

S. Sankili Chettiar (Minor) by next friend and mother Papathi Ammal *alias* Lakshmi Ammal and others *Respondents.*

Hindu Law—Succession to stridhana property—Basis of—Principle of representation in succession—Applicability.

Since religious efficacy is not the basis of succession to stridhana property under Hindu Law the rule of representation which applies to succession to the property of a male cannot determine the heir to stridhana property. In other words the doctrine of representation which renders the son, grandson and great grandson as single in the case of succession to the property of a male is not treated as applicable to determine the heirs in dealing with stridhana succession. The rule of representation which is founded upon religious efficacy as also on the theory of unobstructed heritage of survivorship prevailing between these co-heirs has no application to stridhana succession in regard to which it is propinquity and the rule that the nearer excludes the more remote governs to determine the heir.

Texts referred: Mayne, 11th Edn., para 624 ; Mulla 11th Edn. para 147, referred.

Karuppai Nachiar v. *Sankaranarayanan Chetty*, (1903) 13 M.L.J. 398 : I.L.R. 27 Mad. 300 (F.B.) ; *Marudayi* v. *Doraiswami Karambian*, (1907) 17 M.L.J. 275 : I.L.R. 30 Mad. 348 ; *Bhimacharya* v. *Ramacharya*, (1909) I.L.R. 33 Bom. 452 and *Bai Raman* v. *Jagjivandas*, (1917) I.L.R. 41 Bom. 618, referred.

Appeal against the Decree of the Court of the Subordinate Judge of South Malabar at Palghat in Appeal Suit No. 47 of 1949 preferred against the Decree of the Court of the District Munsif of Palghat in Original Suit No. 338 of 1947.

N. R. Raghavachariar for Appellant.

T. R. Ramachandran for Respondents.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—The Second Appeal has been placed before a Bench in view of a very interesting question of Hindu Law regarding stridhana succession rai ed by it.

The relevant facts are not in dispute. The property in suit was purchased by five persons along with one Vella Ammal with the last of whom alone we are now concerned. It is conceded that under this purchase Vella Ammal was entitled to a sixth share and it is the succession to this share that forms the subject-matter of these proceedings. Vella Ammal died on 18th May, 1941 without issue. As there is no proof that she was married in any unapproved form, the succession to the property which is admittedly the stridhana property of Vella Ammal would be to her husband and in his absence to his heirs. Vella Ammal was the second wife of her husband and by his first wife her husband Karuppan Chetti had five sons, all of whom were dead by the date of Vella Ammal's death. The plaintiff was a great grandson of Vella Ammal's husband through this elder wife while defendants 1, 2, 3, 4 and 6 are respectively grandsons by three of Vella Ammal's step-sons. The 5th defendant is a daughter-in-law of her step-son. Defendants 1 to 4 and 6 resisted the plaintiff's suit on the ground that he was a remoter heir than themselves and could not claim to succeed in their presence. The learned District Munsif however rejected this defence and held that the son, the grandson and the great grandson should also be considered as " sons " on the doctrine of representation and that they would all take together without the son or the grandson excluding the grandson or the great grandson respectively. On appeal by the contesting defendants, the learned Subordinate Judge agreed with this view of the law and dismissed the appeal. Hence the second appeal by the defendants.

The argument urged on behalf of the appellants was two-fold. The first was that the theory of representation was based upon the doctrine of spititual benefit whereas stridhana succession was not based upon spiritual benefit but

* Second Appeal No. 1174 of 1950. 9th March, 1955.

merely on propinquity. It was next aruged that as the son, grandson and great grandson of the propositus herself would not take together but the nearer would exclude the more remote it was illogical to hold that a different rule for determining the heir would apply when one proceeded to the father or the husband. Having examined the matter carefully, we are of the opinion that the contentions raised on behalf of the appellants are well founded and have to be accepted.

It is admitted that there is no direct decision governing the point and that the matter has to be decided on principle and on such light as may be gathered from observations in decisions regarding the basis of stridhana succession.

There is no direct text bearing upon this question. But it might be useful to set out such of them as might throw some light on the ratio applicable in this type of succession. The text of Yagnavalkya dealing with succession to stridhana is "Her kinsmen take it, if she die without issue". The commentary of the Mitakshara on this text is to be found in Chapter II section 11 from placitum 9 onwards :

"*Placitum* 9 : If a woman die 'without issue' that is, leaving no progeny in other words, having no daughter, nor daughter's da ghter, nor daughter's son, nor son, no son's son ; the woman's property, as above described, shall be taken by her kinsmen, namely, her husband and the rest, as will be forthwith explained.

Placitum 11 : Of a woman dying without issue as before stated, and who had become a wife by any of the four modes of marriage denominated Brahma, Daiva, Arsha and Prajapatya, the whole property, as before described, belongs in the first place to her husband. On failure of him, it goes to his nearest kinsmen (sapindas) allied by funeral oblations....

Placitum 12 : In all forms of marriage, if the woman 'leave progeny' that is, if she have issue ; her property devolves on her daughters. In this place by the term 'daughters', grand-daughters are signified ; for the immediate female descendants are expressly mentioned in a preceding passage ; 'the daughters share the residue of their mother's property, after payment of her debts.'

"*Placitum* 15 : On failure of all daughters, the grand-daughters in the female line take the succession under this text 'if she leave progeny, it goes to her daughter's daughters'.

Placitum 18 : On failure also of daughter's daughters, the daughter's sons are entitled to the succession. Thus Narada says, 'Let daughters divide their mother's wealth ; or, on failure of daughters, their male issue.'

Placitum 19 : If there be no grandsons in the female line, sons take the property ;

Placitum 24 : On failure of sons, grandsons inherit their paternal grandmother's wealth.

Placitum 25 : On failure of grandsons also, the husband and other relatives above mentioned are successors to the wealth.

(The above translation is that of Colebrook).

The other commentators do not materially add to the exact succession beyond the husband.

It will be seen from the list of enumerated heirs that, in the matter of stridhana succession, the woman's own son would exclude her grandson and that the theory of representation that a son includes not merely the son but also the grandson and the great grandson, which obtains in the case of succession to the property of a male, does not apply to the issue of a female propositus. The question is whether when the text provides that after the father or the husband as the case may be (dependent on the form of marriage) the kinsmen of these succeed as the next heirs of the propositus, their kinsmen should be determined of the principle of propinquity based on the ordinary rule that "to the nearest sapinda the inheritance next belongs" or on the special theory of representation which applies to cases of succession to the property of a male governed by Mitakshara. It may be premised that the theory of representation is really a concomitant of a coparcenary and of *succession by survivorship*—if such an expression could be used in the case of succession to males. It has no application to collateral succession. For instance between a brother and a brother's son or between a brother's son and his grandson the succession is on the basis of propinquity the nearer excluding the more remote.

The question for our consideration now is, when the "next kinsman" of a husband has to be ascertained whether there is any scope for the theory of representation. Of course it has to be conceded that the son, gradson etc., in such a

case would not take as coparceners with rights of survivorship. The point is whether the theory of representation could be invoked in any case where the son, grandson and great grandson do not take the property as coparceners with rights of survivorship.

We shall now set out the observations in the several cases on which reliance has been placed by learned counsel for the appellants. In *Karuppai Nachiar* v. *Sankaranarayanan Chetty*[1], a Full Bench of this Court had to consider, whether, when the stridhana property of a woman devolves on her sons who form an undivided family at the time of their mother's death, the sons take as coparceners or as tenants in common without benefit of survivorship. The learned Judges decided that the property devolved on them as tenants in common. Dealing with an argument, based on an analogy between succession to the property of a male and that of a woman, the learned Judges said (at page 308) :

> "Another argument used by the respondent's pleader is that, as in the case of the grandsons inheriting to the paternal grandfather, so in the case of grandchildren inheriting to the stridhanam of the maternal or paternal grandmother, they take *per stirpes* and not *per capita*. No doubt there may be this similarity, but as pointed out by the learned pleader for the appellant, there is a dissimilarity in another respect, *viz.*, that where the deceased dies leaving children and grandchildren, the grandchildren do not by representing their deceased mother or father as the case may be, step into their shoes and inherit along with the children of the deceased."

The question that arose for consideration in *Marudayi* v. *Doraiswami Karambian*[2], was whether among the issue of divided sons the right of representation existed, when they succeeded to the property of their divided father and whether in such a case the rule of exclusion of remoter by a nearer sapinda would apply. The learned Judges held that the right of representation was not put an end to by a partition and dealing with the point they stated at page 351 :

> "It must however be conceded that to allow a rule of succession *per stirpes* in a separated family is to admit an exception to the rule of Hindu Law by which the inheritance devolves on the nearest sapinda ; but the exception is one which, in our opinion, necessarily follows from the exposition given by Vijnaneswara (Mit. 1, 1 3) of the rights of sons and grandsons in the estate of the grandfather. It is true that the exception does not extend to cognate or collateral relations but that is because they take an 'obstructed' inheritance, whereas the sons and grandsons take an 'unobstructed' inheritance. The difference is explained by Sir T. Muthuswami Ayyar in *Muthuvaduganatha Tevar* v. *Periasami*[3], where he says 'the distinction is material only to the extent that, in the one case the nearer male heir excludes the more remote, while in the other the doctrine of representation excludes this rule of preference. It is founded upon the theory that the spiritual benefit derivable from the three lineal male descendants is the same, though among collateral male heirs the quantum of such benefit varies in proportion to the remoteness of the male heir from the deceased male owner'."

The next decision which was referred to in this connection was one by the Bombay High Court in *Bhimacharya* v. *Ramacharya*[4]. The observations relied on occur at pages 459 and 460 of the report. The case related to, whether a husband of a woman was entitled to preference over a son by another wife. The learned Judges held that he was so entitled and Chandavarkar, J., dealing with the text of Mitra Misra which was relied upon before him on behalf of the step-son said :

> "But it does not follow from this that Mitra Misra intended the son of a co-wife to be heir to the woman's property in preference to her husband. It is true that he says in the placitum in question that in default of the *aurasa* (born) sons of the woman, their sons, and grandsons, 'the son of a rival wife, his son, and grandson (become heirs *in their order*) ; by reason of their being under the circumstances, the giver of the *pinda* and the liquidator of debts, and by reason of the text of Manu, cited above.' But he cannot have meant by that, to bring in the son of a rival wife before the husband. For, he goes on to say, that 'on failure of these', that is, the son of a rival wife, his son and grandson, 'the sister's son and the rest alone'. . . . . take the property".

Learned counsel for the appellant places strong reliance upon the words in brackets above—"become heirs in their order" in the citation from Mitra Misra to show that the son excluded the grandson and that the son and the grandson did not take together but one after the other. The last decision that was referred to by

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1. (1903) 13 M.L.J. 398 : I.L.R. 27 Mad. 300 (F.B.).
2. (1907) 17 M.L.J. 275 : I.L.R. 30 Mad. 348.
3. (1892) 2 M.L.J. 265 : I.L.R. 16 Mad. 11 at page 15.
4. (1909) I.L.R. 33 Bom. 452.

learned counsel was the one in *Bai Raman* v. *Jagjivandas Kashidas*[1]. Our attention was invited to the argument of Mr. Jayakar for respondent reported at page 620 which was accepted by the Court. Learned counsel said :

"The doctrine of survivorship, which is co-extensive with the simultaneous succession of sons, grandsons and great grandsons, is confined strictly to the male's property of an ancestral character. It has its basis in the doctrine of spiritual benefit and *shradha*. The three constitute an entity because each of them is equally capable of giving the same spiritual benefit to the ancestors whose manes are to be administe ed to. T. is consideration applies only to male ancestral property. It has no place with respect to stridhana property, for the right arises for the first time on the death of the woman. *See* Smriti Chandrika, Ch. IX, s. 3, pl. 4, 5 ;".

The learned Judges accepted this argument and stated their conelusions at page 624 thus :

"It is pointed out for the respondent that the doctrine of religious efficacy in the offering of shradha is what governs the inheritance in the case of the pr perty of the father ; that the offerings of a son, of a grandson, of a great grandson all have religious efficacy, and all in theory are combined for the benefit of the deceased ancestor, and that is why where inheritance rests upon the basis of religious efficacy, the sons, grandsons and great grandsons will take collectively irrespective of their propinquity to the deceased ancestor. In the case of the inheritance of a woman's property, it is pointed out that the doctrine of religious efficacy in the ministrations to the *manes* can have no place and it has been so laid down by the Allahabad High Court in *Musammat Ganga Jati* v. *Ghasita*,[2] ; moreover, Nilkantha himself in the passage following that relating to inheritance of non-technical stridhana quotes the well-known text of manu that 'of the nearest *sapinda* the wealth shall be' declaring propinquity to the deceased as the criterion of the right to take wealth."

We consider that the argument of learned counsel for the appellant before us that since religious efficacy is not the basis of succession to stridhana property the rule of representation which applies to succession to the property of a male cannot determine the heir to stridhana property is justified.

Though the text writers have not specifically dealt with the question, the inclination of their opinion appears to support the appellants. Thus in Mayne's Hindu Law (11th edition) paragraph 624 runs thus :

"In default of the above heirs (that is issue of the deceased) succession proceeds in two lines according as she was married in an approved or unapproved form. If she was married in an approved form, succession devolves up n her husband, and after him on the husband's heirs in the order in which they succeed to his property. Her husband's heirs would be her step-son, and his son and grandson, co-wife, step-daughter and her son, mother-in-law, father-in-law, husband's brother, husband's brother's son, sapindas, samanodakas and Bandhus."

It is pointed out by learned counsel for the appellants that the step-son and his son and grandson are mentioned as successive heirs and not as *simultaneous co-heirs*. To a similar effect is a passage in Mulla's Hindu Law (11th edition), paragraph 147 :

"Husband and his heirs : where the marriage is in an approved form, the stridhana goes, in default of issue, to the husband and his heirs, that is to say, it descends in the same way as it had belonged to the husband himself. The husband's sheirs are not enumerated in the Mitakshara. . . . . . the successive h is to a woman's stridhana, after the husband would be :

(1) husband's son by another wife ;
(2) his grandson by another wife ;
(3) his great grandson by another wife,"

* * * * * *

In other words, the doctrine of representation which renders the son, grandson and great grandson as single in the case of succession to the property of a male is not treated as applicable to determine the heirs in dealing wih stridhana succession. We are therefore clearly of the opinion that the rule of representation which is founded upon religious efficacy as also on the theory of unobstructed heritage and of survivorship prevailing between these co-heirs has no application to stridhana succession and that in the latter case it is propinquity and the rule that the nearer excludes the more remote that governs to determine the heir.

Only one point remains to be mentioned. The argument urged on behalf of the respondent is that as the succession after the husband is enjoined "as if the property belonged to the husband", the property should be treated as that of the husband himself and succession determined on such a fiction. We are clearly

1. (1917) I.L.R. 41 Bom. 618.
2. (1875) I.L.R. 1 All. 46 at page 50.

of the opinion that the application of this principle cannot serve to constitute stridhana property as coparcenary property of the grandson and great-grandson of the husband. One cannot lose sight of the fact that the propositus is really the woman and that is to her that succession is treated and the kinsmen of the husband inherit her property because they are also her kinsmen.

The result is that the plaintiff has no right to a share in the prsence of defendants 1 to 4 and 6 and his suit has therefore to be dismissed. The appeal is accordingly allowed and the plaintiff's suit is dismissed with costs throughout.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

M/s. Gandhi Sons, Ltd., having its registered Office at 232, Vadgadi Bombay-3 and branch office at G.T.O. Road, Kozhikkode .. *Petitioners**

v.

The State of Madras, represented by the Commercial Tax Officer, Malabar North, Kozhikkode .. *Respondent.*

Madras General Sales-tax Act (IX of 1939) *and Article* 286 (1) *of the Constitution of India—Section* 2 (*h*) *Explanation* (2)*—Sale—Locus of—How determined—' Export sale ' and ' sale in the course of export '—Meaning of—C.I.F. contracts—When exempt from levy of sales-tax.*

In order to find out whether a particular sale is exempt from the levy of sales-tax under the Madras General Sales-tax Act as a result of Article 286 (1) of the Constitution, the locus of the sale for the purpose of tax liability is to be determined as per Explanation (2) to section 2 (*h*) to the Act, except to the extent such sales are taken out of the purview of the tax liability by the Constitution.

An ' export sale ' which gets immunity from sales-tax under Article 286 (1) of the Constitution is one in which the assessee figures as exporter—privity having been established between him and the foreign buyer, either through direct negotiation or delivery or through the local representatives of the latter. In order to determine whether a particular sale is one ' in the course of export ' within the meaning of Article 286 (1) (*b*) of the Constitution the crucial question to be considered is whether the sellers continued to be the owners of the goods up to or beyond the time when the goods, so to speak, entered the export stream. In a C.I.F. contract where the goods are consigned in the name of the buyers two views are possible as to the inference to be drawn. One is that the seller reserves the *jus disponendi* in himself till the documents are presented to the buyer and the payment is made. (Section 25 (3) of the Sale of Goods Act). The other is that the property passes immediately and the sellers retain possession of the bills only for the purpose of claiming a lien on the goods to secure payment of the price, he having parted with the property in them. The first of the two alternatives will be the normal rule because the taking a bill of lading in the name of a buyer does not *ipso jure* negative a conditional appropriation or the reservation of a right of disposal.

(Case-law discussed).

The fact that the invoice showed that the goods were loaded on account and at the risk of the buyer refers to the situation after the shipping and may even negative the passing of the property at any earlier stage.

Petition under section 12-B (1) of the Madras General Sales-tax Act, 1939 and Rule 13-C (1) praying the High Court to revise the order of the Sales-tax Appellate Tribunal, Madras, dated 26th August, 1953 and made in T.A. No. 284 of 1953 preferred against the order of the Commercial Tax Officer, Malabar, North Kozhikode, dated 26th March, 1953 and made in Ref. D. 547 of 1953 (Bl. 5119 of 1950-51) on the file of the Dy. Commercial Tax Officer, Kozhikkode Town North.

M. K. Nambiar, C. F. Louis and *G. K. Govinda Bhatt* for Petitioners.

The Assistant Government Pleader (*K. Veeraswami*) for Respondent.

The Order of the Court was pronounced by

Rajagopala Ayyangar, J.—This is a Revision Petition filed by the assessees against the order of the Sales-tax Appellate Tribunal.

*Tax Revision Case No. 11 of 1954. 1st April, 1955.

The assessèes are dealers, among others, in pepper having their head-office at Bombay and a Branch at Kozhikkode. In respect of their turnover for the assessment year 1950-51 they submitted returns in form A-3 dislosing sales to the extent of Rs. 3,94,788-11-0 to the Deputy Commercial Tax Officer, Calicut, who was the assessing Officer. Out of this figure they claimed exemption in respect of a turnover of Rs. 4,054-1-9. They also producded their ledger, day-book, journals, etc., to the assessing officer who checked up their accounts and substantially accepted their return and assessed them on a net turnover of Rs. 3,93,486-13-6 by his order, dated 15th December, 1951. Subsequently the Commercial Tax Officer, Malabar North, called for and examined the record of the assessment order passed by the Deputy Commercial Tax Officer under section 12 (1) (i) of the Madras General Sales Tax Act and finding that certain sales effected by the assessees which had been disclosed in their accounts had been incorrectly treated as not liable to inclusion in their turnover, issued notice to the assessees on 28th February, 1953 why the assessment should not be rectified. After verifying the figures from the accounts which were called for he added a sum of Rs. 5,07,753-9-0 to the assessable turnover and a demand for tax on this basis followed.

The assessee took this order in appeal before the Sales-tax Tribunal where they raised two points for its consideration. The first was that the Commercial Tax Officer had no jurisdiction to revise the assessment in the manner in which he had done and the second that on the merits the turnover of the sales which were included in their assessment by the Commercial Tax Officer was exempt from inclusion under Article 286 (1) (*b*) of the Constitution as being sales " in the course of export ". The Appellate Tribunal rejected both the contentions and confirmed the order passed by the Commercial Tax Officer. Hence the Revision.

Mr. Nambiar, learned counsel for the Petitioners (assessees), raised the same two contentions before us as had been put forward before the Tribunal.

The first point relates to the jurisdiction of the Commercial Tax Officer under section 12 (1) of the Act which is in these terms :

" 12 (1). The Commercial Tax Officer may

(i) *suo motu* or

(ii) in cases in which an appeal does not lie to him under section 11, on application call for and examine the record of any order passed or proceeding recorded under the provisions of this Act by any Officer subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such order, or as to the regularity of such proceeding, and may pass such order with respect thereto as he thinks fit ".

The argument urged on behalf of the Petitioners is that on a proper construction of this provision, the Commercial Tax Officer could not convert himself into an assessing authority and reassess what is virtually an escaped turnover. Having regard to the facts of the present case, it is not necessary to define exhaustively the scope of the revisional power under section 12 (1) of the Act or to consider whether it could enable the Commercial Tax Officer to assess an escaped turnover. We are making this reservation particularly in view of the fact that this question is awaiting consideration at the hands of a Full Bench in certain appeals which are pending. In the present case the sales whose turnover was included in the Petitioners' turnover by the Commercial Tax Officer were all in the books of account produced by the assessees before the assessing Officer. The assessees, however, had contended, when the matter was before him, that these sales were entitled to the constitutional exemption under Article 286 (1) (*b*) of the Consitution and this had been accepted by him, without however, formally so recording it in the assessment order. It was the legality and propriety of this exemption that was considered by the Revising Authority under section 12 and it is not therefore a case of an escaped turnover at all but a case where the propriety of an exemption which had been granted by the assessing authority was considered by the Commercial Tax Officer. If the question were viewed in this light—and this is the only manner in which it could be approached—we do not understand Mr. Nambiar to contest the jurisdiction of the Commercial Tax Officer. We are, therefore, of the opinion

that in the present case the complaint that the Commercial Tax Officer really purported to exercise the powers of an assessing authority is not made out. We, therefore, have no hesitation in rejecting this objection to the assessment of the petitioners.

The second point relates to the merits of the petitioners' case in regard to the inclusion of this turnover of Rs. 5,07,753-9-0. Before adverting to the contentions raised it will be convenient to refer to the admitted facts in relation to the sales occasioning this turnover. The added turnover represents the sale-price of 616 bags of black garbled pepper sold by the assessees under three contracts.

The first contract which is numbered as 80 was with M/s. Mulji Rattanshi & Co., of Bombay and was for five tons. It was entered into by the Head Office of the assessees at Bombay on 4th December, 1950. The price was 1120 sh. per cwt. C. & F. London the shipment to be during January, 1951. The terms as regards payment were that it was to be in Indian currency with exchange at one shilling 6 1/16 d ; 95 per cent. cash against shipping documents and the balance 5 per cent. to be adjusted after weighment of the goods in London. There was a special note that the shipping documents wee to be in two lots each for 2 1/2 tons. This contract was signed in Bombay by the assessees as sellers and Mulji Rattanshi & Co., as buyers. This pepper was packed in 80 bags and marked as M. R. G., the initials of the buyers. The goods in relation to this contract were shipped in the vessel Clan Maclonnan of the Clan Line Steamers Ltd., from Cochin Port. Two bills of lading Nos. 42 and 43 were taken each for 2 1/2 tons, dated 25th January, 1951 (40 bags) in the name of M/s. Mulji Rattanshi and the goods were made deliverable to their order. The goods were loaded into the steamer on 25th January, 1951 and were made deliverable in London, freight to be paid at destination. The Bombay Office of the assessees having received these bills of lading prepared a *pro-forma* invoice and despatched on 1st February, 1951, the two documents to the buyers. In the invoice it was stated that the goods had been shipped from Cochin to London by the assessees "on account and risk of" the buyers. As the freight was payable at destination a deduction was made in the price for this item and the invoice made a claim for 95 per cent. of the agreed price which came to to Rs. 69,857-7-0. A cheque for the sum was issued by Mulji Rattanshi on 2nd February, 1951 and this was cleared by the assessees on the 3rd. The balance of 5 per cent. in respect of this contract was received by the assessees on 29th May 1951, after weighment, etc., in London.

The second contract of sale was with the Mills Export Import Co., also a firm carrying on business in Bombay. This was dated 29th December, 1950 and the formal document recorded the Mills Export Import Co., as having purchased from the assessees for the former's clients in U.S.S.R. 25 tons of "black garbled pepper new crop". The shipment of the goods was to be in the first half of February by vessel to be named by the buyers. The price was fixed at Rs. 640 per cwt. F.O.B. Cochin excluding export duty and less 2 per cent. To the bills of lading were to be attached certificates as to weight and quality issued by the Indian Chamber of Commerce. The payment for these goods was to be by a letter of credit to be opened in favour of the buyers and payable against documents in Bombay. The buyers were to hand over the credit to the sellers after receipt. This contract was signed by the assessee's office in Bombay as well as by the buyers. The 25 tons were packed in 400 bags and marked M.E.I.C.O. They were surveyed by the Travancore Chamber of Commerce. The representative of the buyers one Mr. Fuss was apparently present at the time of the survey and handed over to the assessees the freight to be paid to the shipping company. The goods were thereafter taken to Cochin Port and loaded on board the vessel M. S. Kieldrecht which sailed to Port Said for transhipment to Odessa which was the destination of the goods. The bill of lading, dated 23rd February, 1951, was taken in this case also in the name of the buyers as consignor and consignee and the goods were deliverable to their order. As soon as the assessees received the bills of lading from their representatives from Malabar, they prepared a *pro forma* invoice for the

400 bags shipped from Cochin to Odessa by their representative Gandhi Sons Ltd., on account and risk of M/s. Mills Export Import Co., Bombay and sent this along with the relevant bills of lading and certificates. The price was paid by the buyers on 7th March, 1951.

The third and the last contract was dated 25th January, 1951 and was also with a firm in Bombay, *viz.*, M/s. Virchand Panachand & Co., Ltd., Bombay. It covered a sale of 8 1/2 tons of pepper. The shipment was to be during February, 1951. The price was at sh. 1,200 per cwt. for 4 1/2 tons and sh. 1120. per cwt. for 4 1/2 tons, " cost and freight Tunis ". The payment was to be " cash against documents " in Indian currency and as usual it was signed by the buyers and sellers at Bombay. The goods were made up into two lots of 68 bags each and were marked V. P. S. being the initials of the buyers. They were loaded on board the vessel " President Harding " at Cochin and two bills of lading were taken on 9th February, 1951, in the name of the buyers and deliverable to their order at Tunis, *viz.*, Naples. The bills of lading together with a pro-forma invoice were tendered to the buyers on 14th February, 1951, at Bombay and payment was received by the sellers on 15th February, 1951.

It is the total of the sale price received under these three contracts amounting to Rs. 5,07,753-9-0 which, it is contended, is not liable to tax by reason of Article 286 (1) (*b*) Constitution which runs thus :

" 286 (1). No law of a State shall impose, or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place—

(*a*) outside the State ; or

(*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India."

The argument of the learned counsel for the petitioners was that these three sales were " in the course of export " either as export sales or sales which occasioned export as defined by the Supreme Court in the *first Travancore Case*[1] or within the class of sales held to fall within the Article by the *second Travancore Case*[2] inasmuch as the goods which were the subject of sale were actually exported outside the country ; and as (1) the property in the goods would, on the terms of the contracts, which provided for payment against shipping documents, pass to the buyers at the earliest point only on the presentation of the shipping documents by which time the goods were already on the high-seas on their way to their foreign destination ; or (2) in any event by reason of the contracts of sale being on C. & F. or F.O.B. terms the title to the goods would remain with the sellers at least till the goods were put on board the ships and therefore till such time as they entered the export stream ; or (3) because the transfer of property in the goods under the contracts took place by delivery of the bills of lading which covered their transport abroad.

On the other hand, it was urged by the learned Assistant Government Pleader for the State that the sales in question were internal sales by the assessees who are local merchants to buyers with their head office at Bombay and possibly with local representatives within this State ; that the export was effected only by the buyers and not by the sellers and after the purchase by the former was complete with the result that so far as the assessee's sales are concerned they have no export element in them and so were outside the constitutional exemption as interpreted by the Supreme Court in the second Travancore Case, *viz.*, *State of Travancore-Cochin* v. *S. V. C. Factory*[2]. In this context reliance was placed on the definition of " sale " introduced into the Madras General Sales-tax Act, in 1948 by Explanation (2) to section 2 (*h*) of the enactment which reads :

" *Explanation* (2) : Notwithstanding anything to the contrary in the Indian Sale of Goods Act 1930, the sale or purchase of any goods shall be deemed, for the purposes of this Act, to have taken place in this State wherever the contract of sale or purchase might have been made ;

(*a*) if the goods were actually in this State at the time when the contract of sale or purchase in respect thereof was made ".

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1. (1953) 1 M.L.J. 1 : (1952) S.C.J. 527 : (1952) S.C.R. 1112 (S.C.).

2. (1953) 2 M.L.J. 123 : (1953) S.C.J. 471 (S.C.).

The argument was that the liability to sales-tax in respect of a transaction which would fall within the Explanation to section 2 (*h*) of the General Sales-tax Act would be operative except in so far as it is overriden by the constitutional exemption in favour of " sales in the course of export ".

We are in agreement that the approach to the question should be as suggested by learned counsel for the State, namely that Explanation 2 [to section 2 (*h*)] would determine the locus of the sale for the purpose of liability to sales-tax except to the extent such sales are taken out of the purview of tax liability by the Constitution.

The first question that falls for consideration is whether the sales by the assessees are export sales or those which occasioned the export as explained by the Supreme Court in the first Travancore case, *viz.*, *State of Travancore Cochin* v. *Bombay Co., Ltd., Alleppey*[1], we are definitely of the opinion that they were not. The transaction dealt with by the Supreme Court related to sales of coir, lemon grass oil and tea and consisted of the export sales of those respective commodities to foreign buyers on either c.i.f. or f.o.b. terms. Their Lordships held that the sales occasioned the export in each case and fell within the scope of the exemption under Art. 286 (1) (*b*) having been put through by employing the machinery of export. The transaction was described as commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. The learned Chief Justice added :

" Such a sale cannot be dissociated from the export without which it cannot be effected and the sale and resultant export form part of a single transaction.—Assuming without deciding that the property in the goods passed to the foreign buyers and the sales were thus completed within the State before the goods commenced their journey as found by the Sales-tax Authorities, the sales must nevertheless be regarded as have taken place in the course of export and are exempt under Article 286 (1) (*b*) ".

What was characterised by the Supreme Court as an " export sale " was one in which the assessees figured as exporters, privity having been established between them and the foreign buyer, either through direct negotiation or dealing, or through the local representatives of the latter. That certainly does not obtain here. The assessees were in no sense the exporters of these goods. The position appears to be that the three merchants in Bombay who entered into their respective contracts with the assessees were themselves the purchasers whether their purchases were on their own behalf or on behalf of undisclosed foreign principals, between the latter of whom and the assessees there was no privity. Undoubtedly an export took place here. But in that transaction the assessees were not the sellers who exported or whose sales occasioned the export. A sale will occasion an export or there will be an export sale as understood by the Supreme Court only where the sale is to a foreign buyer with whom the local seller has privity and when as a direct result of such sale the goods are transported across the frontier.

We have next to consider whether the sale was otherwise "in the course of export" as understood in the *Second Travancore Case.*[2] The actual decision related to the question whether purchase of goods by a dealer who bought them with a view to exporting them or to implement contracts for export already entered into, was a sale or purchase 'in the course of export' within Article 286 (1) (*b*) and the Court by a majority answered it in the negative. The argument advanced by the counsel for the State here is that in the present case also, the export was by the Bombay buyers after their purchases were complete and that in consequence the sales by the assessees were not in the course of export. A close examination of the facts, however, clearly establishes that these three sales of the assessees are " sales in the course of export " falling within the constitutional exemption. The crucial question to be considered in this connection is whether the sellers continued to be the owners of the goods upto or beyond the time when the goods, so to speak, entered the export stream. In the majority judgment of the Court the position as regards transactions which fall within Article 286 (1) (*b*) was thus explained :

1. (1953) 1 M.L [illegible] 3 : (1953) S.C.J. 471
(1952) S.C.R. [illegible]

"What is exempted under the clause is the sale or the purchase of goods taking place in the course of the import of the goods into or export of the goods out of the territory of India. It is obvious that the words 'import into' and 'export out of' in this context do not mean the article or commodity imported or exported. The reference to the 'goods' and to 'the territory of India' make it clear that the words 'export out of' and 'import into' mean 'the exportation out of the country' and 'importation into the country' respectively. The word 'course' etymologically denotes movement from one point to another, and the expression 'in the course of' not only implies a period of time during which the movement is in progress but postulates also a connected relation. . . . . As clause (1) (*b*) is concerned only with exempting certain sales or purchases from taxation by the States in this country, it is sufficient to determine where the course of export begins or where the course of import ends. In this connection it is useful to remembrr that the power to make laws with respect to duties of customs including export duties and also with respect to import and export across customs frontiers and the definition of customs frontiers is vested exclusively in the Central Legislature and detailed provisions have been made in the India Sea Customs Act, 1878, for the levy of customs duties by the officers of the Central Government who are stationed along the customs frontiers as defined by the Central Government where, after appraising the goods exported or imported, the duties chargeable, if any, are computed and levied, and it is not until this process is completed, that the goods can be shipped for transportation or cleared by the consignee or his representatives as the case may be. It would seem, therefore, logical to hold that the course of the export out of or of the import into the territory of India does not commence or terminate until the goods cross the customs frontier."

In the light of the law as thus expounded, we have to consider whether the assessees have been able to establish that they remained the owners of the goods until after the goods had crossed the customs barrier for if the agreement of sale entered into by them took effect and became a completed sale, only thereafter as the goods started on the course of export at that stage the sale by them would be one "in the course of export" to which Article 286 (1) (*b*) would apply. The following features of these contracts have to be considered: contracts 1 and 2 which were for delivery in London and Tunis respectively were on c. & f. terms while contract No. 3 namely wherein the goods were shipped to Odessa the price was on f.o.b. terms. We shall consider these two sets of contracts separately. There are two stipulations in the c. & f. contracts to be noticed. Beyond the stipulation about the prices, there was also a condition regarding shipment and payment against documents. The learned Assistant Government Pleader relied on two other matters in these transactions (1) that freight was deducted from the invoice though the price was fixed as inclusive of the freight and (2) the note in the invoices that the goods were to be on account and risk of the buyers. We shall advert to these in their proper places.

There cannot now be much controversy as regards the incidents of a c.i.f. or c. & f. contract. Referring to them Lord Wright said in *Smithy & Co.* v. *Bailey & Co.*[1], (House of Lords):

"The initials indicate that the price is to include cost, insurance and freight. It is a type of contract which is more widely and more frequently in use than any other contract used for purposes of sea-borne commerce. An enormous number of transactions, in value amounting to untold sums, are carried out every year under c.i.f. contracts. The essential characteristics of this contract have often been described. The seller has to ship or acquire after that shipment the contract goods, as to which, if unascertained, he is generally required to give a notice of appropriation. On or after shipment he has to obtain proper bills of lading and proper policies of insurance. He fulfils his contract by transferring the bills of lading and the policies to the buyer. As a general rules, he does so only against payment of the price, less the freight which the buyer has to pay. In the invoice which accompanies the tender of the documents on the 'prompt'—that is the date fixed for payment—the freight is deducted, for this reason. In this course of business, the general property in the goods remains in the seller until he transfers the bills of lading".

Incidentally it may be mentioned that this extract answers one of the points raised by the learned Assistant Government Pleader regarding the deduction of frieght in the invoice prepared by the assessees. If the contract entered into by the assessee is a c. & f. contract—and this is not disputed by the State in the absence of any express stipulation, the property in the goods would remain with the seller until the bills of lading are tendered to the buyer.

It is, however, contended on behalf of the State that the property in the goods passed to the buyers before the goods crossed the customs office at the Cochin port. There is no dispute that at the time of the agreement of sale the contracted goods

were unascertained and therefore under section 18 of the Sale of Goods Act the property in the goods would not be transferred to the buyers unless and until the goods were ascertained. It is urged that there was an ascertainment and an appropriation of the goods to the contract immediately the sellers packed the goods in gunny-bags and marked them with the initials of the buyer for being consigned under the contract. For this purpose reliance is placed on section 23 (1) of the Sale of Goods Act which is in these terms :

"23 (1) : Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied and may be given either before or after the appropriation is made."

There can of course be no dispute that in the present case whatever appropriation there was by reason of packing the goods in the gunny-bags and marking them with the buyers' initials must be taken to have been by the sellers with the assent of the buyers for, as packing and marking were to be done by the sellers, the assent of the buyers might be implied and therefore this condition would be satisfied. But the question is : Was this appropriation unconditional? In this context section 23 has to be read with the provisions enacted in section 25 of the Act which runs thus :

"25 (1) : Where there is a contract for sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange and if he wrongfully retains the bill of lading, the property in the goods does not pass to him".

Did the sellers in the present case by the terms of the contract or appropriation reserve the right of the disposal in the goods until certain conditions were fulfilled? In dealing with this a point made on behalf of the State might be noticed, *viz.*, that the bills of lading were taken in the name of the buyers making the goods deliverable to their order, This feature would undoubtedly render sub-section (2) of section 25 unavailable to the assessee but there is abundant authority for the view that the taking of a bill of lading in the name of a buyer does not *ipso jure* negative a conditional appropriation or the reservation of a right of disposal.. If authority is needed reference may be made to the decision in *Moakes* v. *Nicolson*[1] and *The Kronprinsessan Margareta, The Parana*[2]. In the latter case the bills of lading were taken in the consignee's name and these were sent with an invoice and a sight draft for its amount through collecting agents of the consignors to be presented to the bank. The question was whether the property in the goods passed to the neutral sellers on shipment, or whether this occurred only on payment of the draft Lord Sumner, delivering the opinion of the Privy Council, said :

"In these circumstances what can be inferred as to the passing of the general property? What is there to show an intention to pass that property for anything less than payment, and what motive is there for such an intention? The appellants, Messrs. Lundgren and Rollven, have to show that it passed to them and passed, too, before the beginning of the voyage. If it did, then the consignors no longer owned the goods and had nothing to show against them except a draft of their own, which could not be enforced and a bill of lading, which would not entitle them to delivery of the goods, though its retention might seriously inconvenience the new owners, the consignees. Rights to stop *in transitu* or to exercise an unpaid vendors' lien need hardly be discussed, for, on a question of intention in facts as to which there is a good deal of evidence, it would be artificial to assume that the consignors' minds were actually determined to the contrary by consideration of legal remedies, of which it is not shown that they had any knowledge, let the legal presumption be what it will . . . . . "
" . . . . . Cases, in which it has been held that taking the bill of lading in the shipper's own

1. 19 C.B. (N.S.) 290.
2. (1921) 1 Appeal Cases 486 at 514.

name negatives any unconditional appropriation to the buyer by the delivery of the goods on shipboard and indicates one conditional on the documents being taken up, can throw only an indirect light on the question here involved. Certainly no case was found, in which it was held that taking th bill of lading in the buyer's name, while withholding delivery of it until presentation and taking up of the documents, would not be, as an appropriation, equally conditional."

These considerations, apart this argument even if accepted would not very much help the Government case. At best it would support a contention that the property in the goods passed when the goods were loaded on board the vessel and the bill of lading was taken. But by that time the goods, if they were liable to export duty would have paid those duties and been cleared out of the customs and entered the export stream and therefore would be " in the course of export ". We are unable to uphold the contention of the learned Assistant Government Pleader that on the terms of this c. & f. contract there was an unconditional appropriation of the goods to the contract sufficient to pass property in them to the buyers on the goods being packed and marked with the buyers' initials in the warehouse of the sellers at Kozhikode. Dealing with a notice of appropriation which had been given by a seller to a buyer under a c.i.f. contract and its effect on passing property, Lord Wright stated in *Smyth and Company* v. *Bailey and Company*[1], already referred to at page 65 :

" I have already quoted the opinion of the Court of Appeal that the result of the appropriation was that the property in the 15,444 quarters passed to the buyers under the Sale of Goods Act, 1893. . . . . The notice of appropriation under an ordinary c.i.f. contract is not intended to pass, and does not pass, the property. Where, as here, the sale is of unascertained goods by description, there are, at that stage, no goods to which the contract can attach. The seller is free to appropriate to the contract any goods which answer the contract description. This he does by the notice of appropriation which specifies and defines the goods to which the contract attaches. These thereupon he is bound to deliver and the buyer is bound to accept, subject to the terms of the contract. That, however, does not involve the passing of the property. The property cannot pass under a contract of sale until the goods are ascertained. . . . but once they are ascertained, the property passes at the time when the parties intend it shall. As the parties seldom express any such intention, or perhaps even think of it, the intention will generally be a matter of inference from the terms of the contract, the conduct of the parties, and the circumstances of the case.

"Then section 18 (corresponding to sections 20 to 24 of the Indian Sale of Goods Act) gives some general rules, which are to apply unless a different intention appears. Of these rules, the Court of Appeal rely on rule 5 (1) (corresponding to section 23 of the Indian Sale of Goods Act).

". . . . The assent is generally inferred from the terms of the contract or the practice of the trade. Sub-rule (2) deals with the delivery of the goods to the carrier for transmission to the buyer without reserving the right of disposal and provides that in such a case there is deemed to be an unconditional appropriation. This latter sub-rule, which only deals with delivery to the carrier and not with actual notice of appropriation, is disregarded by the Court of Appeal. In such event, the carrier receives and holds the goods for the buyer, so that in law they are delivered to the buyer. . . . However, the Court, I venture to think should not have disregarded the word ' unconditionally ' in sub-rule (1). I do not construe sub-rule (1) as limited to a case where there is an express term that the notice of appropriation is unconditional, or, on the other hand, to a case where the notice of appropriation is in terms conditional . . . . . In this case the facts known to both parties would import that the appropriation was conditional. The bills of lading were held by the appellants. The contract provided for cash or (at sellers' option) an acceptance of sellers' draft against documents. That condition for the transfer of the documents had not been fulfilled. The bills of lading were symbols of the goods, and the appellants, by retaining them, retained as against the respondents' title and control over the goods. All the respondents had at that stage was a contractual right to obtain control, and thereby become owners upon taking up the documents. It is impossible, in my opinion, to hold that the notice of appropriation was, even part from the express reservation unconditional."

In the present case there was no notice of appropriation as such but only an appropriation in fact. Even if this appropriation was with the assent of the buyer, it was certainly not unconditional because the seller had further duties in connection with the goods which included loading them on board the ship and obtaining proper bills of lading for conveyance of the goods to the contracted destination and the seller in his turn was entitled to payment in exchange for these shipping documents. In these circumstances, we are unable to hold that on the terms of this contract the property in the goods passed to the buyer when the goods were packed and marked in the godowns of the seller.

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1. (1948) 3 All E. R. 60 (H.L.).

When did the property pass thereafter? These goods were after being packed and marked transferred by rail from Calicut where they were at the time of the agreement of sale to Cochin. If at that stage, the railway receipts had been taken in the name or to the order of the buyers, the property in the goods might have passed to the buyer under the terms of section 23 (2) of the Sale of Goods Act. But this could not obviously happen for two reasons. Firstly, it was part of the duty of the sellers to transport the goods upto the steamers waiting to receive them at the Cochin harbour. This part of their duty they could not discharge if the railway receipts were taken in the name of the buyers. Secondly, there was a term in the contracts under which they were entitled to be paid the price before the documents were handed over. In these circumstances, the delivery to the carrier during the course of the transport from Calicut to Cochin was not a delivery to an agent of the buyers but the goods were conveyed as the goods of the sellers who still remained their owners.

When the goods arrived at the Railway Station at Cochin and were taken delivery of by the sellers through their representatives and cleared through the customs, the goods still remained their property. They were then placed on board the ships and bills of lading were taken in the name of the buyers as consignor. This would be the earliest point of time when any contention could be raised that the property in the goods passed to the buyers. The bills of lading though taken in the name of the buyers were retained by the sellers and were deliverable only against payment. Two views are possible as to the inference to be drawn from the goods being consigned in the name of the buyers. One is that the seller reserves the *jus disponendi* in himself till the documents are presented to the buyer and the payment is made. That is the case which is provided by section 25 (3) of the Sale of Goods Act. The other is that the property passes immediately and the seller retains possession of the bills only for the purpose of claiming a lien on the goods to secure payment of the price, he having parted with the property in them. That the first of the above alternatives is the normal rule would appear to be favoured by the judgment of the Supreme Court in the *Commissioner of Income-tax, Madras* v. *Mysore Chromite, Ltd.*[1] *Vide* also the passage from the judgment of Lord Sumner in the *Parana* already extracted.

The learned Assistant Government Pleader invited our attention to the decision of a single Judge of the Calcutta High Court in *Juggernath Augurwallah* v. *E. A. Smith*[2], as deciding that in cases of this sort the property in the goods passes immediately after appropriation. That case was concerned with the title of the pledgee of goods from a buyer who had purchased unascertained goods for shipment abroad. Clause 13 of the agreement of sale provided for payment in these terms :

"Cash on delivery of mate's dock receipts or as provided for in clauses 8, 9 and 11. Should the said receipts or warrants be retained by the buyers for examination, they shall remain the property of the sellers and be held by the buyers in trust for and at the absolute disposal of the sellers, until payment has been made in cash in terms of this contract, and if payment be made by cheque, until such cheque has been cashed."

The jute which was the subject-matter of the contract was packed in bales and having been marked with the buyers marks were to be placed alongside the steamer and mate's receipts obtained. These were handed over to the buyers who applied to the Master of the vessel and obtained the relative bills of lading which they negotiated with a bank and appropriated the money to themselves. The question was whether the bank was entitled to the goods as against the sellers who had not been paid the price. The whole question in that case turned upon whether by clause 13 of the agreement the sellers intended to retain merely a special property in the goods in order to secure the price or had retained the right of disposal with the result that no property in the goods passed till they were paid. Sale, J., held that only a special property was retained the property in the goods having passed to the buyer by reason of an unconditional appropriation of the goods to the contract with the assent of the buyer. The appropriation is referred to by the learned Judge in these terms at page 554 :

1. 1955 S.C.J. 185.
2. (1906) I.L.R. 33 Cal. 547.

"In the present case it is shown that 1000 bales of jute bearing the contract mark were appropriated to the contract by the plaintiffs, that they were sent alongside the Uganda and shipped in due course at the request of the defendant firm and that the mate's receipts granted in respect of the goods show that the goods so shipped were marked with the private mark of the defendant firm in red ink as required by their shipping instructions. These facts in my opinion afford abundant *prima facie* evidence that the goods in question were appropriated to the contract by the plaintiffs, and that such appropriation was assented to by the defendant firm."

There was an appeal against this judgment which came up before a Special Bench whose judgment was reported in *Juggernath Augurwallah* v. *E. A. Smith*[1]. The passage from the judgment of Sale, J. which we have extracted above was quoted with approval by Maclean, C.J. and was made the basis of the affirmance. This decision therefore cannot help the Government in their contention that the property in the goods passed to the buyer before they reached the customs frontier at Cochin. Further in passing we might mention that under section 21 of the Sale of Goods Act if the seller has something to do for the goods for the purpose of putting them into a deliverable state the property in them does not pass until this is done. Under the contracts in the present case, as it was the duty of the sellers to load them on board the ships and take proper bills of lading covering their transport to the named destinations, until this duty was accomplished, the title in them would not pass unless there was any indication elsewhere in the contract pointing to a different intention.

The second contract for the delivery of the goods at Odessa and which is on f.o.b. terms stands on a very similar footing and even in that case the property in the goods would pass at the earliest only when the goods are put on board. We might mention that the Supreme Court in *Commissioner of Income-tax* v. *Mysore Chromite Ltd.*[2], already referred to dealt with cases of f.o.b. contracts also and their decision holding that the property in the goods passed only in London when the documents were tendered and payment made against them would appear to be decisive against the Government's contention of the property passing at any stage earlier than the loading of the goods.

Only one point remains to be dealt with and that is the reference in the invoice that the goods have been shipped "on account and at the risk of the buyers". It will be seen that this refers to the situation after the shipping and therefore to the extent to which it states that the risk attaches after shipment it contradicts the Government's case of the passing of the property at any earlier stage.

We therefore hold that the property in the goods did not pass to the buyer until the relevant bills of lading were presented to the buyers or in any event at least not until the goods were put on board the vessels at Cochin harbour. In this view as admittedly the goods were booked and had started on their journey to a foreign destination at the moment when the title in the goods passed to the buyer, there was "a sale in the course of export" entitling the assessees to the Constitutional exemption under Art. 286 (1) (*b*) of the Constitution.

It is unecesary to consider the further contention raised on behalf of the petitioners that as in the present case the transfer of property was effected only by the delivery of the bills of lading when the goods represented by them were already on the high-seas, the transaction was clearly a sale in the course of export specifically referred to by the Supreme Court in the second Travancore case.

In the result, the petitioners' contention that the turnover totalling Rs. 5,07,753-9-0 being the sale price involved in the three contracts dealt with above was entitled to the constitutional exemption under Article 286 (1) (*b*) of the Constitution was well founded and the inclusion of this in their turnover was erroneous. The order of the Sales Tax Appellate Tribunal including this turnover in the assessment of the assessees is set aside. The petition is accordingly allowed with costs. Counsel's fee Rs. 100.

R.M. ——— *Petition allowed.*

1. (1906) I.L.R. 34 Cal. 173. 2. 1955 S.C.J. 185.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

The Public Prosecutor .. *Appellant**

v.

V. R. Alangaram Chettiar .. *Respondent.*

Madras District Municipalities Act (V of 1920), sections 244 and 249—Coffee-hotel on Railway premises with the permission of the Railway authorities—Necessity to obtain a licence under the Municipalities Act.

Under section 249 of the District Municipalities Act for the purpose of running a coffee-hotel in any place within the limits of a Municipality the licence of the executive authority of that Municipality is undoubtedly necessary. According to section 244 of the Act the licence prescribed under section 249 of the Act is not necessary if the Central or State Government or any committee appointed under the Marketing of Commercial Crops Act does anything in a place in their occupation or under their control, for which a licence is otherwise required as per the schedule of the Act. But if a private person does coffee-hotel business in the place under the occupation or control of the Central or State Government he has to take out a licence and pay the prescribed fee as required by the Act and section 244 of the Act does not confer any exemption in such cases. Sections 244 and 249 of the Act have to be read and interpreted only in this way.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (Accused) by the Bench of First Class Magistrate of Pollachi in B.G. No. 51 of 1954 on its file.

Public Prosecutor (*V. T. Rangaswami Ayyangar*) for Appellant.

S. Krishnamurthi for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal preferred by the State against the acquittal of the respondent by the First Class Bench Magistrate, Pollachi. The facts of the case are not in dispute. The respondent with the permission of Railway authorities is running a coffee-hotel within the Pollachi railway station premises. The question is whether the municipality is entitled to ask him to take out a licence under section 249 of the District Municipalities Act which runs as follows :

> "The council may publish a notification in the district gazette and by beat of drums that no place within the Municipal limits of. . . .shall be used for any one or more of the purposes specified in schedule V without licence of the executive authority and except in accordance with the conditions specified therein."

Schedule V (*j*) mentions about the keeping of a hotel, restaurant, eating-house, coffee-house, boarding-house or lodging-house (other than a students' hostel under public or recognised control). Therefore under section 249 of the District Municipalities Act for the purpose of running a coffee-hotel in any place within the municipal limits the licence of the executive authority is undoubtedly necessary. But section 244 of the same Act says :

> "Nothing in this Act or in any rule, by-law or regulation made thereunder shall be construed as requiring the taking out of any licence or the obtaining of any permission under this Act or any such rule or by-law or regulation in respect of any place in the occupation or under the control of the Central or State Government or of a market committee established under the Madras Commercial Crops Committee Markets Act, 1933, or in respect of any Government property or of any property belonging to such market committee."

On the ground that the respondent is running a coffee-hotel in a place which is under the occupation and control of the Central Government, the railways being a concern of the Central Government, the respondent has been acquitted as a person running a coffee-hotel in such places is not required to take out a licence from the executive authority.

In C.R.P. No. 1566 of 1949, Basheer Ahmed Sayeed, J., has held that the municipality is entitled to collect licence fee for storing jute in a place in the vicinity of a minor port situated within the Municipal limits of Bimilipatam. I agree with the reasoning of my learned brother in the above judgment. The principle is that if

* Cr. Appeal No. 780 of 1954. [redacted]955.

the Central Government or the State Government or any committee appointed under the Marketing of Commercial Crops Act does anything in a place in their occupation or under their control, for which a licence is required as per Schedule V of the District Municipalities Act, they are supposed to do it in the interests of the public in which case the licence prescribed under the provisions of section 249 of the Act is not necessary according to section 244. But if a private person in the same place or premises under the occupation or control of those bodies does a similar thing he would be required to take out a licence under section 249 and pay the prescribed licence fees. Sections 244 and 249 of the District Municipalities Act have to be read and interpreted only in this way. The acquittal of the respondent by the lower Court is not justified. The order of acquittal is hereby set aside and the respondent is convicted under section 249 read with section 313 of the District Municipalities Act and sentenced to pay a fine of Rs. 5 (five) in default to suffer simple imprisonment for three days. In addition, the respondent is also directed to pay the licence fee of Rs. 45 which will be collected by the Court and paid over to the Municipality.

R.M. —————— *Acquittal set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Messrs. Kalam Somasundaram Chettiar and Sons, Salem .. *Petitioner**

v.

The State of Madras represented by the Commercial Tax Officer, Salem .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), section 12-A—Powers of Appellate Tribunal under—Order of Appellate Tribunal resulting in enhanced tax—If invalid "and pass such orders thereon"—Scope of—Order of the Appellate Tribunal resulting in favour of the department who have no right of appeal—Validity.

An Appellate Tribunal under the Madras General Sales Tax Act has no doubt no authority to add a new item to the turnover and include therein what was not before the assessing authority as that would be a matter not assessed but omitted from assessment. As the Appellate Tribunal is not the assessing authority and has merely to determine facts giving rise to the tax liability and the law in relation thereto it is obviously empowered to allow an appeal and remand it for the assessment being computed in accordance with the facts as found and the law as laid down by it and thus re-assessment has to be done by the assessing authorities; where the basis of an assessment is challenged by an assessee and this is accepted by the Tribunal and the matter is remitted to the assessing authorities, there has to be a re-assessment in conformity with their order: This might result in either an increase or decrease of the tax liability. Merely because the Tribunal's order if given effect to would result in an enhancement of the assessment the order cannot be challenged as invaild.

The expressession 'thereon' in section 12-A (4) of the Madras General Sales Tax Act has no fixed or rigid meaning. It takes colour from the context and the terms of the proviso to section 12-A (5) afford some light as to the intention of the legislature. The proviso contemplates cases where an order by the Appellate Tribunal might conceivably result in the assessment being enhanced.

Moreover under the provisions of the Madras General Sales Tax Act from any order of assessment passed by the Deputy Commercial Tax Act Officer, appeals to the C.T.O., as well as to the Appellate Tribunal therefrom are open only to the assessee and not to the department and the powers of the Appellate Tribunal to modify the basis of an assessment cannot be circumscribed by the consideration of the department having accepted the order of the lower authority in so far as it decided any point against it.

Difference in language between section 33 (4) of the Income-tax Act and the present section pointed out—Decisions under the Income-tax Act held not applicable.

Petition under section 12-B (1) of the Madras Sales Tax Act (IX of 1939), to revise the order of the Sales-tax Appellate Tribunal, Madras, dated 3rd February, 1954, and passed in Tribunal Appeal No. 774 of 1953.

S. Swaminathan for Petitioner.

Assistant Government Pleader (*K. Veeraswami*) for Respondent.

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* [illegible] 31st March, 1955.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This is a revision by the assessees against the order of the Sales-tax Appellate Tribunal in his assessment proceedings for the year 1951-1952.

The assessees carried on business at Salem in the manufacture and sale of groundnut-oil and cakes and are registered as such under the provisions of the Madras General Sales Tax Act. During the year 1951-1952 the assessees purchased groundnut of the value of Rs. 22,95,670 and converted it into oil and oil-cakes and effected a sale of these products. The gross turnover of the oil and oil cakes during the year was Rs. 43,59,133-3-1. The scheme of taxation in respect of the groundnuts and groundnut-oil under the Madras General Sales-tax Act is this: Under rule 4 (2) of the Madras General Sales Tax (Turnover and Assessment) Rules in the case of groundnuts, the gross turnover of a dealer for the purpose of these rules is the amount for which the goods are sold by the dealer. In cases, however, where a dealer purchases groundnuts and manufactures groundnut oil and cakes from the groundnut or kernel purchased by him and who is registered as a manufacturer of groundnut oil under rule 18 of the Turnover and Assessment Rules, that manufacturer :

"is entitled to a deduction equal to the value of the groundnut or kernel purchased and converted by him into oil and cakes provided the amount for which the oil is sold is included in his turnover."

So, generally speaking when a dealer as a manufacturer includes the sale value of the oil in his turnover, he is entitled to deduct therefrom the purchase price of kernel or the groundnut, which has been utilised for the manufacture of the oil under rule 18 (2).

Before the Deputy Commercial Tax Officer the assessee claimed exemption from tax in respect of their sales turnover to the extent of Rs. 42,44,102-15-1. This was made up of two items, *viz.*, (1) a claim to a decuction under rule 18 (2) mentioned above, that is, the purchase price of the groundnut or kernel obtained by them which amounted to Rs. 22,36,371-13-1 and (2) a sum of Rs. 20,07,731-2-0 in respect of which the claim was based on the sales to that extent being outside the State and so entitled to exemption under Article 286 (1) (*a*) of the Constitution. The Deputy Commercial Tax Officer by his assessment order, dated 27th March, 1953 allowed some small deductions in the computation of the sale turnover and also allowed to the assessees a deduction of Rs. 22,95,670 under rule 18 (2). In regard to the other claim for excluding from the turnover the amount of sales effected outside the State, he allowed a deduction in respect of Rs. 1,00,685-4-6 being the value of the goods sold through commission agents at Bombay but disallowed the claim to exclude the rest of the turnover totalling Rs. 19,07,045-10-6. On these calculations he determined the net turnover for the purpose of the sales-tax at Rs. 19,61,372-3-7 and assessed them accordingly.

The assessees took up the matter in appeal to the Commercial Tax Officer, Salem, and there raised the contention that they were entitled to a deduction of purchase turnover under rule 18 (2) and that when oil extracted from the groundnut purchased was exported outside the State, they were also entitled to have the sale price of such exported goods excluded from the assessment under the Sales Tax Act by virtue of the exemption granted by Article 286 (1) (*a*) of the Constitution. This appellate authority substantially dismissed the appeal and refused to grant to the assessees the benefit of the exemption conferred by Article 286 (1) (*a*) on the ground that they had already obtained relief under rule 18 and that to grant them reliefs both under rule 18 (2) as well as under Article 286 (1) (*a*) would in effect be tantamount to a grant from the Government and not merely afford relief from the payment of tax. The result of the decision was therefore that the assessees were held entitled to the deduction under rule 18 but they could not at the same time claim to have the sale price of the commodities manufactured out of the goods so purchased excluded from their turnover because the sales took place outside the State.

From this decision of the Commercial Tax Officer as the appellate authority, the assessees took the matter in further appeal to the Sales Tax Appellate Tribunal. The contention raised by them there was while the lower authorities rightly granted them the deduction under rule 18 (2) of the Turnover and Assessment Rules, they had erred in holding that the grant of such deduction was inconsistent with the claim to exemption under Article 286 (1) (*a*) on the turnover of the ales effected by them. The view however which the Appellate Tribunal took on this matter was (1) that on a proper construction of the rules framed under the Sales Tax Act in respect of the sale turnover of manufacture of oil, a dealer would not be entitled to exemption both under rule 18 (2) and under Article 286 (1) affirming the view of the Commercial Tax Officer and (2) that the claim of the assessees to an exemption under Article 286 (1) (*a*) was paramount and the lower authorities had erred in not excluding from the turnover of the assessees their 'outside sales'. As a result, the basis of the assessment had to be altered inasmuch as the assessees were held entitled to the exclusion from their turnover of the price realised by sales effected outside the State but that in respect of such turnover the purchase price of the relative groundnut or kernel could not be deducted under rule 18 (2). Learned counsel for the assessees also raised before the Tribunal the contention that if they found that the assessees were entitled to exemption under Article 286 (1) (*a*) the jurisdiction of the Tribunal was confined to their allowing the appeal, notwithstanding that the assessees might not be entitled to both the deduction as well as the exemption and that inasmuch as both the lower authorities had granted to the assessees relief by way of deduction under rule 18 (2) such a deduction could not be disturbed by the Tribunal. This argument was however rejected and the Tribunal held that the entire assessment was before them by reason of appeal which had been brought up by the assessees and that it was open to them to lay down the correct basis of the assessment and directed the assessing authority to effect the assessment in accordance with these principles. It is against this order of the Tribunal which remanded the assessment proceedings to the Commercial Tax Officer on the basis mentioned earlier that this revision has been filed. There is no challenge about the correctness of their view as regards the relative scope of the deduction and exemption open to an assessee under rule 18 (2) and Article 286 (1) (*a*), as the same is in accordance with the view expressed by this Court in a decision in *Sri Chandramowleeswara Oil Company, Kurnool, In re*[1] where the following proposition was laid down :

"If the assessees were exempted from paying tax on the sale turnover of the oil as the sale was outside the State, they cannot claim the benefit of the deduction under rule 18 (2) of the Turnover and Assessment Rules."

But it is however the jurisdiction of the Tribunal to pass an order of remand which it did that is called in question by learned counsel for the petitioners in this revision. We might mention that in accordance with the order of the Tribunal the Commercial Tax Officer has re-assessed the assessees by allowing them the constitutional exemption under Article 286 (1) (*a*) by excluding from their turnover, sales effected outside the State but not allowing the deduction to the assessees under rule 18 (2) of the Turnover and Assessment Rules. The result of the re-assessment on this footing has been that the net assessable turnover has been increased from Rs. 18,63, 222-8-7 which was the figure originally arrived at by the Commercial Tax Officer, to Rs. 23,34,550-9-1. We are not concerned now with the correctness of the latter figure but only with the jurisdiction of the Appellate Tribunal to pass the order of remand in the form adopted by them.

The entire question turns upon the powers of the Sales Tax Appellate Tribunal under section 12-A of the General Sales Tax Act. The relevant portions of this section run in these terms :—

"12-A. (1) : Any assessee objecting to an order relating to assessment passed

(*i*) by the Commercial Tax Officer whether on appeal under section 11 or *suo motu* under section 12, sub-section (1) or

(*ii*) by the Deputy Commissioner *suo motu* under section 12, sub-section (2),

may, if the assessee has not preferred an application for revision of the order under section 12, sub-

1. (1954) 2 M.L.J. 187.

section (2), or under sub-section (3) of that section as the case may be, appeal to the Appellate Tribunal within sixty days from the date on which the order was communicated to the assessee........

(4) The Appellate Tribunal shall, after giving both parties to the appeal a reasonable opportunity of being heard pass such order thereon as it thinks fit.

(5) Notwithstanding that an appeal has been preferred under sub-section (1), tax shall be paid in accordance with the assessment made in the case:

Provided that the Appellate Tribunal may, in its discretion, permit the appellant to pay the tax in such number of instalments, or give such other direction in regard to the payment of the tax, as it thinks fit:

Provided further that if as a result of the appeal any change becomes necessary in such assessment, the Appellate Tribunal may authorise the assessing authority to amend the assessment, and on such amendment being made, the amount over-paid by the assessee shall be refunded to him without interest, or the further amount of tax due from him shall be collected in accordance with the provisions of this Act, as the case may be."

The argument advanced by Mr. Swaminatha Ayyar, learned counsel, on behalf of the petitioners was based upon the language of sub-section (4) which authorises the Appellate Tribunal " to pass such order *thereon* as it thinks fit." The expression " thereon ", it is contended, limits the jurisdiction of the Tribunal not merely to the assessment which is complained of but to the grounds upon which the order of the lower authorities is attacked by the particular appellant. It is stated that it is not the entire assessment that is before the Appellate Tribunal at the stage of the hearing of the appeal but only those portions of the assessment order which an appellant attacks.

Learned counsel based this argument mainly on certain decisions on the scope of section 33(4) of the Indian Income-tax Act where words similar to those in section 12-A (4) of the General Sales Tax Act occur. But before referring to those decisions it is necessary to point out that under the Madras General Sales Tax Act it is the assessee and the assessee alone that has the right of appeal to the Tribunal and that the State has no right of filing an appeal or cross-objections against any order of the assessing authorities ; as also that the Income-tax Act does not contain any provision such as to be found in the second proviso, to sub-section (5) which we have extracted above. We shall be dealing with the effect of these distinctions at a later stage.

The first decision to which our attention was invited was that of the Bombay High Court in *Motor Union Insurance Co., Ltd.* v. *Commissioner of Income-tax, Bombay*[1]. Section 33 (4) of the Indian Income-tax Act contains language almost identical with that which is used in section 12-A (4) of the General Sales-tax Act and runs thus :—

" The Appellate Tribunal may after giving both parties to the appeal an opportunity of being heard pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner."

The facts of the case were as follows : The assessee, a non-resident company, incorporated in the United Kingdom carried on insurance business in British India in lines other than life insurance. The Income-tax Officer who was the assessing authority proceeded under rule 6 of the schedule and included in its assessment an amount of Rs. 7,615 as interest received by the Company. The Appellate Assistant Commissioner on appeal confirmed the assessment and the assessee appealed to the Tribunal. The Tribunal held that the Income-tax Officer was wrong in applying rule 6 of the schedule but should have applied rule 8 with the result that the income earned in the shape of interest was increased to Rs. 49,549. The question was whether the Appellate Tribunal was entitled to so enhance the assessment. Dealing with the scheme of the appeals under the Indian Income-tax Act, Kania, J., as he then was, stated :

"After the Income-tax Officer has made an order, if the assessee feels aggrieved, he can appeal to the Appellate Assistant Commissioner. The powers of the Appellate Assistant Commissioner

1. (1945) 13 I.T.R. 272.

in such a case are defined in section 31. Sub-section (3), clause (*a*) in terms provides that in disposing of an appeal the Appellate Assistant Commissioner may confirm reduce, enhance or annul the assessment. He has also power under clause (*b*) to set aside the assessment and direct Income-tax Officer to make a fresh assessment, after making such inquiry as the Income-tax Officer thinks fit, or the Appellate Assistant Commissioner may direct.

........It is significant that there is no provision for appeal to the Appellate Assistant Commissioner by the department against the assessment made by the Income-tax Officer. Under section 33 a right of appeal to the Appellate Tribunal is given, on the order made by the Appellate Assistant Commissioner. That right is given both to the assessee and to the Commissioner. Under sub-section (3) the appeal has to be filed in the prescribed form and verified in the prescribed manner. Under sub-section (4) the Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate the orders to the assessee and to the Commissioner.............

'On behalf of the Commissioner it is urged that section 33 (4) does not circumscribe the powers of the Tribunal, and leaves the Tribunal at large to raise any question it pleases and decide the same. In our opinion, this argument is unsound. Apart from the statute, it is elementary that if a party appeals, he is the party who comes before the Appellate Tribunal to redress a grievance alleged by him. *If the other side has any grievance he has a right to file a cross-appeal or cross-objections.* But if no such thing is done, *the other party in law is deemed to be satisfied with the decision.* (The italics are ours.) He is, of course, entitled to support the judgment of the first officer on any ground open to him, but he is not entitled to raise a ground so as to work adversely to the appellant and in his favour...The word ' thereon ' used in section 33 (4) only means 'on the appeal', which must mean on the grounds raised in the appeal. Read in that way, the sub-section only gives power to the Appellate Tribunal to give its decision and pass orders in respect of all grounds urged (which must be on behalf of the appellant) in respect of the decision appealed against. In deciding those grounds it can pass appropriate orders. But, in our opinion, it is not open to the Tribunal itself to raise a ground *or permit the party who has not appealed*, to raise a ground, which will work adversely to the appellant" (The italics are ours).

It will be seen that the construction of the word "thereon" is related to the fact that the department has a right of appeal and that by not availing themselves of such a right, they should be deemed to have acquiesced in or agreed to abide by the decision of the lower authority. In this connection we might refer to a decision of this Court in *Gajalakshmi Ginning Factory* v. *Commissioner of Income-tax*[1], where it has pointed out the relevancy of this feature in considering the powers of the Income-Tax Appellate Tribunal.

The decision of the Patna High Court in *Jagarnath Therani* v. *Commissioner of Income-tax, Bihar and Orissa*[2] was next referred to. There the assessee was carrying on business in the district of Purnea and had also branches at Calcutta and Jalpaiguri. In the assessment order in question the Income-tax Officer at Purnea who was the assessing authority reserved for future consideration the income derived from the Calcutta and Jalpaiguri branches, and made an assessment in regard to the income drived by the assessee from his business in Purnea district. The assessee appealed against this assessment to the Assistant Commissioner and this appellate authority while reducing the assessment on the Purnea business enhanced the assessment as a whole by including in the assessable income that which was derived from Calcutta and Jalpaiguri branches. The assessee then had a case referred to the High Court by the Commissioner of Income-tax as to whether the Assistant Commissioner had the power to include a source of income which was not at all assessed by the Income-tax Officer. The learned Judges held that as the Income-tax Officer who was the assessing authority had reserved for future consideration by himself as such assessing authority, the income derived by the assessee from the Calcutta and Jalpaiguri branches, the subject matter of the appeal before the Assistant Commissioner was the assessment in relation to the Purnea business alone and that in consequence the latter had no jurisdiction to travel beyond and seek to assess the income from those sources which had been reserved for future consideration. We are unable to see how this decision affords any assistance to the petitioners in the present case.

The last case that was referred to in this connection was that of the Lahore High Court in *Messrs. Nawal Kishore Kharaiti Lal* v. *The Commissioner of Income-tax Punjab*[3]. There the assessee was carrying on business as a jeweller and for the

1. (1953) 1 M.L.J. 35.
2. 2 I.T.C. 4.
3. 9 I.T.C. 356.

year 1932-33 disclosed a gross income from sales of Rs. 26,553. The Income-tax Officer accepted the figures of sales but enhanced the net profits available for assessment. Against this order the assessee preferred an appeal to the Assistant Commissioner. The Appellate Authority acting under section 31 issued a notice to the assessee to show cause why certain items of expenditure which had been allowed by the taxing officer should not be disallowed and the income enhanced. After hearing the assessee the appellate authority passed an order dismissing the appeal and enhancing the assessment by a sum of Rs. 4,512. Against the order of assessment as finally passed by the Appellate Authority the assessee preferred an appeal to the Commissioner of Income-tax under the repealed section 32. The Commissioner of Income-tax partially accepted the appeal and allowed a portion of the deductions which had been granted by the Income-tax Officer, and the appeal was otherwise dismissed, on 3rd September, 1934. On the same day the Commissioner of Income-tax issued a notice to the assessee to show cause why enhancement of the income from the sales of jewellery should not be made and after receiving the explanation of the assessee passed an order in October, 1934, in the purported exercise of his powers of review under section 33 and enhanced the income from the sales from Rs. 26,000 and odd to Rs. 50,000. The question canvassed before the High Court was whether this order of enhancement by the Commissioner was within his jurisdiction. If the income of Rs. 23,000 and odd which was added to the assessee was treated as income which had escaped assessment the same was not liable to be included in the assessment because no notice was served on the assessee within one year of the end of the assessment year under section 34 of the Act as it then stood. The learned Judges held that when the Commissioner was dealing with an appeal under section 32 he could pass orders only with respect to the subject-matter of the appeal and could not *suo motu* enhance the assessment which he had power to do under section 33 but that the latter provision was subject to the limitations provided in section 34. Reliance is placed upon a sentence in this judgment dealing with the powers of the Commissioner as an Appellate Authority being confined to the appeal before him and as not extending to assessing escaped income. But we are unable to find any useful analogy or assistance furnished by this case for the determination of the question arising in the present revision.

We are therefore unable to read these decisions as a conclusive judicial interpretation of the expression "thereon" occurring in section 12-A (4) of the General Sales Tax Act and confining the powers of the appellate authority to deciding for or against any particular point raised by the appellant. It will be seen from the extracts quoted above that the content of that expression has been determined with reference to the context and in the light of the provisions of the Income-tax Act which confer a right of appeal on the Department equally with the assessee. Under the provisions of the Madras General Sales Tax Act from any order of assessment passed by the Deputy Commercial Tax Officer, appeals to the Commercial Tax Officer as well as to the Appellate Tribunal therefrom are open only to the assessee and not to the department, and the powers of the appellate authority to modify the basis of an assessment cannot be circumscribed by the consideration of the department having accepted the order of the lower authority in so far as it decided any point against it.

There is also one other matter to be considered in this connection and that is the light afforded by the second proviso to sub-section 5 of section 12-A of the Act. Sub-section 5 is directed to the consequences of an appeal to the Tribunal and the orders that might be passed in relation to the tax liability by this appellate authority. The body of the section enacts the usual declaration that an appeal does not by itself impede the enforcement of the orders appealed against. To this two riders are added in the two provisos which follow. The first proviso empowers the Appellate Tribunal, in cases where they deem it proper, to permit the appellant to pay the tax in instalments or in such other manner as the Tribunal might order. Upto this stage the enactment is dealing with the assessment order appealled against and the limitation subject to which an order could be enforced. The second proviso deals with the stage subsequent to the disposal of the appeal and enacts

the consequences which might follow the order of the Appellate Tribunal. There are two limbs to this proviso. The first is concerned with cases where the Tribunal accepts any of the grounds urged by the appellant and this results in a reduction of his tax liability and in those cases, if, as a result of the enforcement of the assessment order either under the main part of sub-section 5 or in the manner contemplated by the first proviso, a larger amount has been collected from the assessee than is warranted by the assessment as modified by the Appellate Tribunal, provision is made for the refund of the excess so collected. The second limb is concerned with the other possibility namely the effect of the Tribunal's order necessitating the payment of a larger sum than was originally assessed and provision is made for the collection of this sum in addition to the sum as originally determined. As this proviso undoubtedly contemplates an order of the Tribunal leading to an enhancement in the assessment, the construction contended for by the learned counsel for the petitioners that the only jurisdiction of the Appellate Tribunal is either to accept or reject the grounds of appeal raised by an assessee in his memorandum of appeal cannot be upheld. Mr. Swaminathan urged that it was not a permissible rule of construction to widen the scope of an enacting part from implications to be gathered from a proviso and relied upon a decision to the House of Lords in *West Derby Union* v. *Metropolitan Life Assurance Society*[1] as authority for that proposition. The House of Lords was there considering the provisions of section 2 of the Poor Law Loans Act of 1871 under which the Poor Law Board was given authority to borrow money at cheaper rate of interest, in order to pay off loans carrying a higher rate of interest. The section contained a proviso that loans made subsequent to the enactment could not be redeemed before their term without the consent of the creditors. The Poor Law Board claimed a right to redeem loans made before the Act before the expiry of term stipulated in such loans. The argument on which this power was supported was that the proviso indicated that the Board could redeem before the term without the consent of the creditors and confined the protection only to those creditors who lent money subsequent to the enactment. The House of Lords affirming the decision of the Court of Appeal held that the proviso was really in the nature of a saving clause and not a true proviso and rejected the claim of the Poor Law Board. This was really a case where the proviso had been introduced by way of abundant caution. This matter has been referred to by Lord Herschell at page 656 where the learned Lord said :

"My Lords, I am satisfied that many instances might be given where provisos could be found in legislation that are meaningless because they have been put in to allay fears when those fears were absolutely unfounded, and when no proviso at all was necessary to protect the persons at whose instance they were inserted."

On the other hand, a later judgment of the House of Lords in *Jennings* v. *Kelly*[2] clearly lays down that there is no rule that the terms of an enacting part have to be construed without reference to the provisos.

"The proper course is to apply the broad general rule of construction, which is, that a section or an enactment must be construed as a whole, each portion throwing light, if need be, on the rest."

The expression "thereon" in sub-section (4) has no fixed or rigid meaning. It makes colour from the context and the terms of the proviso referred to afford some light as to what the Legislature had in mind when enacting sub-section (4) in the form in which it is found. This proviso undoubtedly enacts that an order by the Appellate Tribunal on appeal might in certain cases conceivably result in the assessment being enhanced. Before leaving this part of the case we might also refer to the terms of section 12 which confers revisional powers on the Commercial Tax Officer, Deputy Commissioner and the Board of Revenue. Each of these authorities is empowered to call for and examine the record of any order passed or proceeding recorded by the subordinate authority and after satisfying itself as to the legality or propriety of such order or proceeding to pass such order *with respect thereto* as it thinks fit. The words "with respect thereto" detached from

1. (1897) A.C. 647.
2. (1940) A.C. 206 (per Lord Wright at page 229).

the context are, it would be recognised, colourless and do not throw any light on the question whether these revisional authorities have power to enhance the assessment but guidance on this point is afforded by the terms of sub-section (6) which runs thus :

> "No order shall be passed under sub-section (1), (2), (3) enhancing any assessment, unless the opportunity has been given to the assessee to show cause against the proposed enhancement".

It will be noticed that this is really a limitation on a procedure enjoined with respect to a power which is assumed to exist without any positive provision conferring such power. In this connection the terms of section 31 (3) of the Income-tax Act might be usefully referred to. The language there used is :

> "(3) In disposing of an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment (*a*) confirm, reduce, enhance or annul the enhancement."

There is a proviso

> "Provided that the Appellate Assistant Commissioner shall not enhance an assessment or a penalty unless the appellant has had a reasonable opportunity of showing cause against such enhancement."

The framers of the General Sales Tax Act, it will be seen, have incorporated the proviso to section 31 (3) of the Income-Tax Act without introducing the positive provision as is to be found in the enacting portion of that sub-section. Regard thus having had to the manner of drafting adopted by the framers of the Madras General Sales Tax Act, we feel that effect has to be given to the implication arising from the second proviso to sub-section (5) that the Appellate Tribunal have a power to pass an order which might result in an enhanced assessment.

We might now sum up our conclusions :

(1) The Appellate Tribunal have no authority to add a new item to the turnover and include therein what was not before the assessing authority for that would be a matter not assessed but omitted from the assessment.

(2) As the Appellate Tribunal are not the assessing authorities and have merely to determine facts giving rise to the tax liability and the law in relation thereto, they are obviously empowered to allow an appeal and remand it for the assessment being computed in accordance with the facts, as found and the law as laid down by them and this re-assessment has to be done by the assessing authorities.

(3) Where the basis of an assessment is challenged by an assessee and this is accepted by the Tribunal and the matter is remitted to the assessing authorities, there has to be a re-assessment in conformity with their order. In the normal cases this would result in the decrease of the tax-liability of the appellant. The second proviso to sub-section 5 enables the refund to be obtained by the assessee as a consequence of the reassessment in accordance with the orders of the Appellate Tribunal.

But on the facts of the particular case the giving effect to the order of the Tribunal might result in an enhancement of the tax. The point raised by the petitioners in its ultimate analysis amounts to a denial to the Tribunal of the power to pass an order which if given effect to would result in an enhancement of the assessment. We are clearly of the opinion that this contention cannot be accepted not merely because of the second proviso to sub-section 5 but also as such a view does not accord with any logical or intelligible construction of the relevant provisions of the Act. To take the present case as an illustration, the petitioners as appellants before the Appellate Tribunal raised two points for the latter's determination, *viz.*, (1) that the Commercial Tax Officer, erred in the view that as assessee was not entitled at the same time to both the reliefs provided for by rule 18 (2) of the Turnover and Assessment Rules and by Article 286 (1) (*a*) of the Constitution and (2) that the Commercial Tax Officer erred in refusing to hold the sale turnover of oil sold outside the State as not falling within the exemption provided by Article 286 (1) (*a*). The Tribunal w[illegible]d to accept both these contentions. The final result of their order w[illegible]ejected the first of the

above contentions raised on behalf of the appellants before them but accepted the second. It meant that while the appellants were entitled to the exemption under the Constitution they were not entitled to the benefit of both the deduction and the exemption as the Tribunal affirmed the view of the Commercial Tax Officer in this regard. In this situation the only order that they could pass was one remanding it to the Commercial Tax Officer for making a computation on the basis suggested by them. In particular cases such a computation might have resulted in a diminution of tax liability. In other cases, as in the present, it might result in an enhancement of the tax. The validity of their order cannot be judged by the result, that is the order cannot be held valid if it resulted in a reduction of tax liability but held invalid and beyond their jurisdiction if the re-computation resulted in enhancing the tax. Whether the expression "thereon" in section 12-A (4) read in the light of the second proviso to sub-section (5) would include the entire assessment order or only those grounds which are raised for consideration of the Appellate Tribunal by any particular appellant; in the present case the claim to deduction under rule 18 (2) of the Turnover and Assessment Rules and the constitutional exemption under Article 286 (1) (*a*) were so interrelated to each other that it would not be possible for the Tribunal to pass any order on the appeal other than that which they have passed.

In the result, we hold that the order of the Appellate Tribunal was within their jurisdiction and that was the proper order to pass. The Revision Petition fails and is dismissed with costs. Advocate's fee Rs. 100.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

N. Dasai Gounder & Co., Madras .. *Petitioner**

v.

The Deputy Chief Controller of Imports, Custom House, Madras.. *Respondent.*

Imports and Exports (Control) Act (XVIII of 1947) and Import Trade Control Regulation—Insistence on production of Income-tax Verification Certificate by applicants for import quota—Validity—If amounts to unreasonable restriction on the fundamental right to carry on business—Object of Government—If bona fide.

The object of the Government in laying down the conditions that an applicant for licence to import under the Import Trade Control Regulation should produce the Income-tax Verification Certificate is not to collect the income-tax arrears but is intended to satisfy the Controller that the applicant will be able to meet the financial commitments involved in the import trade, and the solvency and integrity of the importers. Where the Government has necessarily to make a selection of some persons from among a number of applicants for import quota licence it is not unreasonable if the Government prefers persons who are not in default of payment of tax to the Government over defaulters. The condition requiring the production of an Income-tax Verification Certificate is not an unreasonable restriction on a person's fundamental right to carry on business because no one has a fundamental right to obtain a quota under a licence.

K. Raman & Co. v. *The State of Madras,* (1952) 2 M.L.J. 544, distinguished and explained.

Vedachala Mudaliar v. *Divisional Engineer, Highways, Saidapet,* (1955) 1 M.L.J. 234; *Rasipuram U.M.S. Ltd.* v. *State of Madras,* (1955) 1 M.L.J. 231; *Lotus Industrials, Kallai* v. *State of Madras,* (1952) 1 M.L.J. 532 and *Srinivas* v. *Director of Controlled Commodities,* (1952) 2 M.L.J. 113, referred.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of mandamus or other suitable writ to the respondent herein, *viz.,* the Deputy Chief Controller of Imports, Custom House, Madras, to grant the petitioner import licences for which he has applied without requiring the production of an Income-tax verification Certificate.

M. K. Nambiar for *K. Srinivasan, R. Aravamuda Iyengar* and *M. J. Swamy* for the Petitioner in W. P. No. 495 of 1954.

M. R. M. Abdul Karim for the Petitioner in W. P. No. 605 of 1954.

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* W.P. Nos. 495 an 2nd May, 1955.

The Government Pleader (*C. A. Vaithialingam*) on behalf of the Respondent in both the petitions.

The Advocate-General (*V. K. Tiruvenkatachari*) and the Special Government Pleader (*V. V. Raghavan*) and *C. S. Rama Rao Sahib* on behalf of the State.

The Judgment of the Court was delivered by

Rajamannar, C.J.—These two petitions filed under Article 226 of the Constitution were heard together because they raise a common question, namely, whether the production of an Income-tax Verification Certificate can be made a condition precedent for the entertainment of an application for the grant of an import licence. The provisions relating to this subject are to be gathered from several rules and notifications and public notices made and issued from time to time by the Government. They are contained in a Handbook of Rules and Procedure relating to Import Trade Control published in 1952 by the Government of India, Ministry of Commerce and Industry, and the Import Trade Control Policy issued by the Government of India for different licensing periods. The Imports and Exports (Control) Act, 1947, is in the barest terms and contains very little relevant information. Section 3 (1) of the Act provides :—

"The Central Government may, by order published in the official Gazette, make provision for prohibiting, restricting or otherwise controlling in all cases or in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order,—

(*a*) the import, export, carriage coastwise or shipment as ships' stores of goods of any specified description ;

(*b*) the bringing into any port or place in the Provinces of goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried."

Section 4 runs thus :—

"All orders made under rule 84 of the Defence of India Rules or that rule as continued in force by the Emergency Provisions (Continuance) Ordinance, 1946, and in force immediately before the commencement of this Act shall, so far as they are not inconsistent with the provisions of this Act, continue in force and be deemed to have been made under this Act."

There is a Notification, dated 1st July, 1943, by the Government of India, published in exercise of the powers conferred by sub-rule (2) of rule 84 of the Defence of India Rules, prohibiting the bringing into India by sea, land, or air, from any place outside India of any goods specified in the schedule annexed thereto except *inter alia* the following : (xii) any goods of the description specified in Part IV of the schedule which are covered by a special licence issued by an Import Trade Controller appointed in this behalf by the Central Government. Though control of import trade originated in the circumstances which prevailed during the last war, it had to be continued even after the termination of the war owing to several difficulties which arose from several causes, one of which was that the sterling and dollar resources of the country were limited and had to be conserved. One main feature of the licensing was the allocation of quota for specific classes of goods which would be allowed to be imported from what are generally known as 'hard currency' and 'soft currency' areas. The Government had to resort to a method of distribution of the available resources with reference to commodities, and a selection had to be made among the applicants, in view of the fact that the applications received for licences to import largely exceeded the available purchasing power of the country. The applications for licences were entertained both from "established importers" and newcomers, and the allocation of the quota to an applicant was more or less on the basis of the quota certificates given to the applicants in the previous licensing periods. It is common ground that with every application for an import licence a certificate from the income-tax authorities, known as Income-tax Verification Certificate had to be produced. In the public notice, dated 15th June, 1953, issued by the Government of India, the procedure is thus laid down in this matter : All prospective applicants for import licence shall make application in the form prescribed to the proper income-tax authority, who will verify the particulars from the record and subscribe the necessary verification certificates.

When a complete certificate is given, a registration number is allotted to the applicant, which is valid for the half-yearly licensing period in which the certificate was issued, and for the next two half-yearly licensing periods. Certain classes of applicants were entitled to obtain exemption from production of such certificates from the proper income-tax authority. The particulars contained in the certificate comprise information regarding the trade name and address of the assessee, the year in which the business was established, the income-tax circle in which the applicant is assessed to income-tax, and the line or lines in which the applicant is doing business. The certificate to be granted by the Income-tax Officer should be in the following manner :

"In my opinion the applicant mentioned above has been doing everything possible to pay the tax demands promptly and regularly and to facilitate the completion of the pending or outstanding proceedings."

In proper cases, the certificate would be that " this is a case for allotment of Exemption number ". Admittedly, neither the petitioners in W. P. No. 495 nor the petititioners in W. P. No. 605 produced the necessary Income-tax Verification Certificate along with their application, and consequently their applications were not considered by the Controller of Imports and Exports.

Before dealing with the contentions raised on behalf of the petitioners, the facts which are not in dispute may be set out. The petitioners in W.P. No. 495 are a firm doing business on a large scale in imported oilman stores, drugs, toilet preparations, etc. The firm consists of four persons. The annual income of the firm which was registered under the Indian Income-tax Act, was assessed for income-tax purposes, and the profits of each partner were added to his individual income, and the income-tax was assessed on the individual partners concerned. In 1952, one of the partners failed to pay the income-tax assessed on him. It was therefore not possible to obtain an Income-tax Verification Certificate. The Income-tax Officer agreed to grant the necessary verification certificate if the other partners arranged for the payment of so much at least of the income-tax due from the defaulting partner as was due in respect of the defaulter's income from the petitioner firm. But the other three partners were apparently not willing to do this. There appear to have been attempts at dissolving the firm, but nothing turns on this. In W. P. No. 605, the petitioners were assessed for the assessment years 1948-49 and 1949-50 to a tax of Rs. 13,595-12-0 out of which only a sum of Rs. 2,500 was paid. But the remaining amount of tax remained unpaid. The petitioners therefore could not get the required Income-tax Verification Certificate. It was alleged that the failure on the part of the petitioners to pay was due to the fact that the Government of Burma had imposed restrictions on remittances from Burma to India, and the tax assessed included the tax on income from Burma.

The main contentions on behalf of the petitioners were (1) that the condition requiring the production of an Income-tax certificate along with an application for the grant of an import licence was an unreasonable restriction on the fundamental right of the petitioners to carry on business, and (2) that the condition was really intended to enable the Government to collect the income-tax due from the applicants, and was, therefore, not in the *bona fide* exercise of the power of the Government to impose conditions for the grant of an import licence.

In support of the first contention, reliance was placed on the decision in *K. Raman & Co.* v. *The State of Madras*[1]. The petitioner in that case was a firm doing retail business in yarn. The firm had a licence under the Yarn Dealers' Control Order. When the firm applied for the further renewal of the licence, the Collector refused to renew it on the sole ground that the firm had not produced the Income-tax and Excess Profits Tax Verification Certificates, because the firm was in arrears, and Subba Rao, J., held that the action of the Collector was unreasonable. This is how he dealt with the legal aspect of the case :—

"The petitioner is a citizen of India and has the fundamental right to carry on the trade which he has been doing. The State can only put a reasonable restriction upon his right in the interests

1. (1952) 2 M.L.J. 544.

of general public. But, in this case, the order of the Collector discloses that he is using his powers under the Yarn Dealers' Control Order for the purpose of collecting the amounts due to the Government of India. The fact that a person is in arrears of income-tax is not germane to the issue of a licence under the Yarn Dealers' Control Order. It is a circumstance extraneous to the petitioner's right to carry on his business. The Income-tax Act provides an adequate machinery for realising the arrears due from an assessee. I am of the view that the restriction imposed is unreasonable and is not in the interests of the general public."

Though we do not subscribe to everything that Subba Rao, J., has said above, we are clearly of opinion that the decision was right. But there are certain circumstances present in the cases before us which were absent in that case. That case dealt with a person who had the right to carry on the business in the sale of yarn, and the licence which he had obtained was only intended for the State to regulate and control the conduct of that business. There was no question there of selection between different applicants. Moreover, there is no relation between payment of income-tax and the carrying on of the business in yarn. As Subba Rao, J., pointed out, it was a circumstance extraneous to the right of the petitioner to carry on his business. The learned Judge was, therefore, right in holding that the restriction imposed was unreasonable and was not in the interests of the general public. Reference may well be made to another decision of a Division Bench of which one of us was a party in *Vedachala Mudaliar* v. *Divisional Engineer, Highways, Saidapet*[1]. In that case, the Government insisted on the production of an Income-tax clearance certificate as a condition precedent to the Government entering into a contract with the petitioner for black-topping a public road. It was contended that the Government's insistence on the production of a clearance certificate infringed on the fundamental right of the petitioner under the Constitution. But the contention was repelled on the ground that the petitioner, though he had the fundamental right to carry on trade or business, had no such right to insist on the Government or any other individual doing business with him. Government could decide with whom they could enter into a contract, just as a private person could. The Advocate-General relied upon the statements made by the Deputy Chief Controller of Imports in the supplementary counter-affidavit filed by him in W.P. No. 605, which clearly shows that the Government had the final discretion to distribute the available resources among various applicants and in making a selection among the applicants the financial status and integrity of the applicant were very relevant considerations. The following paragraph in the supplemental affidavit sets out the policy pursued by the Government in the matter of granting an import licence :—

"It is respectfully submitted that it is wrong to suggest that this is a method of collecting income-tax. The import control authorities take no action for the collection of the tax, and in fact cannot do so. The Verification Certificate gives important data relating to the status of the individual, his prior business in the field and his reliability. In considering applications for import, the import control authorities have to keep within the overall monetary ceiling fixed by the Central Government allowable for the particular goods, according to hard and soft currency areas from which they are allowed importation. When quotas are allotted to applicants, we take into consideration cases of persons whose applications on checking with Income-tax Verification Certificates and further enquiries from the income-tax authorities, show that the facts stated by the applicants are correct and also with further reference to the prior volume of trade handled by him. With regard to Established importers, the allocation depends upon their basic performance. When we give a quota to one person to that extent, it is denied to others. If we give quotas for a specific period to persons who have no financial status, they are unable for that reason to fulfil their contract and import the goods and the quotas get expired without being utilised. Other persons who have applied and who might have performed the contract will be kept out of the trade. Therefore, it is respectfully submitted that on the general aspect of the question, the Income-tax Verification Certificate serves a useful purpose, firstly, for checking up the history of the persons, and secondly, for judging the financial and commercial status both of which are most relevant when quotas have to be distributed among a large number of applicants by selection of some to the exclusion of others. As mentioned above, the proper compliance with the Import Trade Control Regulations is a very important factor in the national economy. The status and respectability of a merchant is a guarantee and a reasonable ground for hoping that he will comply with these regulations."

In the report of the Import Control Enquiry Committee, 1950, Appendix C, Part II, item (4), we find the following explanation of the object of income-tax registra

"The system of income-tax registration was introduced with a view to ensuring that the persons receiving import and export licences did not evade taxes to Government. It was noticed that a person sometimes applied for licences in 4 or 5 different names. In the absence of a system of income-tax registration it would not have been possible for the income-tax authority to find out if the same person was trading in different names. The present system has enabled the Licensing Authority to ascertain the status of a firm."

The learned Advocate-General referred us to analogous instances in which it was held that default in payment of taxes could be taken into account in making a selection between applications for a licence or a permit. In *Rasipuram U. M. S. Ltd.* v. *State of Madras*[1], it was held that deliberate and habitual default in the payment of taxes was a circumstance which could be taken into consideration in arriving at a decision as to whether the grant of a permit under the Motor Vehicles Act to a person was in the interests of the general public. In *Lotus Industrials, Kallai* v. *State of Madras*[2], it was held that in allotting quota of yarn direct from the mills the State could make a distinction in favour of "consumer quota holders". That no one can be said to be entitled as of right to any "quota" was laid down in another decision of a Bench to which one of us was a party in *Srinivas* v. *Director of Controlled Commodities*[3].

In our opinion, the contention on behalf of the petitioners in based on a wrong assumption that the petitioners have a fundamental right to obtain a quota under a licence. The refusal to grant a licence and allot a quota does not certainly prevent the petitioners from carrying on their business. If the appellants' contention should be accepted, it would mean that all the applicants for licences should be granted quotas, though the available resources are not sufficient to satisfy all the applicants. The Advocate-General is right in emphasising on the fact that the Government have necessarily to make a selection from among the applicants. From this it follows that none of the applicants can be said to have a fundamental right to obtain the licence and the quota. When the Government have to make a selection, is it unreasonable that they should say that persons who are not in default in payment of tax to the Government should be preferred to defaulters? We think not.

There is another aspect of the matter on which also the learned Advocate-General rightly laid emphasis, namely, that the Income-tax Verifiction Certificate is intended to satisfy the Controller that the applicant will be able to meet the financial commitments involved in the import trade, and the solvency and integrity of importers will have a bearing on international affairs, foreign exchange problems and other matters of public interest. We hold that the condition requiring the production of an Income-tax Verification Certificate is not an unreasonable restriction on the petitioners' fundamental right to carry on business.

We see no substance in the suggestion that this condition is a device to collect arrears of income-tax. When we remember that the number of applicants who are also defaulters in the payment of income-tax will form a very insignificant proportion of the total number of income-tax assessees who have not paid the taxes due by them, it will be apparent that the object of the Government in laying down this condition was not to collect the income-tax arrears. Under the Income-tax Act, the Government have large powers for the purpose of collecting the tax without recourse to Civil Courts and it is most unlikely that this condition was imposed to help the Income-tax Department to collect the arrears.

It was not argued before us that the licensing and quota system itself was as such an unreasonable restriction on the fundamental right of the petitioners to carry on business.

In the view we have taken above, it is not necessary to discuss the circumstances under which the petitioners in the two cases were unable to produce Income-tax Verification Certificates along with their applications for licence and quota. It may be in some cases like for instance in W.P. No. 495 of 1954 the insistence on

[redacted]

the condition might cause hardship ; but that is a matter to be taken into account by the Import and Export Controller, and that would not by itself render the condition unconstitutional or invalid. The two applications are, therefore, dismissed. No Costs.

R.M. ——— *Applications dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

Dhanakotia Pillai .. *Appellant**

v.

P. K. Narayana Iyer .. *Respondent.*

Madras Agriculturists' Relief Act (IV of 1938), section 13 and Negotiable Instruments Act (XXVI of 1881), section 44—Promissory note providing for interest at a higher rate than that allowed under the Agriculturists' Relief Act—Applicability of the principle of failure of consideration—Validity of the promissory note—If affected.

Where a promissory note executed by an agriculturist after the commencement of the Madras Agriculturists Relief Act, 1938, in renewal of an earlier promissory note which was liable to be scaled down under the Act it was contended that the second promissory note is not supported by consideration to the extent of the excess over the sum that would have been payable under the earlier promissory note as scaled down under the Act:

Held: Notwithstanding that a Court can, under the provisions of Madras Act (IV of 1938) give relief to an agriculturist applying the appropriate provisions thereof and scale down a debt in accordance with the principles and at the rate of interest provided it would not make it illegal or unlawful to charge and recover interest at a rate higher than that provided under the Act. If an agriculturist chooses to enter into a transaction and borrows at a rate of intersest higher than that provided in the Madras Act (IV of 1938) and discharges the debt by payment at the contract rate of interest it would not be open to him later to question the validity of the consideration and plead failure of consideration and recover the amount so paid.

Applicability of sections 8 and 9 of the Act to cases governed by section 13, considered.

Thiruvengadatha Aiyangar v. *Sannappan Servai* (1941) 2 M.L.J. 307 ; *Krishnamurthi* v. *Narayana* (1944) 2 M.L.J. 298, referred to.

Mallikarjuna Rao v. *Tripurasundari* (1953) 2 M.L.J. 313, followed.

Shama Charan Misser v. *Chunilal Marwari* (1898) I.L.R. 26 Cal. 238, referred.

The Madras Agriculturists' Relief Act, 1938, is not declaratory as to rates of interest which should be considered as proper and legal in the case of borrowing by an agriculturist, but only a remedial enactment intended to give relief to agriculturists, whose debts come up for adjudication in a Court of law, and who also can apply to a Court for a declaration of the amount of the debt due by them by applying the provisions of the Act. The Act, however, does not make it illegal for interest being charged and recovered at higher rates than that provided under the Act, even if the borrowing is by an agriculturist. Unless the charging of interest at a rate higher than that provided by the Act and the appropriation or recovery thereof is considered to be illegal, there cannot be a failure of consideration.

Appeal against the decree of the Court of the Subordinate Judge of Mayuram in Appeal Suit No. 35 of 1952 preferred against the decree of the Court of the District Munsiff of Tiruvarur in Original Suit No. 254 of 1951.

T. S. Kuppuswami Ayyar for Appellant.

C. S. Vidyasankaran for Respondent.

The Court delivered the following

JUDGMENT.—This appeal raises an important question under the Madras Agriculturists Relief Act (IV of 1938). The defendant-judgment-debtor is the appellant. The suit was on a pronote for Rs. 1,400, dated 5th July, 1948, executed by the defendant to the plaintiff with interest at 12 per cent. per annum. The defendant claimed relief under Act (IV of 1938) on the ground that the suit pronote was in renewal of an earlier pronote dated 9th July, 1945, for Rs. 1,500 executed by the defendant in plaintiff's favour. The main question that was considered by both the lower Courts was as to whether the suit pronote was in renewal of the earlier pronote or a fresh contract between the parties and whether the defen-

* [illegible] 3rd May, 1955.

dant was entitled to relief under section 13-A of the Madras Agriculturists Relief Act. Both the Courts found that it was a fresh contract and was not in renewal of the earlier pronote and that the suit pronote being after the Act the defendant would be entitled to relief only to the extent provided by section 13 of the Act by reducing interest on the suit pronote to 5 per cent. per annum.

It is now contended that the suit pronote was really in renewal of the earlier pronote of the 9th July, 1945 (Exhibit A-1) for a sum of Rs. 1,400 being the balance due after payment of the interest and a portion of the principal under the previous pronote, the rate of interest in Exhibit A-1 being 12 per cent. I have no hesitation in finding that the amount of the suit pronote represents the balance due under Exhibit A-1 after payment of interest at 12 per cent. the contract rate under Exhibit A-1, and a portion of the principal, and in that view the suit pronote is a renewal of the earlier pronote for the balance of the amount due thereunder. It was argued by Mr. Kuppuswami Ayyar for the defendant that the principles as to the re-opening of earlier transaction available under sections 8 and 9 of the Act should be applied to the present case. But the proper provision of the Act that is applicable to the suit debt, which is incurred after the commencement of the Act is section 13, where the only relief that an agriculturist is entitled to have is a reduction of interest calculated at $5\frac{1}{2}$ per cent. per annum. Notwithstanding that the suit pronote may be in renewal of an earlier pronote, the suit pronote is a debt which was only incurred after the commencement of the Act and as such section 13 alone is applicable. Sections 8 and 9 are applicable to debts incurred before and on or after the 1st October, 1932, respectively. Explanation III to section 8 and the first proviso to section 9 (1) which provides for relief being granted even in respect of prior debts, however, have no application to a debt incurred after the commencement of the Act.

In *Thiruvengadatha Aiyangar* v. *Sannappan Servai*[1], a Bench of this Court held that all debts incurred after the commencement of the Act whether they be in discharge of prior debts or not will fall only under section 13 and section 9 is not applicable to such debts. As observed by Wadsworth, J., in the said decision

> "If it had been the intention of the Legislature to introduce the theory of renewals into the scaling-down operations in respect of debts incurred after the commencement of the Act, some specific provisions would have been made in this behalf."

In the absence of such a provision in section 13, the relief that could be granted to an agriculturist must be only within the limited scope provided for in section 13.

Similar is the view taken in *Krishnamurthi* v. *Narayana*[2], where it was held that there is nothing in section 13 of the Madras Agriculturists Relief Act, which imports the Explanation to section 8 and allows the Court to go behind the contract and that in a suit on a pronote of 1942 executed in settlement of previous debts of 1939, in giving relief under the Act section 13 can be applied to the suit contract only, but not to the previous debts which it superseded.

Mr. Kuppuswami Ayyar, however, relied on a judgment of Rajamannar, C.J., in *Mallikarjuna Rao* v. *Tripurasundari*[3]. In that case the suit was for recovery of the amount due for principal and interest on a pronote executed on 6th April, 1945. The said pronote was in respect of principal and interest due under a prior pronote dated 8th April, 1942, which again was for an amount due under still prior pronote of 1939 and the origin of the defendant's liability under the suit pronote arose on the first pronote of the 30th April, 1936. One of the contentions was that the suit pronote of 1945 was taken for an amount higher than what was due in accordance with the provisions of the Madras Act IV of 1938 and that there was failure of consideration in so far as the excess amount was concerned. The Subordinate Judge refused to accept the plea of failure of consideration and the learned Chief Justice following the unreported decision of a Division Bench of this Court consisting of Patanjali Sastri and Shahabuddin, JJ., in A.S. No. 290 of 1944 accepted

1. (1941) 2 M.L.J. 307.
2. (1944) 2 M.L.J. 298.
3. (1950) 2 M.L.J. [illegible]

the plea and held that there was failure of consideration in respect of the excess amount.

In the Bench decision in A.S. No. 290 of 1944 referred to and followed by the learned Chief Justice the facts were as follows: In that case the suit was on a pronote, dated 25th January, 1940 and the pronote recited that it was executed for the amount of principal and interest found due till that day after deducting payments made under an earlier pronote, dated 13th February, 1934. One of the pleas taken by the defendants was that the suit pronote was not supported by consideration to the extent of the excess over the sum that was payable under the earlier pronote as scaled down under the Act. The learned Judges finding that it was not the case of the plaintiff that the suit pronote was supported by any fresh consideration passing at the time of the execution apart from what was due under the earlier note of 1934 and observing that the plea that a pronote sued on was not supported by consideration to the extent of the payment made under the earlier note was open to the debtor under section 44 of the Negotiable Instruments Act, held that the plaintiff would not be entitled to recover anything more than what would be found properly payable under the earlier pronote of 1934.

The principle laid down in the Bench decision and followed by the learned Chief Justice is applicable to the present case and is binding on me. The appeal has therefore to be allowed and the relief that the appellant-defendant would be entitled to is to re-open the ealier transaction Exhibit A-1, dated 9th July, 1945 and taking Rs. 1,500 as principal advanced on that date and calculating interest at the rate provided under section 13 and after giving credit to the amounts paid, the plaintiff would be entitled to a decree to such amount as is found due for balance of principal and interest if any on the date of the decree.

But the question has been raised whether the plea of failure of consideration would be open to the defendant at all. Section 44 of the Negotiable Instruments Act says:—

"When the consideration for which a person signed a promissory note, bill of exchange or cheque consisted of money, and was originally absent in part or has subsequently failed in part the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionally reduced."

The point therefore is whether there has been really any failure of consideration as regards the suit note. The extent of the failure of consideration is arrived at from the application of the Act to the ealier note to such amount over and above the amount due under the ealier note as scaled down. The contention apparently is that under the earlier pronote Exhibit A-1 interest having been charged at 12 per cent. and since in respect of debts incurred after the commencement of the Act interest being provided at 5½ per cent. by a latter notification of the Government under section 13 of the Act it would not be open to any party to a debt evidenced by a negotiable instrument, as in the present case, to charge interest at a rate higher than that provided under section 13. The point that arises therefore for determination is whether it would not be open to parties to a loan transaction to charge interest at a rate higher than that provided in the Act if the borrower is an agriculturist within the meaning of Act IV of 1938. The Act, however, is not declaratory as to rates of interest which should be considered as proper and legal in the case of a borrowing by an agriculturist but only a remedial enactment intended to give relief to agriculturists, whose debts come up for adjudication in a Court of law, and who also can if they are so inclined, apply to the Court for a declaration of the amount of the debt due by them by applying the provisions of the Act. The Act, however, does not make it illegal for interest being charged and recovered at higher rates than that provided under the Act, even if the borrowing is by an agriculturist and unless the charging of interest at a rate higher than that provided by the Act and the appropriation or recovery thereof is considered to be illegal, there cannot be any failure of consideration. The failure of consideration can arise only by total or partial absence of payment of the consideration or on other grounds such as illegality. Section 23 of the Contract Act provides that the consi-

deration or object of an agreement is lawful, unless it is forbidden by law ; or is of such a nature that, if permitted it would defeat the provisions of any law, or is fraudulent or involves or implies injury to the person or property of another or the Court regards it as immoral or opposed to public policy and in each of these cases, the consideration or object of an agreement is said to be unlawful and every agreement of which the object or consideration is unlawful is void. It appears to me that notwithstanding that a Court can, under the provisions of Act IV of 1938, give relief to agriculturists applying the appropriate provisions thereof and scale down the debts in accordance with the principles and at the rate of interest provided, it would not make it illegal or unlawful to charge and recover interest at a rate higher than that provided in the Act, If an agriculturist chooses to enter into a transaction and borrows at a rate higher than that provided in the Act and discharges the debt by payment at the contract rate of interest it would not be open to him later to question the validity of the consideration and plead failure of consideration and recover the amount so paid. It is open to the parties, though the borrower is an agriculturist to agree upon such rates of interest as they may choose and settle their transactions at those rates even though the rates may be higher than that provided under the Act.

In *Shama Charan Misser* v. *Chuni Lal Marwari*[1], the suit was on two bonds and the second bond was for a certain sum of money, a part of which was interest upon the amount covered by the first bond and it was agreed between the parties that the whole amount of the consideration as mentioned in the bond should bear interest the result being that the obliger promised to pay interest upon the interest which was due upon the first bond. It was contended that inasmuch as a part of the consideration for his bond was unlawful, according to section 23 of the Contract Act the plaintiff obligee was not entitled to recover having regard to the provisions of section 24 of that Act, any portion of the money covered thereby. The contention as to the unlawful nature of the consideration was based on certain provisions of the Santhal Regulation III of 1872 and Regulation V of 1893, which provided that all Courts having jurisdiction in the Santhal Parganas shall observe the following rules relating to usury namely, interest on any debt or liability for a period exceeding one year shall not be decreed at a higher rate than two per cent. per mensem, notwithstanding any agreement to the contrary and no compound interest arising from any intermediate adjustment of account shall be decreed and so forth. Construing these provisions the learned Judges observed that :

> " There is no law or regulation laying down than an agreement between any two persons living in the Santhal Parganas to pay compound interest upon the amount borrowed is unlawful within the meaning of section 23 of the Contract Act. All that the law provides is that compound interest will not be decreed by any Court"

and repelled the contention on the ground of failure of consideration.

I am unable to find in the Agriculturists Relief Act any provision laying down that a transaction of borrowing between two persons, the borrower being an agriculturist within the meaning of agriculturist under Act IV of 1938 agreeing to pay 12 per cent. interest is unlawful within the meaning of section 23 of the Contract Act. The Act is intended to provide relief to agriculturists and has not laid down the lawful interest which a creditor could charge an agriculturist in any transaction which he might enter into with him and unless it is shown that interest at 12 per cent. which was charged under Exhibit A-1 is forbidden by law or would defeat the provisions of any law prescribing the rates of interest which alone can be contracted for with an agriculturist there is nothing preventing the plaintiff in this case from appropriating the amounts paid to him towards interest calculating at 12 per cent. and entering into a fresh transaction for the balance of the amount due under the earlier note. Section 7 of the Act provides that notwithstanding any law, custom, contract or decree of Court to the contrary all debts payable by an agriculturist at the commencement of the Act shall be scaled down in accordance with the provisions of Chapter II of the Act. Unless a debt as defined in the Act comes to the notice

1. (1898) I.L.R. 26 Cal. 238.

of the Court either in a suit or in execution or in an application for scaling down, it is not affected by the Act. The correctness of the application of the principle of failure of consideration to a case like the present one requires to be further examined and I would have been inclined to refer this case to a Bench. But in view of the small stakes involved in this appeal I refrain from adopting the course but prefer to dispose of this appeal by allowing it as I am bound by the decision of the Bench in A.S. No. 290 of 1944 and followed by the learned Chief Justice in *Mallikarjuna Rao* v. *Tripurasundari*[1]. I am, however, of the opinion that the doubt expressed as to the correctness of the said two decisions requires to be resolved by an authoritative pronouncement.

With these observations the appeal is allowed, However, this is a case in which I should grant leave to appeal. Leave granted accordingly. No order as to costs of the second appeal. The plaintiff will get proportionate costs on the amount allowed in the Court below.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Messrs. Kemp and Company, Ltd., Bombay, represented by its General Manager .. *Petitioner**

v.

The Commissioner for Workmen's Compensation, Madras and another .. *Respondents.*

Madras Shops and Establishments Act (XXXVI of 1947), *sections* 2 (12) *and* 41 (2)—*Person employed in a position of management—Who is to decide—Tests.*

Unless a given person is a person employed within the meaning of section 2 (12) of the Madras Shops and Establishments Act, he cannot avail himself of the appellate right created by section 41 (2) of the Act. Even if he is a person employed, if he is a person employed in a position of management within the meaning of section 4 (1) (*a*) the statute takes away the rights conferred on such persons employed by the provisions of section 41 (2) of the Act among others.

In deciding whether a person is employed within the meaning of section 2 (12) of the Act, it is the requirement of the statutory definitions that will have to be examined ; the common law concepts of employer and employee and master and servant can have no application. The primary duty of deciding the questions whether an employee is a 'person employed' and if so whether he is employed in the position of management is on the Tribunal, *viz.*, the Commissioner.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of certiorari or other appropriate writ calling for the records in M.S. and E. Act Case No. 557 of 1953 on the file of the Commissioner for Workmen's Compensation, Madras, peruse the same and quash the order, dated 5th May, 1954 and passed therein.

V. Thyagarajan for *Messrs. Pais, Lobo and Alvares* for Petitioner.

Special Government Pleader (*V. V. Raghavan*), *K. Bashyam* and *S. R. Subramaniam* for Respondents.

The Court made the following

ORDER.—The petitioner-firm which has a branch at Madras has its head-office at Bombay. The second respondent was in the service of the petitioner at Madras and held the post which was designated Branch Manager. The petitioner-firm terminated the services of the second respondent with effect from 28th August, 1953, after giving him a month's salary in lieu of notice and also an additional payment *ex gratia*. The second respondent preferred an appeal to the Commissioner for Workmen's Compensation under section 41 (2) of the Madras Shops and Establishments Act (XXXVI of 1947). In the proceedings before the Commis-

1. (1953) 2 M.L.J. 313.

* W.P. No. 157 of 1955. 19th July, 1955.

sioner preliminary objection of the petitioner, that the appeal was not competent and the Commissioner had no jurisdiction was overruled. It is the validity of that order of the Commissioner, dated 5th May, 1954, that the petitioner challenged by his application under Article 226 of the Constitution for the issue of writ of certiorari.

Section 41 (2) gives the " person employed " whose services have been terminated, a right of appeal to the appellate authority, that is, the Commissioner. Section 4 (1) of the Act provided :

" Nothing contained in this Act shall apply to (*a*) persons employed in any establishment in a position of management."

The plea of the petitioner before the Commissioner was that section 4 (1) (*a*) precluded the application of the provisions of the Act to the second respondent. The Commissioner's finding was :

" I find that the applicant had no authority to appoint or dismiss an employee, that he had no power to decide policies, that he had to take permission from the head-office even in small administrative details and that he really had no power of management. He cannot therefore be deemed to be a person excluded by the provisions of section 4 (1) (*a*) of the Act."

It is not every employee that is given a right of appeal under section 41 (2) of the Act : it is only a person employed " as that term has been defined by section 2 (12) of the Act. In deciding whether section 4 (1) (*a*) excluded an appeal under section 41 (2), the Commissioner will still have to find whether the employee who preferred that appeal was a person employed within the meaning of section 2 (12) of the Act. It is only then that the other question arises, whether that person employed was in a position of management within the meaning of section 4 (1) (*a*). The first of these questions, whether the second respondent was a "person employed" within the meaning of section 2 (12), was not specifically decided by the Commissioner ; but then it must also be remembered that that was not the specific issue raised in the preliminary objection put forward by the petitioner before the Commissioner. It was only during the arguments before me that the further question arose, whether the second respondent was a person employed at all within the meaning of the Act.

Unless a given person is a person employed within the meaning of section 2 (12), he cannot avail himself of the appellate right created by section 41 (2) of the Act. Even if he is a person employed, if he is a person employed in a position of management within the meaning of section 4 (1) (*a*), the statute takes away the rights conferred on such persons employed by the provisions of section 41 (2) of the Act among others.

In deciding whether the second respondent was a person employed within the meaning of section 2 (12) of the Act, it is the requirements of the statutory definitions that will have to be examined : the common law concepts of employer and employee and master and servant can have no application. An employee can himself be a statutory ' employer ' within the scope of this Act.

It was common ground that the Madras office of the petitioner was a " commercial establishment " as defined by section 2 (3) of the Act and therefore an " establishment " within the meaning of section 2 (6) of the Act.

Section 2 (5) defines " employer " :

" 'Employer' means a person owning, or having charge of, the business of an establishment and includes the manager, agent or other person acting in the general management or control of an establishment."

With reference to a commercial establishment, " a person employed " has been defined by section 2 (12) (3) :

" Person employed means........

" in the case of a commercial establishment........a person wholly or principally employed in connection with the business of the establishment and includes a peon."

One of the contentions of Mr. Thyagarajan was that the second respondent, though he was in the position of a paid employee of the petitioner-firm, was an

" employer " within the meaning of section 2 (5) of the Act, and therefore he could not come within the scope of a " person employed " as defined by section 2 (12) (3) of the Act. He contended that the expressions " employer ", " person employed " and " a person employed in a position of management " must all be construed with reference to the establishment or the commercial establishment, that is, in this case the office at Madras. A further contention was that, since the second respondent was a manager acting in general management or control of the establishment at Madras, he was an employer, and that therefore in relation to that establishment at Madras, where he is a statutory employer, he could not be a "person employed " within the meaning of section 2 (12) of the Act.

The question whether the second respondent was a person employed within the meaning of section 2 (12) of the Act was not decided by the Commissioner, and he had no occasion to decide it. But the proceedings before the Commissioner are still in the preliminary stage, and the contention now put forward by the petitioner will have to be decided by the Commissioner. It is not for me to decide at this stage what is really a jurisdictional issue. If the second respondent was not a " person employed " at all within the meaning of section 2 (12) there should be no need to go into the further question under section 4 (1) (*a*) whether he was " a person employed in a position of management "; and the questions whether the petitioner was a person employed, and if he was, whether he was employed in a position of management are primarily for the Tribunal below, that is, the Commissioner, to decide.

The learned counsel for the petitioner pointed out that the scheme underlying the Act marked out with reference to a given establishment, for example, the branch of the petitioner at Madras (1) the employer, (2) the persons employed and (3) from among the persons employed, persons employed in positions of management. Obviously, a statutory " employer " as such, even though he was an employee, cannot avail himself of the right of appeal under section 41 (2) of the Act. The learned counsel for the second respondent contended that the expression " general management or control of an establishment " which made a person an " employer " within the meaning of section 2 (5) of the Act was something very much less in the scope than the " position of management " referred to by section 4 (1) of the Act. If the scheme of the Act is as postulated by Mr. Thyagarajan, than an employee may become a statutory employer because he is acting in general management or control of the establishment, the person employed in a position of management in that establishment must be under that employer, and therefore the position of management contemplated by section 4 (1) (*a*) of the Act means something less, probably very much less, than the general management or control of an establishment provided for by section 2 (5) of the Act.

Since the jurisdiction of the Commissioner arises only if the second respondent is a person employed within the meaning of section 2 (12) of the Act, and that question has not been decided (the Commissioner, and possibly the parties also proceeded on the assumption that the second respondent was a person employed and therefore only the question, whether section 4 (1) (*a*) applied was considered), I set aside the order of the Commissioner, which means that the whole question will have to be gone into afresh by the Commissioner. I have only set out the contentions put forward for and against the plea that the second respondent is not a person employed at all, and I have refrained from deciding that question, because the primary duty of deciding that question is that of the Tribunal, that is, the Commissioner.

Petition allowed. Rule made absolute. No order as to costs.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Kadikachalam .. *Petitioner (Accused).*

Madras Prohibition Act (X of 1937), section 4 (1) (j)—Prosecution for possession of ganja—Investigating officer conducting prosecution—Validity.

Criminal Procedure Code (V of 1898), section 495 (4)—Disobedience of the provisions of—If renders the proceedings void.

Disobedience of the mandatory provisions of section 495 (4) of the Code of Criminal Procedure will render the entire proceedings void. Where in a prosecution under section 4 (1) (j) of the Madras Prohibition Act, the investigating officer conducts the prosecution the procedure being prohibited by the provisions of section 495 (4) of the Criminal Procedure Code the proceedings are null and void.

Obiter : However illegal the conduct of a prosecution by the investigating officer may be the case has to be considered by the evidence that has been tendered in Court. The evidence is not in any way vitiated because the prosecution is conducted by the investigating officer.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Tirupattur (North Arcot District), dated 19th November, 1954 and made in Criminal Appeal No. 49 of 1954 preferred against the order of the Court of the Stationary Sub-Magistrate of Tirupattur in C.C. No. 1867 of 1954.

R. Lajmi for the Petitioner.

Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

The Court made the following

ORDER.—The petitioner in this case has been convicted for an offence under section 4 (1) (*j*) of the Madras Prohibition Act, by the Sub-Magistrate of Tiruppattur for having been in possession of 16 gundumanis of ganja on 26th July, 1954. He was sentenced to pay a fine of Rs. 20 and the conviction and sentence were confirmed by the Sub-Divisional Magistrate, Tiruppattur.

That such ganja was recovered on the date from the house of the accused cannot be disputed on the facts as spoken to by the prosecution witnesses. But the point that is taken both in the Courts below and also repeated here is that the investigating officer in this case conducted the prosecution, and such a procedure being prohibited by the provisions of section 495 (4), Criminal Procedure Code, the proceedings of the Court are null and void. It is found by the first Court that the prosecution witnesses 1 and 2 were examined on 20th September, 1954 and that the Sub-Inspector who investigated the case conducted the trial on that date. Therefore the fact that this investigating officer conducted the prosecution in this case is not disputed.

The only question is whether on account of the provisions of clause (4) of section 495, Criminal Procedure Code, which states that :

"An officer of police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted,"

the entire proceedings before the Court become null and void. There is a decision by a Bench of this Court in *Sellamuthu Padayachi* v. *State*[1], where the question has been dealt with and exhaustively considered by Govinda Menon and Basheer Ahmed Sayeed, JJ. Therein the learned Judges, after referring to the various decisions of the Privy Council about the curability of the proceedings under section 537, Criminal Procedure Code, observed :

"There are certain positive and negative provisions in the statute, *e.g.*, section 342, Criminal Procedure Code, lays down that the magistrate or the Judges shall question the accused. It is a

th July, 1955.

directive to the Judge to do a certain act and if for any reason that provision is violated it has been held that the proceedings are illegal. Where there is an injunction in the Code prohibiting the Court from following a certain procedure, or allowing a certain state of things to be done, as is contained in section 495 (4), Criminal Procedure Code, then the disobedience of that provision will render the entire proceedings completely void. If the Code says that such and such a thing should not be done, and when that is done, we have necessarily to say that the act is illegal and *ultra vires* and the proceedings null and void."

These observations will apply to this case and since it is a decision of a Bench of this Court, it is binding on me. I must at the same time observe that speaking for myself, however illegal the conduct of the prosecution may be by the investigating officer, the case has to be considered by the evidence that has been tendered in Court. Can it be said that because the investigating officer examined the witnesses, their evidence which is given on oath has become null and void and is no evidence at all? Personally, I should think that their evidence tendered in Court is not in any way vitiated because the prosecution is conducted by the investigating officer. Though this is my view, I am not inclined to direct the papers to be placed before my Lord the Chief Justice for a reconsideration of the matter. Following the Bench decision, I set aside the conviction and sentence, and acquit the accused. The fine, if paid, will be refunded.

R.M. — *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

C. Kondayya Chetty .. *Petitioner**

v.

Sivasankara Naicker and others .. *Respondents.*

Madras Agriculturists Relief Act (IV of 1938), section 8, Explanation III—Scaling down of debts under—Renewal of debt—What amounts to.

There is a difference between a promissory note executed in renewal of a debt and a fresh note. Where after the commencement of the Madras Agriculturists Relief Act parties with the knowledge of the provisions of the Act clearly intended to effect a severance between one transaction and another, there is nothing in the Act which prevents this intention of the parties, expressed in unequivocal terms, being given effect to. Where the effect of a transaction is to discharge a promissory note as if by cash payment and the same or different amount of cash is taken on the same date as consideration for a new promissory note, legal effect should be given to the new transaction and it cannot be traced back into any earlier transactions which have been closed.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the Decree of the Court of District Munsif of Kancheepuram, dated 2nd January, 1952 and passed in S.C.S. No. 616 of 1951.

M. E. Rajagopalachari for Petitioner.

V. Natesan for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff is the petitioner. He seeks revision of the judgment of the learned District Munsif of Kancheepuram in S.C.S. No. 616 of 1951 brought by him for the recovery of Rs. 274-8-0 on foot of a promissory note executed in his favour by the 1st defendant in the case. The defence raised was that the debt was liable to be scaled down under Act IV of 1938 and if scaled down the plaintiff would be entitled to Rs. 15. The Court below has passed a decree for Rs. 15 accepting the contention of the defendants, instead of for the sum claimed.

The case raises for consideration the proper interpretation of the provisions of the Madras Agriculturists Relief Act (IV of 1938) in their application to the suit transaction. On the facts found the following were the transactions between the parties. On 19th June, 1927, the 1st defendant executed in favour of one Ragunayakulu an undivided brother of the plaintiff a promissory note for money borrowed. This was discharged by the execution of another note by the same promisor on 10th September, 1930, Exhibit B-1, in the case. In this renewed promissory note

*C.R.P. No. 870 of 1952. 21st April, 1955.

the amount due to the promisee was ascertained at Rs. 244 and the promisor undertook to pay this sum with interest at 18 per cent. per annum. There were several payments made in respect of this promissory note which was kept alive by successive endorsements until 10th September, 1939, when the note was discharged with an endorsement in these terms": " 1939-ம் வருஷம் செப்டம்பர் மாதம் 10-ம் தேதி இந்த பாண்டு வியவகாரப்படி க. சிவசங்கர நாயகரால் பைசல் ஆகி விட்டது".

On the same date a fresh promissory note Exhibit A-2 was executed in favour of the Ragunayakulu for a sum of Rs. 170 with interest at 6¼ per cent. per annum. Several payments were made to Ragunayakulu till 1947 when the note was endorsed in favour of the present plaintiff. Further payments were made to him and the note was finally discharged by the execution of a fresh promissory note on 30th April, 1948, carrying interest at 5½ per cent. per annum which is the note now in suit.

The defence of the 1st defendant, the executant of the note, and defendants 2 and 3 his undivided sons is that they are entitled to a scaling down of the debt evidenced by the promissory note, dated 30th April, 1948, by treating it as a renewal of the promissory note executed in favour of Ragunayakulu in 1927. The learned District Munsif accepted this defence and scaled down the amount due to Rs. 15.

The contentions raised on behalf of the plaintiff who is the petitioner here are two, *viz.*, (1) that he and Ragunayakulu were divided long before and that the execution of the note in his favour should therefore be deemed to be in favour of a new creditor and so not subject to scaling down by the application of Explanation III to section 8 of the Agriculturists Relief Act. The finding, however, of the Court below is that the debt represented by the promissory note was an asset of the joint family consisting of the plaintiff and Ragunayakulu, the learned District Munsif refusing to believe the evidence as to division adduced on behalf of the plaintiff. This being a pure question of fact it is not open to the petitioner to raise this issue in this Court.

The second point is that there is no legal connection between Exhibit B-1 and Exhibit A-2 so as to constitute the latter a renewal of the former and that if this were made out, the scaling down effected by the Court below was erroneous. I am of opinion that this contention of counsel is well founded. The executant of these several promissory notes knew the difference between a renewal and a fresh note. When Exhibit B-1 was executed in renewal of the note of 1927 proper words are used in order to indicate that the consideration for the promissory note of 1930 is the discharge of the earlier note. When we come to the discharge of Exhibit B-1, the endorsement on it is that it was discharged according to law. It may be noticed that the discharge was effected after the Agriculturists Relief Act came into force and on the same date Exhibit A-2 was executed reciting that cash consideration had been paid on that date for that note. It is therefore clear that the parties with knowledge of the provisions of the Agriculturists Relief Act clearly intended to effect a severance between Exhibit B-1 and the new promissory note Exhibit A-2. I do not see anything in the Agriculturists Relief Act which prevents this intention of the parties expressed in so unambiguous and unequivocal terms being given effect to. The effect of the transaction was really as if the promisor discharged Exhibit B-1 by a cash payment and received back the same or different amount of cash on the same date as consideration for the new transaction. I do not see why legal effect should not be given to this state of facts which the parties desired to bring about and succeeded in doing it. In my opinion, the suit promissory note can be traced only upto Exhibit A-2 and not beyond and in this view the suit ought to have been decreed for the sum claimed by the plaintiff.

The revision petition succeeds and the order of the Court below in set aside and the plaintiff's suit is decreed as prayed for. The petitioner is entitled to his costs in this Court.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

M. V. G. Baluswamy Iyer .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 10—Computation of income—Sale of cotton goods without permit as required by Madras Cotton Cloth and Apparel Export Control Order, 1946—Sale price shown as receipts in previous year—Goods seized at time of attempted export, prosecution and conviction—Order for sale of goods through Textile Commissioner, deduction 10 per cent. of sale proceeds to be given to Government and return of balance to assessee—Loss—If trading loss for which deduction is admissible.

For the year ending 31st March, 1947, the assessee, a firm carrying on business in the manufacture and sale of handloom cloth, obtained a permit (required by Madras Cotton Cloth and Apparel Export Control Order, 1946) to export 200 yards of cloth, but without regard to the limit of this permit he sold to a party in Amritsar 9762 yards of cloth at a sale price of Rs. 16,807. When the assessee attempted to export this quantity this was detected by the textile authorities and the goods were seized. The assessee was prosecuted, found guilty and convicted. In awarding the sentence the Magistrate took into account the fact that some of the partners of the firm had not taken any prominent part in the commission of the offence and therefore sentenced them to varying amounts of fine. In addition the 9762 yards of cloth seized was ordered to be confiscated and placed at the disposal of the Textile Commissioner to be disposed of by him. After deducting 10 per cent. of the sale price which will go to the Government the balance of the sale proceeds was to be returned to the accused's company.

In the sales in pursuance of the above order a sum of Rs. 7,962-10-9 was realised and after deducting the 10 per cent. and costs and expenses amounting in all to Rs. 875-12-9 the assessee was paid the balance of Rs. 7,086-14-0. The assessee who kept his accounts on the mercantile bais had calculated the profits of the previous year in which the sale to Amritsar merchant had been effected, by taking credit for a sum of Rs. 16,806-12-0 as representing the price of the goods sold. In the year of account in question, he credited himself with the moneys received from the Government and claimed the difference between Rs. 16,806-12-0 and what was paid to him namely Rs. 7,086-14-0 as the loss incurred by him in the accounting year. In the circumstances

Held : To the extent to which the Magistrate directed the confiscation to proceed, the loss was not a contemplable and so not a commercial loss in the course of trade. But the loss incurred in respect of the 9/10th of the sale proceeds of the goods would be a trading loss which the assessee can deduct in computing the income for the assessment year.

Case referred to the High Court by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-Tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) in 66 R.A. No. 448, Madras 'A' Bench of 1951-52 (I.T.A. No. 1711 of 1949-50, Assessment year, 1948-49) on its file for decision on the following questions of law, *viz.* :

"Whether the loss of Rs. 9,720 is an admissible deduction in computing the total income of the assessee for 1948-49 assessment year?"

K. Srinivasan, for Applicant.

C. S. Rama Rao Sahib, Special Counsel for the income-tax cases for Respondent.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This is a reference under section 66 (1) of the Income-tax Act. The question referred for our decision is :

"Whether the loss of Rs. 9,720 is an admissible deduction in computing the total income of the assessee for 1948-49 assessment year."

It is necessary to set out a few facts to understand the question at issue. The assessee is a firm carrying on business in the manufacture and sale of handloom cloth, and the present assessment proceedings relate to the assessment year 1948-49, the account year being first which ended on 31st March, 1948. On 14th March, 1946, the Government of Madras promulgated the Madras Cotton Cloth and Apparel

* Case Referred No. 8 of 1952. 27th April, 1955.

Export Control Order, 1946, under rule 81 (2) of the Defence of India Rules. Clause (4) of this Order provided :

"No person shall, on or after 19th February, 1946, transport or cause to be transported cloth or apparel from any place within the limits of the Province of Madras to any place in India outside the said limits except under and in accordance with the terms and conditions of a permit issued by the Commissioner under this Order."

Rule 7 provided that the holder of the permit issued under the order above mentioned should be bound by the provisions of the order and the conditions specified in the permit. Under rule 81 (4) of the Defence of India Rules any person contravening any order made under that rule was liable to imprisonment for a term which might extend to three years or with fine or with both and

" If the order so provides any Court trying such contravention may direct that any property in respect of which the Court is satisfied that the order has been contravened shall be forfeited to His Majesty."

Rule 10 of this order made provision for this forfeiture and confiscation in these terms :

"Any cloth or apparel in respect of which any of the provisions of this order has been contravened shall be liable to be forfeited to His Majesty and such forfeiture may be adjudged by a Collector on a claim under sub-rule 3 (*d*) or by a Court under sub-rule (4) of rule 81 of the Defence of India Rules."

For the year ending 31st March, 1947, the assessee obtained a permit to export 200 yards of cloth, but without regard to the limit of this permit he sold to a party in Amritsar 9762 yards of cloth at a sale price of Rs. 16,807. When the assessee attempted to export this quantity in contravention of his permit, this was detected by the textile authorities and the goods were seized. The assessee was prosecuted in the Court of the Chief Presidency Magistrate, Egmore. The Magistrate found the partners guilty of the offence with which they were charged and convicted them. In awarding the sentence the Magistrate took into account that fact that some of the partners of the firm had not taken any prominent part in the commission of the offence and therefore sentenced them to varying amounts of fine. In addition he passed an order in regard to the 9762 yards seized by the textile authorities in these terms :

" The cloth 9762 yards will be confiscated and placed at the disposal of the Provincial Textile Commissioner who will dispose of it in the manner he considers most appropriate and after deducting ten per cent. of the sale price which will go to the Government the balance of the sale proceeds will be returned to the accused's company.

In pursuance of this order of the Magistrate the Textile Commissioner utilised the services of the assessee to dispose of 99 pieces and himself effected a sale of the balance of 828 pieces. The total of the sums realised by the two sales thus effected was Rs. 7,962-10-9. The Government deducted therefrom 10 per cent. of the sale proceeds and costs and expenses of the sale amounting in all to Rs. 875-12-9 and paid the assessee the balance of Rs. 7,086-14-0. The assessee who kept his accounts on the mercantile basis had calculated the profits of the previous year in which the sale to Amritsar merchant had been effected, by taking credit for a sum of Rs. 16,806-12-0 as representing the price of goods sold. In the year of account with which this reference is concerned what the assessee did was this. He credited himself with the moneys received from the Government and claimed the difference between Rs. 16,806-12-0 and what was paid to him namely Rs. 7,086-14-0 as the loss incurred by him in the accounting year.

The Income-tax Officer held that the sales which resulted in the loss claimed were not sales in the usual course of business and that, as they were necessitated by reason of the illegal act of the assessee, the loss was inadmissible on the broad proposition, that it was the result of the illegal action of the assessee and so it could not be allowed. This was confirmed by the Appellate Assistant Commissioner on appeal. The Tribunal confirmed this disallowance on further appeal to them, for the reason that the loss, though connected with the trade was not incidental to it and that it was inseparable from the penalty which was imposed upon the assessee. They considered that the present case was concluded against the assessee

by the decision of this Court in *Mask* v. *Company* v. *Commissioner of Income-tax, Madras*[1]. The question for our consideration is whether this disallowance is correct.

Learned counsel for the assessee did not contest the correctness of the ruling of this Court in *Mask's case*[1] nor the reasoning upon which that decision was rested. The deduction, that was claimed in the *Mask's case*[1] and which was disallowed by this Court consisted of damages paid by the assessees for breach of contract by reason of their selling goods at lower rates than they were bound to sell. The damages payable were assessed by the Court at Rs. 5,000 and this with costs incurred by the assessees came to Rs. 6,203. In negativing the right of the assessees to deduct this under section 10 (2) (xv) of the Act this Court adopted the test laid down by Rowlatt, J., in *Inland Revenue Commissioners* v. *Warnes & Co.*,[2] that a loss connected with or arising out of a trade should amount to "a loss which is contemplable and in the nature of a commercial loss". In the case before Rowlatt, J., the assessees who were oil exporters were sued for a penalty under the Customs Consolidation Act, 1876, and that action was compounded on the assessees agreeing to pay a sum of £2000 and costs, and the question debated was whether this sum comprising the penalty and costs was a loss connected with or arising out of a trade or business. The learned Judge negatived the assessee's claim for deduction. This view of Rowlatt, J., was upheld by the Court of Appeal in *Inland Revenue Commissioners* v. *Von Glehn*[3] where also the deduction claimed was a penalty imposed upon the assessees for breach of orders and of a proclamation issued under statutory provisions. But the question still remains whether the entirety of the loss claimed by the assessee in the present case could be disallowed on the principle of *Mask's case*[1]. The problem that arises for our consideration is whether the principle that penalties imposed for breaches of the law are not "contemplable" losses and so not deductible could be extended to losses representing not the confiscation effected or the penalty or fine imposed but arising incidentally by the manner in which the confiscation was directed to be enforced.

The loss of Rs. 9,720 claimed, it would be seen, is computed on the basis of the difference between Rs. 16,807 the sale price credited in the account in the previous year and Rs. 7,087 the amount paid to the assessee by the Government. Even accepting the contention of the assessee, he would not be entitled to claim the entirety of this sum since it includes the diminution in value caused by the confiscation ordered. The sum representing the value of 1/10 confiscated and the costs incurred in effecting the sales came to Rs. 875-12-9 and the assessee would not be entitled to claim this as a loss. Learned counsel for the assessee did not dispute this position, that he would not in any event be entitled to claim more than Rs. 8,844-0-0 as loss.

The question is whether this loss of Rs. 8,844, which arose by reason of the sale of the 9/10th of the goods not ordered to be confiscated was a "contemplable loss" in the course of trade.

It is clear that neither the decision in *Mask's case*[1] nor that of Rowlatt, J., and of the Court of Appeal which were followed in *Mask's case*[1] touch the point arising in relation to the loss on the goods not confiscated, and this was not disputed by Mr. Rama Rao Saheb, learned counsel for the Commissioner and the matter has therefore to be determined on principle.

The first point urged by learned counsel for the Commissioner was that this loss resulted from a sale effected *in invitum* which could not be considered as a commercial transaction. In our opinion this is neither correct nor determinative of the question. In the first place what was the character in which the sales were effected; was it or was it not on behalf of the assessee? The 9/10 of the goods remained the property of the assessee, for the forfeiture or the confiscation did not

1. (1943) 2 M.L.J. 274.
2. (1919) 2 K.B 444.
3. (1920) 2 K. B. 553.

extend to them, and we have the further fact that a portion of these sales in respect of 99 pieces were effected by the assessee himself. This would point to the other sales also being on his account, but we do not propose to rest our decision on this basis.

Even conceding that the sales were effected by Government in their own right in pursuance of the orders of the Magistrate it does not necessarily follow that the sales might not result in a commercial loss. The more important aspect is to examine whether the money paid over to the assessee by the Government was or was not a business receipt or a receipt in the course of business. The assessee has so treated it and has computed his loss on that basis. If the argument advanced on behalf of the Commissioner were accepted, this receipt from the Provincial Textile Commissioner ought to be eliminated from the credit side in the assessee's books, and learned counsel for the commissioner frankly stated that this would be the logical result of the acceptance of his argument. We are, however, of the opinion that the receipt in question was a business receipt and was properly entered as such by the assessee. The nature of the receipt is dependent neither on the quantum nor on the financial result of the sale. Nor in the circumstances of this case is it affected by the fact that the sale effected was controlled by the Provincial Commissioner. If for instance prices had risen and the sale of 9/10 of the goods had resulted in a profit, the sale proceeds would have constituted a business receipt. The profit could not have been treated as a windfall resulting from the order of confiscation of 1/10 of the goods. That the assessee sustained a loss would not alter the nature of the receipt of the sale proceeds.

It would follow that there was a trading loss satisfying the tests formulated by learned counsel for the Commissioner. To the extent to which the Magistrate directed the confiscation to proceed, the loss was not contemplable and so not a commercial loss in the course of trade. The order of confiscation might have taken the form of a return to the assessee of 9/10 of his goods and a confiscation of the other 1/10. In such a case there would be no room for controversy that any loss incurred by the assessee in the sale of the 9/10 returned to him would be a trading loss. The form of the order of the Magistrate, *viz.*, a confiscation of a portion of the sale proceeds cannot make a difference in principle from a confiscation of a 1/10 of the goods *in specie*.

Mr. Rama Rao Saheb faintly suggested that the loss incurred by the assessee in the present case arose incidentally out of the enforcement of the penalty imposed by the Magistrate and should therefore be deemed part of the penalty. In other words, the suggestion was that the Magistrate must be deemed to have inflicted a further punishment by his direction as regards the manner in which the confiscation should be enforced in addition to the confiscation ordered. We are unable to consider this as any reasonable deduction from or construction of, the order of the Magistrate.

In our opinion the loss sustained by the assessee to the extent of Rs. 8,844-0-0 is a trading loss which is deductible in computing the income of the assessee for the assessment year. The reference is therefore answered in favour of the assessee to the extent stated above. The assessee is entitled to his costs. Counsel's fee Rs. 250.

K.S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

K. Govindan, Proprietor, Ramson & Co., Madras .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 24 (2)—Question whether a given business is separate or part of another business is one of fact—Finding of tribunal—Interference.

The question whether for purposes of section 24 (2) of the Incometax Act a given business is a separate business or is a part of the other business which the assessee carried on is essentially one of fact. *Soundara Pandia Nadar* v. *Commissioner of Income-tax, Madras*, (1950) 1 M.L.J. 779, relied on. If the finding of the Tribunal is one supported by evidence the sufficiency of that evidence or other evidence *contra* will not justify a refusal to accept the finding of fact arrived at by Tribunal.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (2) of the Indian Income-tax Act 1922 (Act, XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) in R.A. No. 812 of 1949-50 (I.T.A. No. 24 of 1948-49) (Assessment year 1947-48) on its file for decision on the following questions of law, *viz.*:

"Whether on the facts and in the circumstances of the case, the inference of the Tribunal that the transaction in shares was a separate business is justified in law ?"

T. V. Viswanatha Ayyar and *S. Narayanaswami* for Applicant.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The question referred to this Court under section 66 (2) of the Income-tax Act ran :

"Whether on the facts and in the circumstances of the case, the inference of the Tribunal that the transaction in shares was a separate business is justified in law."

The assessee carried on trade as a commission agent at Madras. Among the several trading activities of his, both in the relevant accounting year and the preceding years, was the purchase and sale of shares, which the Tribunal rightly characterised as a speculative business. He was not a share broker. For the accounting year preceding the assessment year 1947-1948, his profits from his transactions in shares was computed at Rs. 13,272. He had sustained losses in the years preceding the relevant accounting year. After adjusting the losses sustained towards the profits computed for assessment in the assessment year 1947-1948, there was still a balance of Rs. 8,321. The contention of the petitioner was that this sum of Rs. 8,321 should be adjusted towards his income from his other trading activities. That contention was negatived by the departmental authorities and by the Tribunal. The Tribunal held that under the provisions of section 24 (2) of the Income-tax Act, the assessee was not entitled to have this sum of Rs. 8,321 adjusted towards his other income, because his business in shares was a different business from that of the commission agency business which he had carried on. It is the correctness of this decision that has been challenged by the assessee before us.

It has been repeatedly laid down that the question whether for purposes of section 24 (2) of the Act a given business is a separate business or is a part of the other business which the assessee carried on is essentially one of fact. (See *Soundarapandia Nadar* v. *Commissioner of Income-tax, Madras*[1].) So, what we have to decide is whether the finding of the Tribunal, that the business that the assessee carried on in the purchase and sale of shares in the relevant accounting year was separate from his commission agency business, was one supported by the evidence placed before it. If there was evidence, the sufficiency of that evidence or other evidence *contra* will not justify a refusal to accept the finding of fact arrived at by the Tribunal.

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*Case Referred No. 19 of 1952. 31st March, 1955.

1. (1950) 1 M.L.J. 779.

Learned counsel for the assessee urged that the finding of the Tribunal that "there was no nexus, inter-connection, interlacing or inter-dependence" between his business as commission agent and his business in the purchase and sale of shares was really not supported by the evidence on record. No doubt, the Tribunal observed that the facts it accepted were, that the assessee had no separate establishment, no separate place of business and no separate finance for his trading activities in the purchase and sale of shares. The Tribunal also accepted that the finance for both these activities of the assessee were derived from the same pool, that there was no separate establishment or expenditure, all these being interwoven. That does not necessarily make the finding of fact, that there was no inter-dependence, one not based upon any evidence or contrary to the evidence which the Tribunal accepted. That the source, that is, the financial resources of the assessee, formed one common pool, from which he financed both sets of trading activities of his, would not necessarily lead to the inference that all through there was an inter-dependence or interlacing of the two sets of activities.

That the nature of the business which the assessee carried on in the purchase and sale of shares, that is, really dealing in futures, was a relevant factor to be taken into account in deciding whether it constituted an item of business distinct and separate from the commission agency business which he carried on, cannot be disputed. If the Tribunal attached more importance to that relevant factor than to the other relevant factors which also it considered, it cannot be said that there was no evidence before the Tribunal on which the Tribunal could come to a conclusion, that the trading activities of the assessee in the purchase and sale of shares for himself constituted a business separate from the commission agency business which he carried on. Learned counsel for the assessee could not deny that the nature of the business, in this case, distinct from the commission agency business, was a relevant factor to be taken into account in deciding whether the activities in purchase and sale of shares was a business separate from the commission agency business.

The question is answered in the affirmative and against the assessee. The assessee will pay the costs of the respondent of this reference. Counsel's fee Rs. 250.

K.S. — *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI NAYUDU.

Vallabhan Somayajipad .. *Petitioner**

v.

Kunhimammad and another .. *Respondents.*

Malabar Tenancy Act (XXXIII of 1951), section 54 (2)—Transaction to which Madras Tenants and Ryots Protection Act (XXIV of 1949) applies—Suit for redemption and recovery with arrears of michavaram—Deposit condition precedent to grant of stay.

A suit for redemption and recovery of arrears of michavaram and for possession of one item of property for the plaintiff's own *bona fide* cultivation is one to which section 54 (2) of Madras Act (XXXIII of 1951) applies. The transaction falls within the scope of Madras Act (XXIV of 1949) under which a tenant will not be entitled to stay under section 4 unless he deposits within two months into Court the arrears of rent claimed in the plaint or an amount equivalent to the rent for two years.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Walluvanad, dated 26th June, 1953 and made in O.S. No. 103 of 1953 staying the said suit under section 55 of Madras Act (XXXIII of 1951).

N. Sundara Ayyar for Petitioner.

Respondents not represented.

*Civil Revision Petition No. 1851 of 1953. 16th December, 1954.

The Court delivered the following

JUDGMENT.—The order sought to be revised is obviously wrong. The suit is for redemption and recovery with arrears of michavaram and for possession of one item of property for the plaintiff's own *bona fide* cultivation. The defendants who are in possession of the properties contended that they are entitled to the stay of the suit under section 55 of the Malabar Tenancy Act (Act XXXIII of 1951). The learned District Munsif accepted the contention and stayed the suit without liability on the part of the defendants to deposit any amount as and towards rent. The view taken by the learned District Munsif is that it is a case to which section 55 would apply and not section 54 (2). Section 54 (2) of Act XXXIII of 1951 provides :-

> "The Madras Tenants and Ryots Protection Act, 1949, in so far as it applies to tenants in the district of Malabar......shall stand repealed with effect from such date as the State Government may, by notification in the Fort St. George Gazette, appoint."

The question is whether the suit transaction is one which comes within the scope of Madras Act XXIV of 1949 (Madras Tenants and Ryots Protection Act). That Act was held to apply to the tenants of the Malabar district governed by the Malabar Tenancy Act and as such this is a case where the suit transaction is one to which Act XXIV of 1949 is applicable. Under Act XXIV of 1949 a tenant will not be entitled to stay under section 4 unless he deposits within two months into Court the arrears of rent claimed in the plaint or an amount equivalent to the rent for two years. The deposit is a condition precedent for the grant of stay under Act XXIV of 1949. The learned District Munsif therefore erred by granting stay without any deposit on the wrong assumption that section 54 (2) is not applicable but section 55 of Act XXXIII of 1951 applies. Section 55 of the Act of 1951 applies only to all suits, appeals and other proceedings which are not governed by section 54 (2). It has already been seen that section 54 (2) applies by reason of the Madras Tenants and Ryots Protection Act of 1949 to the suit transaction. The order of the lower Court is therefore erroneous and is set aside. But the petition has really become infructuous by reason of the stay either under Act XXIV of 1949 or Act XXXIII of 1951 having ceased on the passing of the Amending Act VII of 1954 to the Malabar Tenancy Act. This civil revision petition is therefore dismissed but the petitioner is entitled to his costs from the respondents.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Lakshmikutty Amma on behalf of her minor children and others .. *Petitioners**

v.

Raghavan Nair .. *Respondent.*

Criminal Procedure Code (V of 1898), section 488—Minor children being members of a Malabar Tarwad—Members executing karar (signed by mother of minors) saying that they had no right to enforce any right against the tarwad to get any income—Effect—Children cannot in the circumstances be said to be able to maintain themselves —Right to claim maintenance from father.

A child which possesses a legally enforceable right to maintenance from its mother's tarwad stands in the position of a child which possesses property in its own right and neither can be regarded as "unable to maintain itself" within the meaning of section 488. *Chantan* v. *Mathu*, (1915) I.L.R. 39 Mad. 957. But where the members of the tarwad had entered into a *karar* according to which no member mentioned in the *karar* has got any manner of right and authority under any circumstances either to claim or to get any income in accordance with the share of properties separately allotted to each member under the partition karar or to get any amount towards maintenance, a child cannot be said to be able to maintain itself by reason of its being a member of the tarwad. Accordingly an order for maintenance can be passed against the father.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court the Sub-Divisional

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*Cr.R.C. No. 67 of 1955. 29th April, 1955.
Cr.R.P. No. 65 of 1955.

Magistrate of Palghat, dated 6th December, 1954 and made in his Case No. 48 of 1954.

V. Balakrishna Eradi for Petitioner.

T. C. Raghavan for Respondent.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

The Court made the following

ORDER.—This is a revision against the order refusing maintenance to the two children who are the petitioners herein. On behalf of the children, the mother has filed the petition against the husband who is the respondent in this case. This is a case arising out of Marumakkathayam Law and under the law the husband is entitled to divorce a wife and the wife here has been divorced. But the fact that these two children have been born to the respondent is not disputed.

The next question is whether he is entitled to maintain them under section 488, Criminal Procedure Code. It is very vehemently contended by Mr. Raghavan for the Respondent that in *Chantan* v. *Mathu*[1], it has been held that when the child was interested in the tarwad properties, it is entitled to be maintained from the tarwad properties and the child cannot be said to be unable to maintain itself. Mr. Eradi appearing for the petitioner is relying on a decision of Sadasiva Iyer, J., In re *Parathy Valappil Moideen*[2]. This has been referred to in the Bench decision cited and has been overruled. According to the decision of the Bench, ability contemplated by the section applies as much to the case of the child which has got means of its own or which is entitled in law to be maintained and is being maintained by some other person as to a child who is able to live by his own exertions. Ayling, J., in supporting the judgment of Abdul Rahim, J., states that a child which possesses a legally enforceable right to maintenance from its mother's tarwad stands in the position of a child which possesses property in its own right and that neither can be regarded as 'unable to maintain itself' within the meaning of section 488. The view of the latter as contained in this Bench decision is binding on me but there are certain features in this case which compels me to follow the reasoning and at the same time, to award maintenance to the petitioners herein.

The members of the tarwad entered into a karar which has been filed as Exhibit P-1. According to the karar, no member mentioned in the karar has got any manner of right and authority under any circumstances either to claim or to get any income in accordance with the share of properties separately allotted to each member under this partition karar or to get any amount towards maintenance. The mother who is acting as guardian of these petitioners has signed this karar voluntarily and it is not suggested that any force was used or that the agreement has been entered into with fraudulent intention. But it is clear that but for the terms of the karar these children would normally be entitled to be maintained from the tarwad and also under the General Marumakkathayam Law under section 35 of the Marumakkathayam Act. But now by the terms of this karar no maintenance can be claimed. It is therefore, unable to maintain itself unless it is able to go to Court and get a declaration that this karar is not binding on the minor children. The minor children are therefore literally unable now to maintain themselves. In the circumstances of this case despite the fact that they are members of the tarwad in which they would be clearly entitled to be maintained, by virtue of the karar, their right is not enforceable without a suit to set aside the karar.

Now the income of the property as spoken to by the respondent is that he gets about Rs. 66 inclusive of the allowances and pensions and 200 paras of paddy, out of which he gives 100 paras to his father. So what is left is Rs. 66 and 100 paras of paddy. The maintenance claimed by the two children per month is Rs. 30. But it is represented by Mr. Raghavan appearing for the respondent that the second child is no more, that is after the filing of the revision it appears to have died. The other

1. (1915) I.L.R. 39 Mad. 957. 2. (1913) 25 M.L.J. 355.

side is not in a position to dispute the correctness of the statement made by Mr. Raghavan. However, as there is no evidence before me as to the death of the child, I must go only by the record. A sum of Rs. 30 for both the children is not unreasonable. I, therefore, order that a sum of Rs. 30 per month be paid to the mother towards the maintenance of the two children. But if one of them that is, the second child is no more as reported by Mr. Raghavan, then the respondent will pay Rs. 15 per month towards the maintenance of the first child. The revision is allowed. The maintenance will be paid from April, 1955.

K.S. *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Sri Akshayalingam Temple, Kivalur, by its paid trustee .. *Petitioner**

v.

A. P. Nagarathnam Iyer .. *Respondent.*

Madras Estates Land Act (I of 1908), schedule Part-A—Suit by landlord against ex-ryot for arrears of rent —Jurisdiction of Civil Court if excluded.

The definition of the word "ryot" in section 3 (15) of the Madras Estates Land Act does not take in ex-ryots. Where a landholder sues the defendant for arrears of rent after the defendant had relinquished possession and given up the currency of one year of lease still remaining unexpired, the suit is not one between a landholder and ryot so as to make it cognizable by the Revenue Court and exclude the jurisdiction of the Civil Court.

If the suit is by a landholder or an ex-landholder against an occupancy ryot for arrears of rent it must be filed only in the Revenue Court. If the suit is for arrears of rent against an ex-ryot but for reliefs which can be exclusively granted by the Revenue Court it must be filed in the Revenue Court. If the suit is for rent against an ex-ryot and for a relief which can be granted by the Civil Court, the suit not being exclusively triable by the Revenue Court, it ought to be instituted in the Civil Court.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of East Tanjore at Nagapattinam, dated 5th October, 1951 and made in Civil Miscellaneous Appeal No. 6 of 1951 (Original Suit No. 209 of 1949 on the file of the District Munsif of Nagapattinam.)

K. S. Naidu for Petitioner.

T. S. Kuppuswami Ayyar for Respondent.

The Court delivered the following

JUDGMENT.—This is a Civil Revision Petition filed against the order of the learned District Judge of Nagapattinam in Civil Miscellenaous Appeal No. 6 of 1951 confirming the order of the learned District Munsif of Nagapattinam in Original Suit No. 209 of 1949.

The facts are :—The plaintiff Sri Akshayalingaswami Temple at Kivalur is the owner of the suit lands. These suit lands were leased out in public auction in fasli 1356 for three years. The defendant Nagarathnam Ayyar became the highest bidder for 161 kalams. The plaintiff thereupon put the defendant in possession of the suit lands. The defendant cultivated the lands for faslis 1356 and 1357 and measured only 92 kalams and failed to measure the balance of 69 kalams in the first fasli and did not measure any paddy at all in fasli 1357. The lease was terminated. The defendant relinquished possession and gave up the currency of the one year of lease remaining still unexpired. A new tenant took the properties on lease and he is cultivating the lands. It is in these circumstances that the plaintiff temple has filed the suit for arrears of rent from the defendant in the District Munsif's Court of Nagapattinam.

A preliminary objection raised by the defendant was that the Civil Court had no jurisdiction to try the suit because the suit lands have been held in Original Suit No. 158 of 1948, District Munsif's Court, Nagapattinam and Appeal Suit No. 92 of 1949, District Court, East Tanjore, to come within the definition of an estate under the Madras Estates Land Act and that this defendant had occupancy

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* C. R. P. No. 1008 of 1952. 5th January, 1954.

rights in the same up to March—April 1948, when he is found to have relinquished the holding and surrendered possession and the new tenant had been inducted therein and has been holding the same ever since.

Both the Courts held that this suit is triable only by a Revenue Court and directed the return of the plaint for presentation to the proper Court. Hence this Civil Revision Petition by the Plaintiff Temple.

The general principle is that Civil Courts have jurisdiction to try all suits of a civil nature excepting the suits of which the cognizance is either expressly or impliedly barred. Their Lordships of the Privy Council have clearly laid down that section 9, Civil Procedure Code, lays down the general rule in favour of the jurisdiction of the Civil Court and the burden of proof is on the party who maintains an exception to the general rule : *Ramayya* v. *Lakshmiparayana*[1]. This High Court has held similarly in *Jagannathacharyulu* v. *Kutumbarayadu*[2].

I have just mentioned that the jurisdiction of Civil Courts can be expressly barred and the suits and applications which are triable only by the Collector and not by the Civil Court are specified in parts A and B of the schedule to the Madras Estates Land Act. So, unless we find that the jurisdiction is expressly conferred on the Revenue Court exclusively, the jurisdiction of the Civil Court cannot be said to have been taken away. Except to the extent to which it is expressly or by necessary implication taken away, the jurisdiction of the Civil Courts in all other matters remains unimpaired : *Rajah of Ramnad* v. *Venkataramier*[3].

The burden of proving that the jurisdiction of the Civil Court is ousted and that a particular proceeding is not cognizable by the Civil Court lies on the person who urges want of jurisdiction as just now pointed out and therefore in order to invoke the jurisdiction of the Revenue Court the fact to be proved in each case is that the proceeding is of the nature specified in the Schedule to the Act. Put in this form, the test seems to be a simple one. But in practice it is sometimes difficult to say whether a particular proceeding is or is not of that nature. The general test for determining the jurisdiction are : (i) the parties between whom the litigation takes place and (ii) the matter which is the subject of the litigation. If the relationship between the parties is not one of landholder and ryot, any proceeding between them cannot be cognizable by the Revenue Court. Coming to the second test, *viz.*, the matter which is the subject of the litigation, it has to be seen with reference to the scope of the suit and the reliefs claimed therein whether it is of the nature specified in the Schedule.

In regard to the first test the difficulty arises when the parties to the litigation, *viz.*, the landholder and the ryot, cease to bear that character by the time the suit comes to be filed.

This High Court has had to deal with cases where the landholder ceased to be a landholder by the time he files the suit for arrears of rent. It is now settled law of this Court that even a lessor whose lease had expired is a landholder for the purpose of recovering arrears of rent due to him. In a case under the Bengal Tenancy Act, the Privy Council held that the existence of the relationship of landlord and tenant is essential at the time when the remedy provided by the law is sought to be enforced : *Forbes* v. *Maharaj Bahadur Singh*[4]. This decision however proceeded on the definition of " landlord " under the Bengal Tenancy Act and the provisions of that Act. In *Sundaram Ayyar* v. *Kulathu Ayyar*[5], Spencer and Seshagiri Ayyar, JJ., were of opinion that an ex-lessor cannot bring the holding of a ryot to sale for an arrear due in respect of a year which fell within the period of the lease. Justice Spencer, held that an ex-lessor is not a landholder under section 3 (5). Justice Seshagiri Ayyar while holding that an ex-lessor to whom arrears are due is a landholder held that the law does not give him a first charge on the holding and that he cannot bring the holding

1. (1934) 67 M.L.J. 1 : L.R. 61 I.A. 177: I.L.R. 57 Mad. 443 (P.C.).
2. (1914) 27 M.L.J. 233.
3. (1922) 43 M.L.J. 264 : I.L.R. 45 Mad. 890 (F.B.).
4. (1914) 27 M.L.J. 4 : L.R. 41 I.A. 91 : I.L.R. 41 Cal. 928 (P.C.)
5. (1915) 29 M.L.J. 505 : I.L.R. 39 Mad. 1018.

to sale for the arrears due. In *Venkatalakshmamma* v. *Seethayya*[1], Sadasiva Ayyar and Spencer, JJ., held that a proprietor whose right as proprietor was sold in court-auction was not entitled to bring to sale the holding of a ryot for arrears due to him and such a remedy can be enforced only if the relationship of landlord and tenant subsisted at the time when the remedy is sought to be enforced. In *Venkatalakshmamma Garu* v. *Achi Reddi*[2], the point arose whether a person who was a landholder when the arrear accrued due continued to be a landholder even after his interest in the estate was sold. Justice Napier thought that the decision in *Forbes* v. *Maharaj Bahadur Singh*[3] applied and that he was not a landholder. Justice Krishnan did not agree with him and he opined that there was a marked difference between the Bengal Tenancy Act and the Estates Land Act and the decision in *Forbes* v. *Maharaj Bahadur Singh*[3] was comprehensive enough to include an ex-landholder as a person entitled to collect rents of an estate. The matter was ultimately referred to the Full Bench in *Venkatalakshmamma* v. *Achi Reddi*[2] consisting of Wallis C.J., Oldfield and Sadasiva Ayyar, JJ. The Full Bench held that an ex-landholder who has arrears to collect is a landholder and that the decision in *Forbes* v. *Maharaj Bahadur Singh*[3] was inapplicable, being a decision based on a question of some difficulty depending entirely on the terms of the Bengal Tenancy Act. Justice Sadasiva Ayyar stated that his own reliance on that decision in *Lakshmamma* v. *Seethayya*[1] was unsound. The Full Bench therefore held that a suit for arrears of rent was cognizable only by a revenue Court. In two later decisions in *Meenakshi Ammal* v. *Rangaswami Aiyar*[4] and *Md. Gosukani* v. *Md. Sekka Maracayar*[5] it was held also that a landholder who had transferred his interest as a landholder could bring the holding to sale under Chapter VI of the Act. These decisions, it will be noticed, have all proceeded on the footing of the definition of " landholder " in the Madras Estates Land Act. The term " landholder " includes every person entitled to collect the rent of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor-in-title or of any order of a competent Court or a provision of law.

But the definition of ' ryot ' precludes us from extending that term to take in an ex-ryot. According to the definition in section 3 (15) a ryot means,

"a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying to the landholder the rent which is legally due upon it."

The definition as originally framed contained the word " occupies." The Select Committee substituted the word " holds " for " occupies ". The object of the change was this. The Select Committee wanted to use a word which applies to cases of actual possession as well as possession through another. The word " occupies " indicates actual possession as will be seen from a reading of sections 45 and 163 but it seems to include also cases of possession through another as will be seen from the use of the word in section 4. Therefore, the Select Committee wanted to avoid the use of a word of doubtful signification and substituted the word " holds " which indicates both kinds of possession. In other words, the word " holds " precludes this term taking in ex-ryots. Therefore, it stands to common sense that on the date of the filing of this suit there was no relationship of landholder and ryot between the plaintiff-temple and the defendant Nagarathnam Ayyar. In other words, the first requisite for excluding the jurisdiction of the Civil Court is not present.

Point 2.—Coming to the second test the scope of the suit and the reliefs that could be asked for are different in a suit under section 77 of the Act and one filed for a money decree for arrears of rent in a Civil Court. The relief that can be granted by the Civil Court, *viz.*, money decree can be granted by the revenue Court but remedies that can be granted by the Revenue Court and those than can be obtained under the Estates Land Act as against a ryot cannot be granted by the Civil Court. Therefore, the landholder in the case of an ex-ryot, has got to choose his forum with regard to the scope of the suit and the reliefs that can be asked for by

1. (1920) 39 M.L.J. 30 : I.L.R. 43 Mad. 786.
2. (1921) 40 M.L.J. 319 : I.L.R. 44 Mad. 433 (F.B.).
3. (1914) 27 M.L.J. 4 : L.R. 41 I.A. 91 : I.L.R. 41 Cal. 928 (P.C.).
4. (1929) 59 M.L.J. 752.
5. (1935) 70 M.L.J. 146.

him and when those reliefs are such as can be obtained in a Civil Court and are not such as can be granted only by the Revenue Court and which would make the suit exclusively triable by the Revenue Court, there is no bar to the trial of the suit by the Civil Court and condition (ii) would not have been complied with. In other words, if the suit is by a landholder or an ex-landholder against an occupancy ryot for arrears of rent it must be filed only in the Revenue Court. If the suit is for arrears of rent against an ex-ryot but for reliefs which can be exclusively granted only by the Revenue Court it must be filed in the Revenue Court. If the suit is for rent against an ex-ryot and for a relief which can be granted by the Civil Court, the suit not being exclusively triable by the Revenue Court, it may be instituted in the Civil Court.

In *The Official Receiver, West Tanjore* v. *Sakkuwar Bai Ammal*[1], Panchapakesa Ayyar, J., held as follows :—

"A landholder who had obtained a decree against a tenant, under the Madras Estates Land Act, but has afterwards ceased to be his landholder, and the relationship between the landholder and tenant has ceased to exist, cannot execute the decree in a Revenue Court and realise his arrears in a revenue sale (which will be free of all encumbrances) and should execute it in a Civil Court.... . the policy of the Madras Estates Land Act is to give the landholder who is the present landholder in respect of his holding and ryot preference regarding the recovery of his rent free from all encumbrances and charges for arrears."

The amendments of sections 125 and 127 of the Madras Estates Land Act have not affected the position. *Sundaram Aiyar* v. *Kulathu Aiyar*[2], *Venkatalakshmamma* v. *Seethayya*[3], *Vyraperumal* v. *Alagappa*[4], and *Suryanarayana* v. *Ramachandrudu*[5] were relied on. The observations of Sadasiva Aiyar J., in *Venkatalakshmamma* v. *Achi Reddi*[6] were treated as *obiter* and were not followed.

Therefore, in these circumstances, as there is neither the relationship of landholder and ryot, and the scope of the suit and the reliefs asked for are not such as to make the suit fall exclusively under Part A of the Schedule to the Act, the jurisdiction of the Civil Court cannot be deemed to have been ousted.

The order of the lower Court is set aside and the learned District Munsif is directed to restore the suit to his file and dispose of it according to law on the merits. This Civil Revision Petition is allowed with costs throughout.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE UMAMAHESWARAM.

Varadarajulu Naidu and others .. *Appellants**

v.

Masaya Boyan .. *Respondent.*

Workmen's Compensation Act (VIII of 1923)—Workmen injured while travelling to workspot in a lorry provided by employer which was the only conveyance available—Injury if one arising in the course of employment.

For the purposes of workmen's compensation, a man's employment does not in general begin until he has reached the place where he is to work and does not continue after he has left it. Travelling to and from work is *prima facie* not within the course of the employment. But where an employer provided a lorry which was used by the workmen as the only conveyance to the workspot and a workman was injured while so travelling to the workspot the injury is one arising in the course of employment and the workman is entitled to compensation.

Case-law as to test of liability of employer in such a case considered.

Appeal under clause 15 of the Letters Patent against the order of Basheer Ahmed Sayeed, J., dated 2nd February, 1951, and made in Appeal Against Order No. 656 of 1948, preferred against the order of the Additional Commissioner for Workmen's Compensation, Madras, dated 9th November, 1948, and made in Workmen's Compensation Case No. 175 of 1947.

1. (1949) 2 M.L.J. 425.
2. (1915) 29 M.L.J. 505 : I.L.R. 39 Mad. 1018.
3. (1920) 39 M.L.J. 30 : I.L.R. 43 Mad. 786.
4. (1931) 62 M.L.J. 31 : I.L.R. 55 Mad. 468.
5. (1932) 37 L.W. 655.
6. (1921) 40 M.L.J. 319 : I.L.R. 44 Mad. 433.

* L.P.A. No. 21 of 1951. 14th April, 1954.

C. R. Rajagopalachari and *B. T. Sampath* for the Appellants.

N. V. B. Sankara Rao for the Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This appeal against the judgment of Basheer Ahmed Sayeed, J., arises under the Workmen's Compensation Act. The respondent filed an application before the Commissioner for workmen's compensation claiming a compensation of Rs. 2,106 on the following allegation, namely, that he was a workman employed by one V. Ramaswami Naidu, a contractor, in the month of November, 1946, and that he received a personal injury by accident, arising out of and in the course of his employment. The cause of the injury was the capsizing of the lorry belonging to the contractor and driven by his driver, when the said lorry was conveying the respondent and his fellow workmen to the workspot. The injury sustained by the respondent was the breaking of his left arm, which resulted eventually in the loss of his left arm. The said Ramaswami Naidu, the employer, died soon after the filing of the application and the reply statement was filed by his three sons as his legal representatives. They denied that the respondent was a workman within the meaning of that term as defined in the Act, and further denied that the injury was sustained in the course of his employment under their father. The Additional Commissioner for workmen's compensation made an enquiry and passed an order directing the legal representatives of the employer to pay the respondent compensation in a sum of Rs. 2,016. Against this order they filed an appeal to this Court under section 30 of the Act. That appeal was dismissed by Basheer Ahmed Sayeed, J. and this appeal under the Letters Patent is against his judgment.

Learned Counsel for the appellants, the legal representatives of the employer, pressed before us the two main pleas mentioned above. His first contention was that the respondent was not a workman. In so far as it is material for this appeal, the definition of 'workman' in section 2 (1) (n) of the Act is as follows :—

> " Workman means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is.... employed....on monthly wages not exceeding rupees four hundred, in any such capacity as is specified in Schedule II."

Schedule II contains a list of persons, who are included in the definition of workmen. Among them are persons, who are "employed in the construction, repair, or demolition of any road, bridge or tunnel". Clause (viii) (*c*).

The following facts appear to be beyond dispute. The appellant's father was a contractor for the formation of a road. The respondent was employed as a coolie maistri under him on Rs. 2-8-0 per day. The respondent brought four coolies with him, and along with them he was engaged in breaking stones. The respondent was being paid a lump sum of money every fortnight. He was a regular and continuous worker and not a causal labourer. On these facts, the Commissioner was right in holding that the respondent was a workmen within the meaning of the Act. Basheer Ahmed Sayeed, J., was also of the same view.

The next contention certainly requires greater consideration. The facts relevant for this are those set out by Basheer Ahmed Sayeed, J. :

> " The appellants have been contractors for the formation of roads under the Government in the district of Coimbatore. The workspot is somewhere near the village called Siruvani but the workmen were being transported from another village which was nearly seven miles away from the workspot. Every day a lorry of the appellants used to go to the village, where the workmen were coming from, take them in the lorry and drop them at the workspot and in the evening after the work was over, the lorry would carry the workmen back to the village."

It was on one such trip from the village to the workspot that the lorry capsized and the respondent suffered the injury. The following statements of the respondent in his deposition may be taken as beyond dispute :—

> " The workspot was 7 miles from Semmattu. We used to go by the contractor's lorry from my residence. It used to come at 7 or 8 A.M. to Eruttupallam, a spot near my village, and from there the lorry will take us to the workspot. This was done every morning. Every evening, the lorry used to take us back to our houses at Eruttupallam. The driver was paid by the contractor. About 60 or 70

workmen of the contractor used to get in the lorry and go to the workspot. If the lorry does not come on any day, we cannot go to the workspot. We also paid for petrol charges, anna one per head. There was no other transport available then. To foot the distance will cause undue delay."

On these facts the Commissioner held that the accident did arise out of and in the course of his employment. He reached this conclusion on the following reasoning :- It was clear from the evidence that there was no other conveyance by which all the workers could reach their workspot except by lorry. The lorry was provided and used as the only conveyance to the workspot for all the workers working under the contractor. The lorry belonged to the contractor. The legal principle which was applied was that, when a workmen was using the means of transport in the discharge of his contractual duty owed to his employer either by reason of express or implied directions given by the employer or by reason of proved necessity to use the provided means of transport as being the only means for passing to and from his place of work, he will have to be treated as on duty. As, in this case, the evidence was clear that there was no means of conveyance to and from the workspot other than the lorry provided by the employer, the commissioner held that the accident must be deemed to have occurred out of and in the course of the employment.

Before the learned Judge, Basheer Ahmed Sayeed, J., the legal principle was more fully discussed with reference to authorities, but he also came to the same conclusion as that arrived at by the Commissioner. The contention on behalf of the appellants is that the learned Judge had not properly applied the correct test as laid down by leading decisions of the House of Lords in England.

It may be taken as well established that for the purposes of workmen's compensation, a man's employment does not in general begin until he has reached the place where he is to work and does not continue after he has left it. As Finlay, L.J., said in *Netherton* v. *Coles*[1].

"Travelling to and from work is *prima facie* not within the course of the employment".

Willis states the rule thus in his Workmen's Compensation, thirty-sixth edition, at page 24

"As a general rule a man's employment does not begin until he has reached the place where he has to work or the ambit, scope, or scene of his duty, and it does not continue after he has left it, and the periods of going and returning are generally excluded."

The question how far this rule does not apply when a workman uses means of transport belonging to or provided by the employer to and from the work has been the subject of controversy, on which there was a difference of judicial opinion in England. But it has been generally assumed that the decision of the House of Lords in *St. Helens Colliery Co.* v. *Hewitson*[2], has finally decided the test to be applied in cases where the workman sustains an accident in coming to or leaving the place of his employment. In that case, a Workman employed at a colliery was injured in a railway accident while travelling in a special colliers' train from his work to his home. By an agreement between the colliery company and the railway company, the latter agreed to provide special trains for the conveyance of the colliery workmen to and from the colliery and the place of the residence of the workmen. The colliery company provided each workman with a pass and charging him with a sum representing less than the full amount of the agreed fare, and this sum was deducted from the weekly wages. It was held by the House of Lords that the injury did not arise in the course of employment within the meaning of the Workmen's Compensation Act, 1906. The County Court Judge found as a fact that it was an implied term of the contract of service that the trains should be provided by the employers and that the miners should have the right, if not the obligation, to travel to and fro. He also thought that it was obligatory on a workman who lived six-miles away and who had to be at his work at 5-45 A.M. to use the train if he wished to continue in the employer's service. He, therefore, thought that in law the employment began when the man entered the train and ceased when he left it. The House of Lords by a majority decided that there being no obligation on the workman to use the train, the injury did not arise in the course of employment. Lord Buckmaster

1. (1945) 1 A.E.R. 227. 2. (1924) A.C. 59.

understood the finding of the County Court Judge to imply that while the workman had undoubtedly the right to travel by the train he was not directed to travel by such a train and had he found it convenient or desirable he could have travelled by other means. The noble Lord found himself unable to construe the words "in the course of the employment" as to include in their operation the right of travelling by train which the workman was under no obligation and no proved necessity to use. Lord Atkinson observed thus.:

" If each collier was bound by his contract to travel to his employer's colliery by this provided train, then *cadit quaestio*. The collier would be in the course of his employment when he was doing a thing he was bound by his contract of service to do. But the conferring upon a collier of a privilege which he is free to avail himself of or not, would, *prima facie*, impose no duty whatever upon him to use it."

In special circumstances, however, such an obligation might be implied :

" It must, however, be borne in mind that if the physical features of the locality be such that the means of transit offered by the employer are the only means of transit available to transport the workman to his work, there may, in the workman's contract of service, be implied a term that there was an obligation on the employer to provide such means and a reciprocal obligation on the workman to avail himself of them ".

The case of *Richards* v. *Morris*[1], was an illustration of this principle. In that case, a workman was employed on an island at yearly wages and board and loging, and it was part of his contract of service that he should be allowed at reasonable time to cross to the main land to visit his wife and be taken across in his employer's boat for that purpose. He met with an accident whilst in the boat on his way home from the effect of which he died. It was held by the Court of Appeal that the accident arose out of as well as in the course of his employment. It appeared from the evidence that the employer's boat was the only one on the island and the boat was taken out simply for the purpose of taking him across. It was in these circumstances that it was so held.

Lord Atkinson formulated the test thus in the *Hewitson's case*[2]:

" A workman is acting in the course of his employment when he is doing something in discharge of a duty to his employer, directly or indirectly, imposed upon him by his contract of service."

The noble Lord reviewed the evidence in the case and summed up the result of the evidence thus :

" In my view the evidence in this case does not establish that the colliery company was bound to provide these trains for their workmen to carry them to their work in the colliery. Nor that the workmen were on their side bound to travel to their work by those trains ; nor yet that there were no other means reasonably available by which they could travel to their work."

The conclusion drawn by him from the evidence was that the workmen in travelling to or from the colliery in the trains were not discharging any duty to their employers which their contracts of service bound them to discharge.

The decision of the House of Lords has been taken to have laid down the law on the point. The *Taylor* v. *Sir R. McAlpine & Sons, & Southern Railway Co.*,[3] (third parties) Sir Ernest Pollock, M. R., says, referring to the case,

" In that case it has been clearly explained and laid down that where it is no part of the duty of the workman as a part of his contract with the employer to use the facilities provided for his transport, where there is no obligation or no duty on the part of the workman, it cannot be charged as against the employer that what happened at the time when the workman was making use of facilities afforded to him that the employer is responsible for an injury incurred by the workman during the use of those facilities but before the actual employment began."

Warrington, L.J., developed the test of obligation on the part of the workman to use the facility afforded by the employer in the following telling manner :—

" More than that, supposing the workman had not made use of the train but gone to work in some other way the employer could not even have recovered nominal damages as for breach of contract........Supposing he picked up a motor-car, the chauffeur of which was a friend of his and he said, "Let me run you down there", would he have broken an obligation with the employers ? Clearly not."

In *Newton* v. *Guest, Keen, & Nettlefolds, Limited*[4], the question was again discussed by the House of Lords. The appellant there was employed by the respondents as a

1. (1915) 1 K.B. 221.
2. (1924) A.C. 59.
3. (1924) 130 L.T.R. 793.
4. (1926) 135 L.T.R. 386.

colliery labourer. The colliery was 3¼ miles from his home on a mountain 1,240 feet high and the road to it was an exposed mountain road. The first shift at the colliery was at 7 A.M., and the respondents, to enable them to form so early a shift, provided trains by which the miners could travel to the colliery. The appellant joined the train about 5-30 A.M., at the platform, and to do so had to cross the line, and whilst doing so, was knocked down by a light engine and received injuries resulting in the amputation of his left leg. The County Court Judge found that the only practicable and reasonable means for the miners to get to and from their work was by the trains so provided, and therefore the accident arose out of and in the course of the employment. But the House of Lords, affirming the Court of Appeal, held that there was no evidence upon which it could be found that it was part of the workman's contract that he should use the train whenever he went to or from the mine or that it was his duty to use the means of access so provided for him. Lord Cave, L.C., remarked that if on any occasion the workman had declined to travel by the train, it was impossible to say that he would have been committing a breach of his contract. Lord Sumner pointed out that if, on a brilliant moonlight morning in winter, some young fellows chose to walk or bicycle to their work, they would not have been held to be guilty of breach of contract. Lord Phillimore put it thus :

> " It may be that the colliery owners are bound by the terms of that agreement to provide this train, that they have contracted to provide this train ; but it does not follow that, if they have, the miners have contracted to avail themselves of it, and I do not think they ever did. I do not think it was the duty of any single miner to use this train unless it suited his purpose."

In *Weaver* v. *Tredegar Iron and Coal Co.*[1], a full discussion is found of all the authorities on the point. In that case, a collier was injured when trying to board a train. The train was owned by a railway company, but the platform was situated by the side of a railway line which ran through the colliery premises and was accessible from the colliery premises only. The employees of the colliery used it under an arrangement between their employers and the company whereby specified trains were stopped at the platform to take the men to and from their homes at a reduced fare, which was deducted by the employers from the men's wages. The men were free to go home by means of the main road which ran past the colliery, but in practice nearly every employee used the railway. It was held by the House of Lords that, as the workman was making use of facilities provided by his employers for leaving the place of employment, which he had not left at the time of the accident, and as the duty to leave the employment in a permitted manner had not been completed, the accident arose in the course of and out of the employment, and he was entitled to compensation. The test as laid down in *Hewitson's case*[2], was again reiterated, and on the facts of the case it was held that the workman had not actually left the employment when the accident occurred. It is sufficient for the purpose of this case to refer to the following commentary of Lord Wright on *Hewitson's case*[2]. Referring to the argument in that case, the noble Lord Wright said :

> " He was on his way home on a public conveyance. He had no greater right to claim that his employment was continuing than if he had been bicycling home on the public street when the accident happened. The fact that the colliery had arranged with the railway company to provide a special train for the men did not extend the course of the employment, as it would have done if the men were bound by their contract of employment to use the train, or, it may be, if there was no other possible way for the men to get to and from their home, or from or to the colliery as was the case in *Richards* v. *Morris*.[3]"

Though Viscount Maugham dissented from the majority in the application of the rule in *Hewitson's case*[2] to the facts before them, he was in general agreement with the principle laid down therein. Referring to the later case in *Newton* v. *Guest, Keen, & Nettlefolds, Limited*[4], he summed up the position therein in the following words :—

> " ....the Court of Appeal and this House decided on the authority of *Hewitson's case*[2] that there was no duty or proved necessity for the applicant to travel to his work by the train provided, and that the accident, therefore did not arise out of and in the course of his employment."

1. (1940) A.C. 955.
2. (1924) A.C. 59.
3. (1915) 1 K.B. 221,
4. (1926) 135 L.T.R. 386.

Learned counsel for the appellants referred us to the decision of the Patna High Court in *Becharam Mallik* v. *The Khas Joyrampur Colliery.*[1] In that case, a workman employed at a colliery was injured in an accident while travelling in a motor omnibus provided by his employers. It was found that though there was an implied agreement that the colliery should provide omnibuses for the miners to take them to and from their homes, there was no obligation on the part of the miners to travel by the omnibus provided and they were free to go to the colliery to work by whatever means they chose. It appeared, however, that the motor omnibus provided by the colliery was the only reasonable and feasible means of transport available to the worker. It was held that the workman was not injured as a result of an accident arising in the course of his employment and was therefore not entitled to compensation. The learned Judges followed the rule laid down in *Hewitson's case*[2], and *Newton's case.*[3]

> " If the workman was under no obligation to use the lorry but could use it or not as he felt inclined, then he was under no obligation to his employer to use the conveyance and, therefore, he could not be said to be acting in the course of his employment when he was injured."

There can be no doubt that the correct rule is that laid down by the House of Lords in *Hewitson's case*[2], a rule which has been affirmed in subsequent decisions of the House of Lords.

The question still remains whether and as to what extent the rule applies to the facts of the present case. On this point, we cannot lightly set aside the findings of the Commissioner and the learned Judge of this Court who heard the appeal, based as they are on the evidence on record. The Commissioner found that not only was the lorry provided by the employer the most reasonable and feasible means of transport, but also that there was no other means of conveyance to and from the workspot being a hilly tract. P.W. 1 stated :

> " If the lorry does not come on any day, we cannot go to the workspot."

Basheer Ahmed Sayeed, J., was of the same view. On this concurrent finding, we are of opinion that the present case falls within the scope of the exception to the general rule laid down in *Hewitson's case*[2], namely, that in the circumstances it may be implied that there was an obligation on the part of the employer to provide the transport, and there was equally an obligation on the part of the workman to make use of the transport which was not merely the only reasonable means but also the only means of going to the workspot. The case will be more or less analogous to the case of *Richards* v. *Morris*[4].

In this view, we agree with the learned Judge and the Commisioner for workmen's compensation and dismiss the appeal with costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

A. K. Munuswamy Mudaliar & Company, Tannery, Ranipet .. *Petitioner**

v.

The State of Madras represented by the Commercial Tax Officer, North Arcot at Vellore .. *Respondent.*

Madras General Sales Tax Act (IX of 1939) *and Turnover and Assessment Rules, Rule* 16 (3)—*Construction of—Single point taxation of hides and skins—Tax liability—When arises—'Tax leviable under the Act'—Meaning of.*

Under the Madras General Sales Tax Act, the general scheme of taxation is a multi-point one and all commodities, except those mentioned in clauses (*ii*), (*iv*) and (*vi*) of section 5, are liable to

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1. (1940) I.L.R. 19 Pat. 514.
2. (1924) A.C. 59.
3. (1926) 135 L.T.R. 386.
4. (1951) 1 K.B. 221.

*T.R.C. No. 38 of 1954. 18th April, 1955.

multi-point taxation and the tax liability is imposed automatically under section 3 (1) and section 3 (5) subject to any exceptions that might have been provided by the Act or the Rules. But in the case of commodities like hides and skins in respect of which a tax can be levied only at a single point to be fixed by the rules under section 5 (*vi*), there can be no tax liability accruing until and unless the rules prescribe the single point for taxation. Rule 4 (1) does not by itself impose any tax liability in the case of commodities which are liable to tax only at a single point. That rule only provides that as and when the single point is fixed in respect of certain commodities or transactions falling within the Act, the seller will be liable on the turnover and not the buyer. The theory that under the Madras General Sales Tax Act the transactions of sale in hides and skins are intended to bear the tax at some one stage and that for that reason if the goods have not borne tax at an earlier stage and are not likely to bear the tax at subsequent stages, a tax liability accrues on any particular sale is fallacious. The essence of a single point taxation consists in the fixation of a single point either by the Act itself or under the rule-making power if the Act so prescribes. Such single point taxation in respect of hides and skins is to be gathered only from rule 16 of the Turnover and Assessment Rules.

The term 'tannery' in sub-rule (3) of Rule 16 of the Turnover and Assessment Rules means a tanner as under the Act there is no tax payable by a tannery as such. The normal and grammatical meaning of the expression 'paid the tax leviable under the Act' in sub-rule (3) of rule 16 of the Turnover and Assessment Rules would be 'paid such tax if any as has been levied under the Act.' Where no tax is payable under the Act on the purchase made by a tanner either because the sale or transaction takes place outside the State and so a tax on it is not within the legislative competence because the Sale Tax Act exempts such transactions of sale or purchase from tax, the tanner cannot be said to have not paid 'the tax leviable under the Act.'

Being a taxing enactment it must be construed strictly and no tax liability can be imposed if there are no express words to that effect. If a licensed tanner has paid such tax as was payable by him on his purchase turnover the words of sub-rule (3) of rule 16 would confer upon him exemption from payment of tax on his sale turnover. Any other interpretation of the sub-rule will render the rule invalid as being in contravention of the specific statutory provision in section 5 (*vi*) of the Act.

Petition under section 12-B (1) of the Madras General Sales Tax Act praying the High Court to revise the order of the Sales-Tax Appellate Tribunal, Madras, dated 29th December, 1953, made in T.A. No. 945 of 1953 preferred against the order of the Commercial Tax Officer, North Arcot, dated 29th May, 1953 and made in Appeal No. 206 of 1953-54 (L. 29/51-52, dated 29th March, 1953 of D.C.T.O., Arcot).

K. V. Venkatasubramania Aiyar and *T. T. Srinivasan* for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*) instructed by the Assistant Government-Pleader (*K. Veeraswami*) for Respondent.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This is a revision by the assessees against an order of the Sales Tax Appellate Tribunal and it relates to the assessment year 1951-52. This petition raises for consideration the proper construction of rule 16 (3) of the Turnover and Assessment Rules under the Madras General Sales Tax Act.

The assessees were licensed tanners and dealers in hides and skins. For the assessment year the assessees returned a gross turnover of Rs. 2,55,181-14-6 but claimed that no part of this turnover was liable to be taxed. The Deputy Commercial Tax Officer examined and scrutinised the accounts of the assessees and found that during this year they had purchased 17,097 raw hides and had sold out of their tannery 26,882½ tanned hides for Rs. 4,32,278-10-5. The assessing authority found that the assessees had effected the purchase of these raw hides outside the State with the result that no tax was payable on the purchase price of this quantity of untanned hides and skins under rule 16 (2). He however held that when these goods were tanned in the assessee's tannery and were sold by them as tanned hides and skins, the assessees were bound to pay sales tax on their sale turnover on ground that they had not paid sales tax at the stage of their purchase. On the basis of the figures furnished and the price realised at the sales, the Officer worked out the sale value of the hides tanned out of the 17,097 raw hides which had been purchased by the assessees, at Rs. 2,77,006-1-0 and levied assessment accordingly. In doing so he overruled the objection raised by the assessees that on the language of rule 16 (3) of the Turnover and Assessment Rules they were exempt from payment of any tax on their sale turnover. There was an appeal against this order of

assessment to the Commercial Tax Officer but this was dismissed. A further appeal to the Sales Tax Appellate Tribunal was also dismissed. Hence this revision.

To start with, it might be mentioned that under section 5 (vi) of the Act, hides and skins—whether tanned or untanned—are laible to taxation only "at such single point in the series of sales by successive dealers as may be prescribed." Further under the terms of section 3 (5) of the Act, rules have to prescribe whether in respect of sales with reference to any particular commodity it is the seller or the buyer that is liable to pay the tax. The prescription by rule under the above provisions in regard to dealings in hides and skins is to be found in rules 4, 15 and 16 which run thus :

"4 (1) : Save as provided in sub-rule (2) the gross turnover of a dealer for the purposes of these rules shall be the amount for which goods are sold by the dealer.

(2) In the case of the undermentioned goods the gross turnover of a dealer for the purposes of these rules shall be the amount for which the goods are bought by the dealer.

(*a*) groundnut.

(*b*) cashew, cotton including kapas bought by spinning mill or by dealer who exports outside the State.

(*c*) untanned hides and skins bought by a licensed tanner in the State, and

(*d*) untanned hides and skins exported outside the State by a licensed dealer in hides or skins

(3) ....

Rule 15 (1) : Rules 6 to 13 shall not apply to licensed tanners and other licensed dealers in hides or skins in respect of their dealings in hides or skins ; but the provisions of this and the following rules shall apply to them in respect of such dealings.

(2) Every tanner or other dealer in hides or skins whose net turnover for a year has been or is expected to be not less than Rs. 10,000 shall submit to the assessing authority, on or before the last day of November, 1939, (or the 25th day of the month following that in which he commences business) and thereafter on or before the 25th day of every month, a return in Form A-4 or, as the case may be in Form A-5 showing his transactions for the preceding month. Along with the return, he shall also submit a receipt from a Government treasury or a crossed cheque in favour of the assessing authority for the full amount of the tax payable for the month to which the return relates.

(3) On receipt of the return and of the receipt or crossed cheque referred to in sub-rule (2) the assessing authority shall, after such scrutiny of the accounts and after making such enquiry as he considers necessary, satisfy himself that the return is correct and complete and that the correct amount of tax has been paid.

(4) If no return is submitted in respect of any month before the last day of the succeeding month or if the return is submitted without a receipt or crossed cheque for the full amount of the tax or if the return submitted appears to be incorrect or incomplete, the assessing authority shall, after making such inquiry as he considers necessary, and after giving the tanner or other dealer an opportunity as prescribed in rule 9 of proving the correctness and completeness of his return where one has been submitted, determine the turnover, to the best of his judgment and assess the tax payable for the month and shall serve upon the tanner or other dealer a notice in Form B-1 and the tanner or other dealer shall pay the sum demanded at the time and in the manner specified in the notice.

(5) If at the time of the receipt of the return referred to in sub-rule (3) or of the issue of the notice in Form B-1 referred to in sub-rule (4) or subsequently, it is found that the amount paid by the tanner or other dealer is in excess of the correct tax payable, such excess shall, at the option of the tanner or other dealer, be credited towards the tax, if any, payable by him for succeeding months or be refunded to him.

16 (1) : In the case of hides and skins the tax payable under section 3 (1) shall be levied in accordance with the provisions of this rule.

(2) No tax shall be levied on the sale of untanned hides or skins by a licensed dealer in hides or skins except at the stage at which such hides or skins are sold to a tanner in the State or are sold for export outside the State.

(i) In the case of all untanned hides or skins sold to a tanner in the State, the tax shall be levied from the tanner on the amount for which the hides or skins are bought by him.

(ii) In the case of all untanned hides or skins which are not sold to a tanner in the State but are exported outside the State, the tax shall be levied from the dealer who was the last dealer not exempt from the taxation under section 3 (3) who buys them in the State on the amount for which they were bought by him.

(3) Sales by licensed dealers of hides or skins which have been tanned within the State shall be exempt from taxation provided that the hides or skins have been tanned in a tannery which has paid the tax leviable under the Act. If such hides or skins have been tanned in a tannery which is exempt from taxation under section 3 (3), the sale of such hides or skins shall be liable to taxation as under the next sub-rule below dealing with hides or skins tanned outside the State.

(4) Sales by licensed dealers in hides or skins which have been tanned outside the State shall be exempt from taxation except at the stage of sale by the dealer who is the first dealer not exempt

from taxation under section 3 (3) who sells them within the State. The tax shall be levied from such dealer on the amount for which he sells such hides or skins.

(5) Sale of hides or skins by dealers other than licensed dealers in hides or skins shall, subject to the provisions of section 3, be liable to taxation on each occasion of sale."

In the light of these relevant provisions we might set out the respective contentions raised on behalf of the assessees and on behalf of the State as regards the tax liability on the assessees' sale turnover of tanned hides.

The argument urged on behalf of the assessees is this : Under section 5 (vi) of the Act, hides and skins tanned or untanned are subject to tax only at such single point as may be prescribed. The assessees are licensed tanners and in their case tax may be levied upon them as a buyer only in respect of untanned hides purchased by them within the State under rule 4 (2) (*c*) of the Turnover and Assessment Rules. In the case of licensed tanners brought within rule 4 (2) they could not also be brought within rule 4 (1) in respect of any of their transactions. The only provision in the Act for the fixation of a single point in dealings in tanned hides and skins by licensed tanners is to be found in rule 16 (3) under which all sales of tanned hides and skins are exempted from tax provided the tax payable by the tanners is paid and the tanner is not exempted under section 3 (3) of the Act by having an annual turnover of less than Rs. 10,000. The term "tannery" in the first sentence of sub-rule (3) of rule 16 must be understood as a "tanner" since under the Madras General Sales Tax Act no tax is payable by a tannery as such but only by tanners on their dealings ; further the words which follow in that sentence "which has paid the tax leviable under the Act" have to be understood in the normal sense as meaning " the tax if payable has been paid. " Where no tax is payable under the Act on the purchase made by a tanner either because the sale transaction takes place outside the State and so a tax on it is not within legislative competence under the Government of India Act, 1935 or the Constitution of India or because the Madras General Sales Tax Act exempts such transactions of sale or purchase from tax, the tanner on whose purchase no tax is leviable cannot be said to have "not paid the tax leviable under the Act" so as to bring him within the class of people who are subject to tax on the turnover of the tanned hides and skins sold by them. It is further urged that the tax levied in the present case cannot be sustained unless rule 16 (3) were read as "provided that the hides and skins have been tanned by a tanner who is liable to tax on the purchase turnover of the untanned hides and skins and has paid the tax leviable on it," and that there is no principle or authority by which words could be read as these into a taxing enactment as the Madras General Sales Tax Act.

On the other hand, the contention of the learned Advocate-General who appeared on behalf of the State was briefly this : The scheme and purpose of the Madras General Sales Tax Act is to inpose a tax on each transaction of sale which occurs within the State : in other words the general rule is multiple points taxation. This is however subject to an exception in the case of dealings in hides and skins by reason of the express provision as to single point taxation under section 5 (*vi*). The principle underlying the Act is that in the case of hides and skins where transactions have taken place in these commodities within the State they are intended to be subjected to tax at one stage. The scheme of the rules and the forms prescribed is to keep track of the particular goods, trace them through the transactions of successive dealers and impose a tax on them at some single point. The relevant forms of returns prescribed under the Act to be submitted by licensed dealers achieve this purpose. Form A-5 is that prescribed for the return of turnover to be submitted by dealers in hides and skins. It runs :

FORM A-5.

Return of Turnover in the case of dealers in hides or skins.

See rule 15 (2).

To

The Assessing Authority.

Sir,

I/We furnish below a statement showing my/our transactions for the month of........

Name(s) and posal address(es) of dealer(s).

Place or places of business.......

STATEMENT.

(*a*) For dealers in untanned hides or skins :

Amount for which goods have been sold to tanneries in the State.	Amount for which goods have been sold to other dealers in the State.	Amount for which goods have been sold on export outside the State.	Amount for which goods falling under column (3) were purchased by the dealers.
(1)	(2)	(3)	(4)

(*b*) For dealers in tanned hides or skins :

Amount for which hides or skins tanned in the State were sold.	Amount for which hides or skins tanned outside the State were sold.	
(1)	(2)	
	(i) Hides or skins bought from dealers in the State.	(ii) Hides or skins bought from dealers outside the State.

In column No. 1 the dealer sets out the amount for which goods have been sold to the tanneries in the State. This will be taxed in the hands of the tanner on his purchase price (*vide* Rule 4 (2) (*c*) and this is the stage at which tax is leviable under rule 16 (2)). Where goods have been sold to other dealers in the State no tax will be levied either on the buyer or on the seller but this will form part of the stock-in-trade of another dealer and will be subjected to tax only when in the series of sales it is sold to a tanner in the State when it would be included in column 1 of the return of such dealer. When the goods purchased have been sold for being exported outside the State the tax is levied upon the dealer but on his purchase price. The fact that these goods have been exported is ascertained by the department by reference to the entries in column No. 3. It may now be convenient to refer to Form A-4 which is prescribed for the return of the turnover in the case of tanners. Under column 3 the amount for which the hides and skins were purchased for tanning is to be stated. Where the goods have been purchased from dealers in the State, this can be gathered from the entries in column No. 1 of the return in Form A-5 of other dealers. When a tanner does not tan but sells them in their untanned state, he would be a dealer and these sales would figure in the return by him under Form A-5, in column 2. It is stated that by this process the identity of the goods is traced through the books of the several dealers and that under this scheme if the goods have not been taxed at any previous untanned state, the tanner who sells the tanned hides pays a tax on his sale, no tax on the purchase of the raw hides having been paid under the Madras General Sales Tax Act at any previous stage.

In a very general sense no exception could be taken to this analysis. But the theory that under the Madras General Sales Tax Act the transactions of sale in hides and skins are intended to bear tax at some one stage and that for that reason if the goods have not borne tax at an earlier stage and are not likely to bear the tax at subsequent stages, a tax liability accrues on any particular sale is obviously fallacious and cannot be accepted. The essence of a single point taxation consists in the fixation of a single point either by the Act itself or under the rule making power if the Act so prescribes. In the present case as the Act by section 5 (*vi*) directs the rules to prescribe the single point for taxation, no tax liability can accrue out of a sale of hides and skins whether tanned or untanned unless the rule has prescribed such a single point.

The question raised in this case must be considered under two aspects, firstly the proper construction of the words used in rule 16 (3) and secondly whether under the general scheme of the Act the point of a sale by a tanner is fixed by the rules as the point at which the tax liability attaches.

The reasoning on the basis of which the Sales Tax Appellate Tribunal decided in favour of the State and which though in another form has been presented to us by the learned Advocate-General may now be briefly stated. Under rule 4

(2) (*c*) of the Turnover and Assessment Rules the purchase of untanned hides and skins by a licensed tanner is made liable to sales tax but the terms of rule 4 (2) (*c*) confine this to purchases made within the State. So where licensed tanners purchase these goods outside the State, their purchases are not within rule 4 (2) (*c*) and consequently they cannot claim to be taxed on their purchase turnover. Every dealing which is not specifically covered by sub-rule 2 of rule 4 is governed by the general residuary provisions in rule 4 (1) under which a dealer is liable to tax on his sale turnover. If rule 4 were the sole governing provision, every sale by a tanner of tanned goods would be liable to sales-tax. It is in the light of this fundamental taxation pattern that the terms of rule 15 have to be understood. If the purchase is chargeable with duty as it would be in the case of what might be termed inside purchases the tanner is entitled to deduct this purchase price from the sale turnover of the tanned hides and skins under rule 16 (3). If his purchase turnover has not been taxed for the reason that such sales are not comprehended within taxable sales under the Act, there is no purchase turnover which the tanner could deduct and his liability to pay tax on such turnover imposed by rule 4 (1) has to be given full effect and therefore his entire sale turnover without any deduction becomes taxable. This conclusion is reinforced by a reference to the form in which the rule 16 (3) is couched, namely, the provision assuming the existence of a tax liability and providing merely for a deduction of a previously taxed turnover.

The matter is not easy to decide and we have given careful thought to the question. The draftsmanship of the rules is far from satisfactory and apart from ambiguity in language, its several provisions are not easily reconcilable and in their framing sufficient attention does not appear to have been bestowed on the essential purposes to be effected under the several provisions to carry out which they have been framed. We hope that in the light of the several decisions which have been rendered by the Tribunal as well as by this Court on the validity and interpretation of the several rules, they would be re-drafted to bring out clearly the exact intention which they seek to achieve.

We are of the opinion that the reasoning of the Tribunal is erroneous and that the contentions raised on behalf of the assessees have to be accepted. The arguments addressed on behalf of the assessees before the Tribunal in regard to the scope and interpretation of rule 4 were mainly two, *viz.*, (1) that the function of rule 4 was merely to determine whether in respect of any particular transaction it was the seller or the buyer that was to be liable, that is, whether it was the purchase turnover or sale turnover that was to be the subject of assessment under the Act and which has to be determined by rules under the first proviso to section 3 (5) ; and (2) that rule 4 applied and could apply to sales which were taxable under the Madras General Sales Tax Act. In other words, rule 4 (1) or 4 (2) does not impose and was not designed to impose a theoretical tax liability on transactions outside the Madras General Sales Tax Act either because such tax was beyond the competence of the State or had not been authorised by the Act. The tribunal rejected both these contentions, in our opinion, erroneously. No doubt in the case of commodities liable to multi-point taxation that is those not provided within the items enumerated in paragraphs (*ii*), (*iv*) and (*vi*) of section 5, the prescription by rules under section 3 (5) would automatically impose tax liability upon the transactions of sale under section 3 (1) of the Act subject to any exemptions that might have been provided by the Act or the Rules. But in the case of commodities like hides and skins in respect of which a tax can be levied only at a single point to be fixed by the Rules, there can be no tax liability accruing until and unless the Rules prescribed a single point for taxation, Therefore apart from other grounds there can be no tax liability imposed on hides and skins by rule 4 (1) of Turnover and Assessment Rules. The effect of that rule would be that, as and when the single point is fixed in respect of commodities or transactions falling within the Act, the seller would be liable on the turnover and not the buyer. It is not therefore correct to regard rule 4 (1) as by itself imposing a tax on every seller of tanned hides and skins and on every dealing in untanned hides and skins not falling within rule 4 (2) (*c*) or (*d*). This much is conceded by the learned Advocate-General that in the case of dealings

in tanned hides and skins which fall within rules 4 (1) no tax can be levied on their sales if there were no other rules fixing the single point since such a tax would be in violation of the express provision in section 5 (vi). We have therefore to eliminate rule 4 (1) as imposing a tax liability in the case of hides and skins which are liable to tax only at a single point. Further the construction which the Tribunal sought to place on the function and purpose of rule 4 in the scheme of taxation of hides and skins has now been authoritatively rejected by the Full Bench of this Court in *Hajee Abdul Shukoor Co.* v. *State of Madras*[1] and the view which we entertain is in accordance with this ruling which is binding on us. We therefore proceed on the basis that the single point for taxation of hides and skins tanned or untanned is to be gathered only from rule 16 of the Turnover and Assessment Rules.

This naturally reflects upon the construction which has to be placed on rule 16 (3). Rule 16 (1) is emphatic in that there can be no taxation in respect of hides and skins except in accordance with the provisions of rule 16. In other words it affirms that the provisions in the sub-rules following determine the single point for taxation of dealings in these commodities. Sub-rule 2 deals with untanned hides and skins and can therefore be ignored. It is only sub-rules (3) and (4) that touch on and relate to dealings in tanned hides and skins. There is no difficulty in regard to the purchase of tanned hides and skins from outside the State, for such cases are dealt with by sub-rule (4). The rule is clear that in these cases the first dealer who having purchased tanned hides and skins from outside the State sells them within the State is liable to tax on his sale turnover. Sub-rule 3 deals with licensed tanners within the State who sell the products of their tannery. In their cases the sub-rule starts with providing an exemption and exempts those tanners who have paid such taxes as are leviable under the Act. It proceeds to make a special provision in regard to tanners whose turnover is less than Rs. 10,000 under section 3 (3) and directs the tax to be paid by the dealer who purchases the goods from them on such buyer's sale turnover. In the construction of this sub-rule the whole controversy hinges round the expression " paid the tax leviable under the Act ". The normal and the grammatical meaning of the words would be " paid such tax if any as has been levied under the Act." As this is a taxing enactment it must be construed strictly. As Lord Cairns stated in *Cox* v. *Rabbits*[2].

" a taxing Act must be construed strictly; you must find words to impose the tax, and if words are not found which impose the tax, it is not to be imposed."

If a licensed tanner has paid such tax as was payable by him on his purchase turnover, the words of sub-rule 3 would confer upon him exemption from payment of tax on his sale turnover.

There is another and more formidable objection raised against the construction sought to be put upon this sub-rule by the State and this is that if the sub-rule were so read as to impose a tax liability on the sales of assessees as the present, there is no single point at all fixed to exempt from tax the series of sales which might take place within the State subsequent to the purchase from this tanner-assessee and that as the rules have not fixed a single point for fixing tax liability in respect of such series of transactions, the imposition of the tax by sub-rule 3 would be invalid as contravening the specific direction in section 5 (*vi*). There has been no satisfactory answer to this objection and we hold that on this ground also no tax can be levied on sales by licenced tanners, when they have not paid tax on their purchases because such purchases are not subject to taxation under the Madras General Sales Tax Act.

It follows that the sale turnover of the assessee was not liable to tax under the provisions of the Madras General Sales Tax Act. This revision petition succeeds and the order of the Tribunal against the assessee is set aside. The assessees are entitled to their costs. Counsel's fee Rs. 100.

There is no dispute that the assessee is liable to tax on a turnover of Rs. 2,118-5-9 which represented sales of tannery refuse. The tax is payable on this item.

R.M. — *Petition allowed.*

1. Since reported in (1955) 2 M.L.J. 494 (F.B.). 2. (1878) L.R. 3 A.C. 473 at 478.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

AL. VR. ST. Ramanathan Chettiar .. *Appellant**

v.

AL. VR. ST. Veerappan Chettiar and others .. *Respondents.*

Code of Civil Procedure (V of 1908), Order 32, rules 7 and 7 (1-A) as amended in Madras—Object of—Suit for partition of joint family property against the manager and other minor coparceners—Manager how far could represent the minors—Memo of compromise in such a suit—Essentials required for validity.

Under Order 32, rule 7 of the Code of Civil Procedure a suit by or against a minor can be compromised only with the leave of Court on application made in that behalf. Sub-rule 1-A of rule 7 of the said Order, introduced by the Madras amendment, lays down the essential formalities to be gone through before such leave can be granted. The first requirement is that along with an application for leave to enter into an agreement or compromise on behalf of a minor, where such a person under disability is represented by a counsel, the counsel shall file into Court a certificate to the effect that the compromise is for the benefit of the minor. The rule further provides that the Court should in its decree or order recite that sanction has been granted and set out the terms of the compromise. Unless the Court grants permission there is no compromise at all so far as minors are concerned and there is nothing on record on which a decree could be passed.

Mohd. Amin v. *Vakil Ahmed*, (1953) 1 M.L.J. 6: 1953 S.C.J. 539: 1953 S.C.R. 1133 (S.C.) referred.

Quaere: A compromise being one and entire, whether a decree can be passed on its footing against some of the executants alone if the others fall out of it?

Narain Das v. *Abinash Chander*, (1922) 44 M.L.J. 728 (P.C.) and *Nalini Kanta Lahiri* v. *Sarnamoyi Debya*, (1914) 27 M.L.J. 76: L.R. 41 I.A. 247 (P.C.), referred.

In a partition suit where the manager and other adult members are parties and the minor coparceners are also impleaded as *eo nomine* parties it is true that the manager or father does not lose his capacity as such to represent the minor coparceners and enter into a valid compromise binding on them. But where a minor coparcener is represented in a suit by someone else other than the father or manager, a decree cannot be passed binding on the minor without the minor's guardian applying to the Court for leave to enter into the compromise according to the provisions of Order 32, rule 7, Civil Procedure Code. Mayne's Hindu Law, 11th edition, paragraphs 459 and 301.

Subba Rao v. *Subba Rao*, (1936) 71 M.L.J. 419; *Bishambar Das* v. *Kanshi Parshad*, (1931) I.L.R. 13 Lah. 483; *Digambar Mahto* v. *Dhanraj Mahto*, (1922) I.L.R. 1 Pat. 361; *Jamna Prasad* v. *Durga Devi*, A.I.R. 1933 All. 138; *Nalini Kantha Lahiri* v. *Sarnamoyi Debya*, (1914) 27 M.L.J. 76: L.R. 41 I.A. 247 (P.C.); *Ramalinga Chetty* v. *Radhakrishna Chettiar*, (1935) 70 M.L.J. 700; *Marwadi Vannaji* v. *Ranga Rao*, (1937) 1 M.L.J. 384; *Udayammai Achi* v. *Umayal Achi*, (1944) 1 M.L.J. 182, referred and explained.

The manager's right to represent the minor in a suit for the purposes of a compromise is taken away by someone else acting as guardian or next friend.

Order 32, rule 7 of the Code of Civil Procedure overrides any general or customary law and should be strictly construed so that a minor's interest may not be jeopardised but protected. The policy underlying the provision is that the Court has to protect the interests of a minor in settlement of suits where he is a party and that is best provided by the safeguards of an application for leave to compromise with a certificate from the counsel.

Bishundeo v. *Seogeni Rai*, (1951) S.C.J. 413 (S.C.) explained.

Adinarayanna v. *Venkata Subbayya*, (1937) 2 M.L.J. 653; *Jamna Bai* v. *Vasantha Rao*, (1916) 31 M.L.J. 18: L.R. 43 I.A. 99: I.L.R. 39 Mad. 409 (P.C.); *Gangadhar* v. *Dattatraya*, A.I.R. 1952 Bom. 424, distinguished.

Subramanian Chettiar v. *Raja Rajeswara Dorai*, (1915) 29 M.L.J. 856: I.L.R. 39 Mad. 115 (P.C.); *Vijaya Ramayya* v. *Venkatasubba Rao* (1914) 30 M.L.J. 465: I.L.R. 39 Mad. 853; *Rangha Rao* v. *Rajagopala Raju*, (1899) I.L.R. 22 Mad. 378; *Chhabba Lal* v. *Kallu Lal*, (1946) 1 M.L.J. 339: L.R. 73 I.A. 52: A.I.R. 1946 P.C. 72, followed.

Where in a suit against a minor a next friend or guardian *ad litem* has been appointed he alone can represent the minor and the kartha of the family or the father of the minor cannot enter into a compromise so as to bind the minor unless the guardian *ad litem* is a party to it.

Appeal against the Order of the Court of the Subordinate Judge of Devakottai, dated 12th August, 1944 and made in I.A. No. 34 of 1954 in O.S. No. 97 of 1952.

T. M. Krishnaswami Aiyar, *O. Radhakrishnan* and *G. R. S. Chander Rao* for Appellant.

R. Kesava Aiyangar, *N. R. Raghavachariar* and *K. Parasaran* and *S. Somasundaram* for Respondents.

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* A.A.O. No. 428 of 1954. 6th May, 1955.

The Judgment of the Court was delivered by

Govinda Menon, J.—O.S. No. 97 of 1952 on the file of the Court of the Subordinate Judge of Devakottai is a suit for partition filed by one AL. VR. ST. Ramanathan Chettiar claiming a 1/3rd share in all the assets of the joint family of which he was a member and pending that suit I.A. No. 34 of 1954 was filed on 6th January, 1954, under Order 23, rule 3, Civil Procedure Code, to record an adjustment and to compromise the suit, and a document, dated 20th November, 1952, containing the terms of the agreement was filed along with it. On a contest by the defendants that there was no lawful agreement or compromise by which the suit has been wholly or partly adjusted, the Subordinate Judge, after considering the affidavit evidence, as well as the documents placed before him, came to the conclusion that there has been no lawful agreement and though he was satisfied that the contentions of defendants 1, 5 and 7 were not *bona fide*; but were purely on a technical point, dismissed the application.

The present Civil Miscellaneous Appeal is by the plaintiff against the dismissal praying that a decree in terms of the compromise in accordance with the document dated 20th November, 1952, may be passed. It is worthy of note that though the document of adjustment is dated 20th November, 1952, an application for passing a decree in terms thereof was filed only on 6th January, 1954 and on that ground it is contended by the contesting respondents that the document was not intended to take effect though it was signed by some persons under a misapprehension. In view of the fact that in our opinion the application has to fail on legal gronds, it is unnecessary to decide about the merits of the compromise or whether the signatories to it had full knowledge of its contents ; or whether there was an equitable and just division of the properties. Before discussing the legal aspects, it is convenient to state briefly the circumstances under which the litigation arose.

The following genealogical tree reveals the relationship of the parties to the litigation :—

AL.VR.ST. Chidambaram Chettiar

Lakshmanan Chettiar (Died 1940) =Umayal Anandavalli Achi (6th Defendant)	Veerappa Chettiar (1st Defendant) =Unnamalai Achi (7th) Defendant	Ramanathan Chettiar Plaintiff
Adopted son Chidambaram Chettiar (5th Defendant)	1. Chidambaram Chettiar (5th Defendant) adopted to Lakshmanan Chettiar 2. Minor Arunachalam Chettiar (2nd Defendant) 3. Minor Chendinathan (3rd Defendant) 4. Minor Lakshmi (4th Defendant) 5. Minors 2 to 4 by guardian mother Unnamalai Achi (7th Defendant).	

The plaintiff's suit was therefore for a one-third share of the ancestral properties which were in the management of the eldest brother Lakshmanan Chettiar and after his death in the management of the second brother Veerappan Chettiar. It may be mentioned that in the plaint the first defendant was proposed as the guardian of his minor children defendants 2, 3, and 4 but on his expressing his unwillingness to act as guardian, the mother Unnamalai Achi was proposed and appointed as guardian. It is therefore a case where the head and manager of the joint family has not accepted the guardianship of his minor sons who would normally be under his protection. This will have a relevant bearing on the position and capacity of the first defendant with regard to his actions as head and manager of the joint family. Another circumstance is that during the pendency of these

proceedings Umayal Anandavalli Achi, the sixth defendant, has filed O.S. 25 of 1954 on the file of the same Court claiming a 1/6th share in the entire properties on foot of her right under the Hindu Women's Right to Property Act as being the widow of Lakshmanan Chettiar who was entitled to a one-third share and that suit is now pending. On these grounds it is alleged by the other defendants that even if a compromise decree is passed in this suit, since the 6th defendant is not a party to the compromise, there will not be finality to the contest.

Exhibit A-1 is the partition agreement by which the entire properties have been divided into three shares and it is signed by the plaintiff, the first defendant, the seventh defendant as guardian of defendants 2 and 3 and by the fifth defendant. The 6th defendant has not given her assent to this compromise. The two mediators who have brought about the agreement, Muthiah Chettiar and Meyappa Chettiar, were not examined by either side ; nor have they filed any affidavit showing the circumstances under which the agreement was effected, the partition agreement being produced by the plaintiff.

In the normal course of things, since almost all the persons interested in the litigation are parties to the compromise, there would have been no difficulty in passing a decree in terms of that document, if the legal requirements had been complied with. As the first and fifth defendants have not shown that their signatures were obtained under a misapprehension or false inducement, the lower Court would have been justified in passing a decree had it not been for the fact that the guardian of the minor defendants had repudiated the settlement though she had affixed her signature and no certificate had been given by the counsel appearing for those defendants that the compromise was beneficial to the interests of the minor. It need hardly be said that the seventh defendant does not affirm that the compromise is in the best interests of the minors. On the ground that the provisions of Order 32, rule 7, have not been complied with, the learned Judge has dismissed the application.

If the Court were satisfied that the suit has been adjusted wholly or in part (in this case wholly) by a lawful agreement or compromise, then the natural result would be a decree in terms thereof. It is now urged on behalf of the opponents to the passing of the decree that there has been no lawful agreement or compromise for the reason that the provisions of Order 32, rule 7, have not been complied with. The provisions of this rule, which are imperative, may be considered :—

"*Sub-rule* (1-*A*) *of Order* 32, *rule* 7, *Madras amendment*.—Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader, the counsel or pleader shall file in Court, with the application, a certificate to the effect that the agreement or compromise or action proposed, is, in his opinion for the benefit of the minor or other person under disability. A decree or order for the compromise of a suit, appeal or matter, to which a minor or other person under disability is a party, shall recite the sanction of the Court thereto and shall set out the terms of the compromise as in Form No. 24 in Appendix D to this Schedule."

It will be seen that rule 7 (1-A) is a Madras amendment not in the original Code. Therefore no next friend or guardian for the suit shall without the leave of the Court expressly recorded in the proceedings, enter into any agreement or compromise on behalf of the minor with reference to the suit in which such a person acts as next friend or guardian. Such being the case, the argument is put forward that Exhibit A-1 in so far as the minors are concerned, has not fructified itself into a lawful compromise since not only has there been no leave of the Court obtained before the agreement was signed, but also the same has not been expressly recorded in the proceedings.

Mr. Kesava Ayyangar for defendants 2, 3 and 7 contends that whatever might be the validity of the document with regard to the executants who are capable of acting, so far as Exhibit A-1 is concerned it has take no legal shape whatever by the seventh defendant merely signing because the necessary condition pre-requisite, *viz.*, the obtaining of leave of the Court in entering into the compromise, has not been fulfilled. There is soundness in this argument. Granting that leave *ex*

post facto can be granted, there is no application for the grant of such permission by the seventh defendant who repudiates the agreement and that being the case, the Court cannot compel her, even if satisfied about her signature, to apply for leave to the Court. Then comes the imperative provisions of sub-rule (1-A) as to what are the essentail formalities to be gone into before such leave can be granted. The first requirement is that along with an application for leave to enter into an agreement or compromise on behalf of a minor, where such a person under disability is represented by a counsel or pleader, the counsel or pleader shall file into Court with the application a certificate to the effect that the agreement or compromise is for the benefit of the minor. The rule also states that the Court should, in its decree or order, recite that sanction has been granted and set out the terms of the compromise. It is admitted that in the suit the second and third defendants by their guardian the seventh defendant were represented by an advocate and he has not filed a certificate to the effect that the compromise is in the best interests and to the benefit of the minors. There is no necessity to mention that a legal practitioner appearing for a person under a disability cannot be compelled by the Court to file a certificate and in the absence of such a certificate and also when no application for leave to enter into the compromise has been made by the seventh defendant, there is no difficulty in concluding that the imperative provisions of Order 32, rule 7, have been transgressed. As has been held in *Mohd. Amin* v. *Vakil Ahmed*[1], unless the Court grants permission there is no compromise at all so far as the minors are concerned and there is therefore nothing on which a decree can be passed. If therefore, confronted with this difficulty, the plaintiff had applied to the lower Court to dismiss the suit against the minor defendants and exonerate them from the effects of this decree by a proper application and thereafter had asked for a decree against the major executants alone, probably something could have been done for him. But he has not adopted that course, though the major defendants strenuously oppose recourse being had to such a step, because the compromise is one and entire and if some of the parties fall out of it, it would be impossible to have a decree on its footing by some of the executants alone. For this purpose reliance is placed on *Narain Das* v. *Abinash Chander*[2] and *Nalini Kanta Lahiri* v. *Sarnamoyi Debya*[3].

In the former case the Privy Council held that where a lease was entered into by the managing member of a family which provided for certain contingencies and in a suit by a minor to set aside the lease as regards his share of the family estate it was held that the lease must be regarded as a whole and that it must be construed as if it was drawn on the date it bore and that when so regarded it was of such a character that it would not justify the manager of a joint family estate binding the joint family property by means of its terms. The *ratio decidendi* of their Lordhips' decision is that if the transaction is found to be unsuitable or unfavourable from the minors' point of view, then it cannot be upheld with regard to the major executants. The plaintiff has not, even now, applied for exonerating the minor defendants and striking out their names. Nor is he satisfied with a compromise decree in which the minors do not figure at all. Therefore the consideration of the question just outlined does not arise.

The main argument of Mr. T. M. Krishnaswami Ayyar for the plaintiff-appellant is that in a suit for partition of joint family estate where, in addition to the manager and other adult members, the minor coparceners are *eo nomine* parties, the manager does not lose his capacity as such and therefore if the manager and other members enter into a lawful compromise it must be binding on the minors as well, even if their guardian has not joined the compromise and leave of the Court has not been granted. In other words it would be as if the minor members are not parties to the suit and though in name they appear on the record they should be deemed to be non-existent. It is also contended that the addition of the minor members to such a suit is unnecessary and not essential to the proper form of the

1. (1953) 1 M.L.J. [illegible] 1953 S.C.R. 1153 (S[illegible]
2. (1922) 44 M[illegible]
3. (1914) 27 M.L.J. 76 : L.R. 41 I.A. 247 (P.C.).

suit, and therefore, if the plaintiff had not added the minor defendants, it would have been perfectly proper and a decree in such a suit would be binding on the minors unless in subsequent proceedings they are able to have it set aside on grounds of its being void or having been brought about by fraud or collusion. The plaintiff's contention therefore is that if he had not impleaded defendants 2 and 3 but had contented himself with impleading the major members alone, there would have been no legal impediment whatever in having a decree in terms of the compromise; and by the mere fact that he had *ex abundanti cautela* impleaded certain unncessary though not improper parties, the legitimate redress which he could get should not be denied to him because of his act. Reliance is placed on Mayne's Hindu Law, 11th edition, page 561, paragraph 459 and page 371, paragraph 301. At page 561, after stating generally that in a partition suit all the coparceners must be before the Court either as plaintiffs or as defendants, the learned author states that where the partition claim is between branches of the family, only the heads of all the branches need be made parties. It is further stated that those members of the family who are entitled to maintenance could be proper parties to a suit for partition. In the present case defendants 2 and 3 did not claim their share separately; nor has any request been made to the Court to ascertain whether such partition is beneficial to their interests. Even the fifth defendant has not claimed a one-third share for the branch of the family to which he belongs and the sixth defendant does not put forward the claim that out of the 1/3rd share to be allotted to her husband's branch she should be given a life estate in half the properties under the Hindu Women's Right to Property Act so far as this suit is concerned. That the managing member can sue and be sued in all matters affecting the family without joining the other members of the family is a well-settled proposition. But in a partition suit, as already stated, the entire joint family must be represented either expressly or impliedly. Various authorities are cited to support the contention that the heads of branches alone need be made parties to a suit like the present one. At pages 423 and 424 of the report in *Subbarao* v. *Subbarao*[1], Venkataramana Rao, J., observes that the father is the only person entitled to represent his sons at a family partition and it is only through the father that the sons take their shares in the joint family property. Mr. T. M. Krishnaswami Iyer relies upon this dictum for his argument. This is answered by the respondents' counsel by stating that where the father has refused to act as the guardian of his minor sons, it cannot be said that despite his unwillingness he continues to represent his sons. If, as a matter of fact, the father alone were added, then there may be a legal presumption that he represented his sons also. But it is difficult in the present case to draw that presumption. The decision in *Bishambar Das* v. *Kanshi Parshad*[2] does not help the appellant. What happened there was that in an appeal in a suit for partition among the members of a joint Hindu family what was claimed was only a division between two branches of the family though all the members were made parties to it and when it so happened that one of the members, who was not the kartha, died and an application to bring the legal representative on record was dismissed and the appeal abated as against him, it was contended that the entire appeal has abated on account of the death of one coparcener. The Bench held that as there was no prayer for partition between the head of one Branch, his sons and grandsons *inter se* but the relief was only for division among two branches, the fact of the death of a junior member of one branch would not put an end to the whole proceedings as the kartha could take the share of the entire branch. It was further held that if the kartha had been the sole plaintiff and the head or heads of the other branches had been the sole defendants, then any decree passed in the suit would have been binding upon their descendants. This is, certainly, not a case where there was any necessity for the application of Order 32, rule 7, at all for, as is seen from the report, the guardians of the minors were their natural guardians and there was no question of compromise decree under Order 23, rule 3. What was held in *Digambar Mahto* v. *Dhanraj Mahto*[3]

1. (1936) 71 M.L.J 419. ... 361.

is that in a suit for partition instituted by a member of a joint Hindu family, even though the grandsons may be proper parties they are not necessary parties if their interests are represented in the suit by their father. It is difficult to see how this could in any way help the appellants' contention. Likewise the discussions of the learned Judge in *Jamna Prasad* v. *M. Durga Dei*[1], that when a partition is effected between brothers in a joint family who have minor sons, each brother is responsible for his branch consisting of himself and his sons, cannot help the appellants. The propositions is undisputed, as stated in Mayne on Hindu Law and Usage, that if the division is between branches *inter se* without the individuals claiming their separate share, then it is sufficient to make the heads of the branches alone parties.

But in deciding what the consequence will be if every member is made a party and the minors are represented by persons other than their natural guardians, none of these cases render any help. In this respect, the observations of the Privy Council at page 78 in *Nalini Kantha Lahiri* v. *Sarnamoyi Debya*[2] are useful. Their Lordships say that if any co-sharer applies for partition of property, he must make the other co-sharers defendants, because the partition which is made in his favour is a partition against his co-sharers. That which gives him a portion of the property takes away all the right which they (the other co-sharers) would otherwise have to that portion and therefore it is a decree against them, and in favour of himself. It is on this principle that the decisions have proceeded that in a suit for partition every member is as much a plaintiff as he is a defendant and when shares are allotted, each one of them gives up his undivided right in the rest of the property in lieu of his getting absolute rights in the properties allotted to him. There is therefore reciprocity and mutuality which cannot be the case where some members alone are made parties. The exception is where the heads of branches alone are joined in which case the head of each group represents all the members of his branch for the purpose of the relief. We do not therefore think that after the joinder of the minor defendants, the first defendant can alone, act for his branch. The learned counsel for the appellant brings to our notice, three decisions from which he argues that despite the fact that the minors are *eo nomine* parties, it is possible for the manager to act on behalf of the entire joint family. If on that footing a compromise is effected and a decree passed thereon, it would be a valid disposal of the suit by which the minors are bound.

Great reliance is placed upon the observations contained in *Ramalingam Chetty* v. *Radhakrishnan Chettiar*[3], where it was held that the provision of Order 32, rules 6 and 7, Civil Procedure Code, do not restrict in any way the powers of the father or manager of a joint Hindu family where such father or manager is not the next friend of the minor members who are *eo nomine* parties to the suit. That was a case where, in execution of a decree to which the members of the joint family were parties and in which the minor was represented by somebody else as guardian, the father-manager reeived certain moneys without the leave of the Court, and it was contended that that would not be a valid discharge, because no leave of the Court was obtained to act on behalf of the minor. The learned Judges held that the father or the manager does not lose his representative capacity as such to act on behalf of the family where he was not the guardian of the minor. The learned Judges referred to *Ganesha Row* v. *Tuljaram Row*[4], *Letchmana Chetty* v. *Subbiah Chetty*[5] and *Vijaya Ramayya* v. *Venkatasubba Rao*[6]. In *Ganesha Row* v. *Tuljaram Row*[4], their Lordships of the Privy Council held that where a minor is a party to the suit and a next friend or guardian has been appointed to look after his interests concerning the suit, the acts of such guardian are subject to the control of the Court and they left open the question how far the acts of the father or managing member may affect a minor who is a party to the suit represented by another person as next friend or guardian *ad-litem*. But the point to be considered is that this case did not relate to sanction being accorded for a compromise so as to bind the minor.

1. A.I.R. 1933 All. 138.
2. (1914) 27 M.L.J. 76 : L.R. 41 I.A. 247 (P.C.).
3. (1935) 70 M.L.J. 700.
4. (1924) 25 M.L.J. 150 : L.R. 40 I.A. 132 : I.L.R. 36 Mad. 295 (P.C.).
5. (1924) 49 M.L.J. 389 : I.L.R. 47 Mad. 920.
6. (1914) 30 M.L.J. 465 : I.L.R. 39 Mad. 853.

At page 705 it is stated definitely that in that case there was no question of any compromise being effected by the managing member of the family without obtaining the leave of the Court under Order 32, rule 7 of the Code and they distinguished the case in *Vijaya Ramayya* v. *Venkata Subba Rao*[1].

What would have been the situation if, in the present suit, defendants 2 and 3 were dismissed out of the record and thereafter a compromise was entered into by the remaining parties and a decree passed thereon might resemble the facts of *Ramalingam Chetty* v. *Radhakrishnan*[2], but the Court cannot be asked to give its sanction to a compromise and pass a decree therefrom so as to bind the minors in case where Order 32, rule 7, has not been complied with. This case is authority only for the position that the mere fact that the minor members are parties to the suit would not deprive, or detract from the managing member's capacity to act on behalf of the family, Varadachariar, J., in *Marwadi Vannaji* v. *Ranga Rao*[3] referred to this case and held that there is no justification for extending the provisions of Order 32, rule 7, Civil Procedure Code, by analogy or considerations of policy to a case where a suit was brought on a mortgage executed by a father in compromise of a certain earlier suit but no sanction of the Court was obtained for effecting the compromise. The learned Judge held that the disability imposed by Order 32, rule 7, Civil Procedure Code, applied only to a father who was also guardian *ad-litem* of his minor son. Where someone else was the guardian, the father does not lose his capacity as manager. Hére also, as we have stated, there is no question of asking the Court to pass a decree in terms of a compromise to which the minors are made parties after ignoring the provisions of Order 32, rule 7.

Great reliance is placed by the learned counsel on a judgment of Leach, C.J., and Lakshmana Rao, J., in *Udayammai Achi* v. *Umayal Achi*[4], where the learned Judges held that Order 32, rule 7, Civil Procedure Code, does not apply to a father or manager of a joint Hindu family who is not the guardian or next friend of the minor. In such a case his powers are unaffected. Reference is made to *Ganesha Row* v. *Tuljaram Row*[5], *Ramalinga Chettiar* v. *Radhakrishna Chettiar*[2] and *Marwadi Vannaji* v. *Ranga Rao*[3]. Leach, C.J., who delivered the judgment felt bound by the decision in *Ramalingam Chettiar* v. *Radhakrishnan Chettiar*[2].

The line of decisions exemplified by the above cases clearly lays down that the father or manager does not lose his capacity as such. But we are not able to find any passage from which it can be held that a decree binding on a minor who is represented by some one else other than the father can be passed when the compromise is entered into by the father or manager alone and the minor's guardian has not applied to the Court for leave to enter into the compromise after filing the necesary application and his pleader filing the necessary certificate. As has already been observed it may be possible that if the minor has not been a party a *bona fide* compromise entered into by the manager would be binding on him unless set aside. But the manager's right to represent the minor in the suit for the purpose of a compromise has been taken away by someone else acting as guardian or next friend. The argument of the learned counsel for the appellant comes to this, that Order 32, rule 7, Civil Procedure Code, can have no application and no leave of the Court is necessary in order to bind the minor when the actions are not of the minor's guardian in the suit but of someone else who, under the general law, has the capacity to represent the minor, if he is a member of a joint family. It seems to us that Order 32, rule 7, overrides any general or customary law and should be strictly construed so that the minor's interests may not be jeopardised but protected. None of the cases above referred to arose out of an application to pass a decree in terms of the compromise where the *imprimatur* of the Court is asked for to make the compromise binding on the minor. The policy underlying Order 32, rule 7, is that the Court has to protect the interests of the minor in settle-

1. (1914) 30 M.L.J. 465 : I.L.R. 39 Mad. 853.
2. (1935) 70 M.L.J. 700.
3. (1937) 1 M.L.J. 384.
4. (1944) 1 M.L.J. 182.
5. (1913) 25 M.L.J. 150 : I.L.R. 36 Mad. 295 (P.C.).

ment of suits where he is a party and that is best provided by the safeguards of an application for leave to enter into compromise with a certificate from the pleader that the proposed settlement is in the best intersts of the minor. When the legislature says that the guardian should conform to these provisions before a compromise is said to to binding on the minor, how can it be said that actions of a person other than the guardian who, under the customary law, might represent the minor, be binding on the minor? We do not therefore think that these cases have any application to the present case.

It is then urged that since the Supreme Court in *Bishundeo Narain* v. *Seogeni Rai*[1] has laid down that a compromise without the leave of the Court and a decree passed thereon are not nullities but are merely voidable at the option of the minor and it is not necessary that the guardian should obtain the sanction even before he begins negotiations with the other side, this Court might now pass a compromise decree leaving it to the minor to avoid it on a later occasion. But when closely looked into, the facts of that case do not show that their Lordships gave any countenance to the theory that without the leave of the Court a compromise can be entered into so as to bind the minors where the minors' guardian does not act. Their Lordships after enunciating the proposition that leave is necessary under Order 32, rule 7 state if a decree is passed in a suit where the minor is properly represented it is binding on him as on the adult member unless the minor can show fraud or negligence on the part of the guardian *ad litem* or next friend. We are unable to see that there are any passages in this judgment which would help the contention of the appellant.

Representation of minors in suits by the kartha or manager was considered by Venkataramana Rao, J., in *Adinarayana* v. *Venkata Subbayya*[2] which was referred to before us. In that case it was a contract entered into by the manager on behalf of the minor. The learned Judge held that the kartha alone could represent the minor member and the entire family. There was no question about the applicability of Order 32, rule 7, at all. If at all, the decision in *Jamna Bai* v. *Vasantha Rao*[3] is helpful it is in justification of the view taken by us. The other case on which reliance was placed for the appellant, viz., *Gangadhar* v. *Dattatreya*[4], which lays down that an agreement entered into in contravention of Order 32, rule 7, is not altogether void, but is voidable only at the option of the minor and if it is so avoided, the parties will naturally be restored to the position which they occupied before the agreement was made, does not relate to a case where the Court is asked to pass a decree in terms of a compromise without granting leave. The facts of the case show that where a decree had been passed and objection had been taken on a later occasion with regard to its void nature on account of non-compliance with Order 32, rule 7, it was held that such a decree was only voidable. The circumstances relate to events occurring after the passing of the decree; but where the Court knowing fully well that Order 32, rule 7, is not complied with is asked to pass a decree, this decision does not lay down that the Court should pass a decree.

The respondents' counsel has cited a large body of case-law to show that when, for the purpose of a litigation, the father or manager has divested himself of the guardianship or the next friendship of a minor coparcener in a joint family then, in such instances, he does not retain his authority to function as father or manager so as to bind the minors in entering into a compromise. Observations of their Lordships of the Judicial Committee in *Subramanian Chettiar* v. *Raja Rajeswara Dorai*[5] which arose out of the judgment of this Court in *Subramanian Chettiar* v. *Raja Rajeswara Dorai*[6] are brought to our notice. In that cas the facts show that in the suit the first defendant was then the Raja of Ramnad, the second defendant was a trustee appointed by him for the management of the estate which the first defendant had

1. (1951) S.C.J. 413 : A.I.R. 1951 S.C. 280.
2. (1937) 2 M.L.J. 653.
3. (1916) 31 M.L.J. 18 : L.R. 43 I.A. 99 : I.L.R. 39 Mad. 409 (P.C.).
4. A.I.R. 1952 Bom. 424.
5. (1915) 29 M.L.J. 856 : I.L.R. 39 Mad. 115 (P.C.).
6. (19 9) I.L.R. 32 Mad. 490.

settled upon his minor son, the third defendant, and which trustee for that litigation was the guardian *ad litem* of the minor. In a previous litigation, a compromise had been entered into in pursuance of which certain mortgages were executed which compromise did not comply with the terms of section 462 of the Code of Civil Procedure (Order 32, rule 7 of the present Code). In discussing the validity of that compromise, their Lordships observe as follows : —

" If on other grounds the deed of compromise could be supported, it is invalid in not complying with the condition imposed by section 462 of the Code of Civil Procedure applicable when the compromise was made......In the present case the leave of the Court was not obtained, and in the absence of such leave the compromise cannot be supported. Their Lordships regard the provision making it necessary to obtain the leave of the Court as of great importance to protect the interests of a minor. It clearly applies to the compromise in question in the present appeal. It may be well to quote the language used by Lord Macnaghten in *Manohar Lal* v. *Jadunath Singh*[1].

It is not sufficient that the terms of a compromise are before the Court. There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained.

Reference may also be made to the more recent case of *Ganesha Row* v. *Tuljaram Rao*[2]."

From these observations it is clear that when the head of the family was a party to the suit he does not retain in himself the right to be a guardian of the minor in order to bind him if somebody else was the minor's guardian. Mr. T. M. Krishnaswami Ayyar sought to distinguish this case on the ground that the compromise in question took place prior to the passing of the Impartible Estates Act and as such it cannot be said that the then Raja of Ramnad who made the settlement was the head and manager of a joint Hindu family with his minor son. We do not think that this contention is acceptable, because despite, the decision in *Sartaj Kuari* v. *Deoraj Kuari*[3], the relationship of coparceners existed between members of a family in which the Raja was the head though their Lordships of the Judicial Committee held in that case that/it was open to the holder for the time being to deal with the estate as he pleases. The fact which gave rise to *Vijaya Ramayya* v. *Venkatasubba Rao*[4] are very much similar to the present case and great emphasis is put upon what Ayling and Hanny, JJ., observed before calling for a finding in that case. An award by arbitrators was sought to be impugned on the ground that the reference was illegally made. In the suit which was referred to arbitration the minors were represented not by their father as guardian but by their brother and no sanction was obtained for referring the matter to arbitration and when that award was impugned the learned Judges stated as follows :—

" The first point argued for appellant is that as the compromise was entered into by plaintiffs' father and not by their guardian *ad litem* (who was their brother, the present second defendant) no sanction of the Court was necessary under section 462 of the old Code of Civil Procedure. Reliance is placed on *Ganesha Row* v. *Tuljaram Rao*[2], which however, affords no support for such a contention. It is not denied that if plaintiffs' father had been representing the interests of his sons in Appeal No. 504 of 1907 he could not have entered into a valid compromise on their behalf without the leave of the Court so as to bind them. *We cannot accept the suggestion that when he had no responsibility for them, and when their interests were entrusted to another person he should have larger power to bind them. We have no hesitation in rejecting this contention.*"

The observations above quoted are apposite. If the contention of the appellant in the present appeal is accepted, the first defendant would have larger powers to bind his minor sons than what he would have if he had been their guardian. We are of opinion that this decision directly applies to the facts of the present case. That the Court cannot compel the seventh defendant to ask for leave to enter into the compromise, and compel the pleader to file a certificate is clear from *Rangha Rao* v. *Rajagopala Raju*[5] where the decision was as follows :—

" The guardian *ad litem* of three minors having agreed to compromise a suit and having signed a petition embodying the terms arrived at, undertook to present the petition at the next sitting of the

1. (1906) 16 M.L.J. 291 : L.R. 33 I.A. 128 : I.L.R. 28 All. 585 (P.C.).
2. (1913) 25 M.L.J. 150 : I.L.R. 36 Mad. 295 (P.C.).
3. (1888) L.R. 15 I.A. 51 : I.L.R. 10 All. 272 (P.C.).
4. (1914) 30 M.L.J. 465 : I.L.R. 39 Mad. 853.
5. (1899) I.L.R. 22 Mad. 378.

Court. Leave of the Court had not been obtained ; and at the time appointed, the guardian declined to present the petition and opposed a decree being passed in its terms. Upon the plaintiff seeking to have the compromise enforced :

Held : that inasmuch as leave of the Court had not been asked for, and the guardian had objected to the Court passing a decree in terms of the compromise, the Court had no power to enforce the compromise, even though the terms of it might appear to be beneficial to the minors."

The rules contained in Order 32, make it quite clear that where a next friend or guardian *ad litem* has been appointed, he and he alone can represent the minors and therefore if a guardian *ad litem* has been appointed for a minor then the kartha of the family or the father of the minor cannot enter into a compromise so as to bind the minor unless the guardian *ad litem* is a party to it. The above principle laid down in *Awadhesh Prasad* v. *Widow of Tribeni Prasad*[1] directly applies to the facts of the present case. The learned Judges there have referred to a number of cases in support of this proposition. The Privy Council in *Chhabba Lal* v. *Kallu Lal*[2], referred to the fact that rule 7 of Order 32 is imperative in its terms and must be strictly complied with and therefore an agreement to refer a matter to arbitration in a suit where minors are not represented can be done only with the permission of the Court as the interests of the minor might well be sacrificed by improper reference and it is necessary that the minor's interests are protected by the Court. Such being the case, if a minor successfully challenges an agreement to refer as not made in compliance with rule 7, it is avoided against all parties. The suit in question was one for partition; but here there was no question of any conflict between the natural guardian and the guardian *ad litem*. That a Court will not record a compromise against a minor entered into by a person other than the guardian on record and that too without the leave of the Court is clear from the decision in *Marwadi Vannagi* v. *Ranga Rao*[3].

Mr. N. R. Raghavachariar appearing for the first defendant has cited a few rulings to show that if Exhibit A-1 cannot form the basis of a settlement as far as defendants 2 and 3 are concerned, then no compromise decree based on that can be passed even as against the first defendant. In *Lakshmana Chetti* v. *Chinnathambi Chetti*[4] the award on which a decree was sought to be passed was made on a reference in a partition suit in which the minors were parties without the leave of the Court having been obtained and when it was prayed that a decree should be passed based on the award at least so far as the major members are concerned, that prayer was refused. At pages 330 and 331 there are observations to show that such an award could not be made the foundation for a decree. At page 331 we find the following :

" It was then urged for the plaintiffs that the adjustment should at all events be held binding upon the parties thereto who were not minors. But the suit was a suit for partition among the members of an undivided Hindu family, and partial adjudication in such a suit is impossible. In these circumstances the agreement must be held to be altogether incapable of being acted upon under section 375 of the Code of Civil Procedure."

Decisions of other High Courts dealing with the same topic reveal a similar strain of thought. The observations at page 587 in *Abhay Kumar* v. *Kirit Narain*[5], show that such a compromise cannot form the basis of a decree. In a case, where some only of the parties to a suit joined in a petition to compromise, the other parties are entitled to object to the compromise being recorded and if they had good cause, the Court has discretion to refuse to grant a decree in terms of the compromise. See *Gopika Raman Ray* v. *Atal Singh*[6]. The decision in *Durga Charan* v. *Akkari Das*[7] also lays down a similar principle that it is impossible to have a compromise that can remain effective or operative when one of the contracting parties drops out of it by reason of the fact that it is not binding on him and if it is not binding on one party it ceases to be an effective and operative compromise even so far as the remaining parties are concerned. Here also it was a case of the compromise not being binding on the minor. It is unnecessary to multiply authorities which show that if a compromise is not binding on some of the parties it is impossible

1. A.I.R. 1940 Pat. 663.
2. (1946) 1 M.L.J. 339 : L.R. 73 I.A. 52 : A.I.R. 1946 P.C. 72 (P.C.).
3. (1937) 1 M.L.J. 384 (387).
4. (1900) I.L.R. 24 Mad. 326.
5. A.I.R. 1951 Pat. 584.
6. A.I.R. 1926 Cal. 193 at p. 198.
7. A.I.R. 1949 Cal. 617.

to pass a lawful decree against those who have assented to it. See *Vir Singh* v. *Kharak Singh*[1], *Macboolan* v. *Habib Ullah*[2] and *Chellaram* v. *Kimatram*[3]. In these cases, the Court refused to pass a decree on a compromise not assented to by all the parties so as to bind others who are parties to it. Where an adjustment of a suit is invalid so far as some of the parties are concerned and it is impossible to separate the interests and liabilities of others, the adjustment fails in its entirety. *Macboolan* v. *Habib Ullah*[2].

But Mr. T. M. Krishnaswami Ayyar cited the observations of Venkatasubba Rao in *Tiruvengada* v. *Thangavelu*[4] to the effect that a compromise of a partition suit is not necessarily ineffectual because every party to the action does not join in it and though in some cases it may not be valid as a lawful compromise unless all the parties join in effect in it, each case must depend on its own facts. It is clear from the facts of that case that the compromise was severable and separable and a decree could be passed as regards persons bound by it. It is impossible to apply the decision in that case which depended on special circumstances to the facts of the present case.

We would therefore hold with the learned Subordinate Judge that there has been no lawful adjustment or compromise of the suit so far as defendants 2 and 3 are concerned and Order 23, rule 3 cannot be invoked by the plaintiff to have a decree binding on defendants 2 and 3. In any event the suit being one for partition and in view of the large body of case-law which hold that such a compromise cannot be cut into pieces and made effective as regards parties bound by it, we cannot pass a decree with regard to that portion alone. In the result the decision of the Subordinate Judge is correct and the appeal is dismissed in the circumstances without costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Sastri Ammal and another .. *Petitioners**

v.

Pravalavarna Naicker and another .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (*XIX of* 1951), *sections* 57 (*b*) *and* 93—*Suit to establish a claim to succeed to the office of hereditary trustee—If barred.*

A right to succeed to a hereditary office is a right to property and a claim to such a right is normally cognisable by a civil Court unless that jurisdiction is ousted by a statute either expressly or by necessary intendment. The bar imposed by section 93 of the Madras Hindu Religious and Charitable Endowments Act would apply to determination by a civil Court of any dispute for determining or deciding which a provision has been made in the said Act XIX of 1951.

Section 57 (*b*) of the Act only provides for determination of the question whether the office of trustee of a given religious institution is hereditary. A dispute between the claimants to succeed to an office, which is admitted on all hands to be hereditary, is not within the scope of section 57 (*b*) of Act XIX of 1951. Neither by express terms nor by necessary intendment does section 57 (*b*) of Act XIX of 1951 divest the civil Court of its jurisdiction to take cognisance of a claim to succeed to to the office of a hereditary trustee and that jurisdiction is not vested in the Deputy Commissioner. The only dispute that falls within the scope of section 57 (*b*) is the dispute whether a trustee holds or held office as a hereditary trustee. That does not include within its ambit a dispute respecting a right to succession to a hereditary office.

(Language of section 47 (3) and section 57 (*b*) compared. Scheme of the Act analysed.)

All classes of claims to succession to a hereditary trusteeship would appear to be outside the scope of section 57 (*b*).

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to O.A. No. 17 of 1953 on the file of the Deputy Commissioner of Hindu Religious and Charitable Endowments, Coimbatore and quash the Order, dated 27th January, 1955, therein.

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1. (1924) 86 I.C. 361 : A.I.R. 1925 Lah. 280.
2. (1927) 102 I.C. 470.
3. A.I.R. 1920 Sind 101.
4. A.I.R. 1928 Mad. 594.

* W.P. No. 425 of 1955. 9th August, 1955.

A. Seshachariar, for *C. Santhamurthi Nayudu* and *A. Venkatachari*, for Petitioners.

Special Government Pleader (*V. V. Raghavan*) on behalf of the State.

S. Ramanujachariar, for 1st Respondent.

The Court made the following

ORDER.—In O.A. No. 99 of 1939, proceedings instituted under section 84 of Madras Act II of 1927, the Board of Hindu Religious Endowments held that Sri Kanni Amman Temple, Manapakkam, Chingleput District, was an "excepted" temple as that was defined by Act II of 1927. That finding naturally implied that the trusteeship in that temple was hereditary.

It was common ground that Venkatachala was the founder of the temple. The petitioners' case was that after the death of Venkatachala, his son-in-law Kolaindavelu succeeded to the office of trustee. Kolandaivelu had three sons. The first petitioner claimed she was the heir to Kanniappa, one of the sons of Kolandaivelu, and that the second petitioner was the widow and heir of Rajamanicka, another son of Kolandaivelu. The petitioners claimed to have succeeded to the office of trustee on the death of Kolandaivelu's sons.

The first respondent in his turn claimed that he was entitled to succeed to the office of trustee as he was the reversioner to the estate of Venkatachala. The first respondent filed an application, which was numbered as O.A. No. 17 of 1953, under section 57 (*b*) of Madras Act XIX of 1951. The Deputy Commissioner eventually decided that application *ex parte* the petitioners, on 27th January, 1955. The Deputy Commissioner upheld the claim of the first respondent, that it was he and not the petitioners that was entitled to succeed to the office of hereditary trustee of the temple. The petitioners appealed to the Commissioner, who dismissed that appeal on 15th April, 1955.

The petitioners thereupon applied to this Court under Article 226 of the Constitution for the issue of a writ of *certiorari* to set aside the order of the Deputy Commissioner, dated 27th January, 1955. The two main grounds put forward by the learned counsel for the petitioners in support of the application were (1) that the Deputy Commissioner had no jurisdiction under section 57 (*b*) of Act XIX of 1951 to decide who was entitled to succeed to the office of the hereditary trustee of the temple, when there was no dispute at all over the question, whether the office of trustee in this temple was hereditary, and (2) even if the Deputy Commissioner had jurisdiction to decide this question, its exercise was vitiated in this case; the decision on 27th January, 1955, which was *ex parte* the petitioners, amounted to a denial of reasonable opportunity to the petitioners to present their defence to the claim of the first respondent before the Deputy Commissioner.

Section 57 (*b*) of Act XIX of 1951 runs:

"Subject to the rights of suit or appeal hereinafter provided, the Deputy Commissioner shall have power to inquire into and decide the following disputes and matters:—

* * * * * *

(*b*) whether a trustee holds or held office as a hereditary trustee."

The question for determination now is, when there was no dispute that the trusteeship of the temple was hereditary, and when the only dispute between the first respondent on the one hand and the petitioners on the other was who was entitled to succeed to that office, did that dispute come within the scope of section 57 (*b*)? If it did not, the Deputy Commissioner could have had no jurisdiction to decide that dispute.

It can be taken as settled law that a right to succeed to a hereditary office is a right to property. A claim to such a right is normally cognisable by a civil Court, unless that jurisdiction is ousted by statute either expressly or by necessary intendment. Section 93 of Act XIX of 1951 runs:

"No suit or other legal proceeding in respect of the administration of management of a religious institution or any other matter or dispute for determining or deciding which provision is made in this Act shall be instituted in any Court of law, except under, and in conformity with the provisions of this Act."

The bar imposed by section 93 would thus apply to determination by a civil Court of any dispute for determining or deciding which a provision has been made in the Act, that is, Act XIX of 1951. So we come back to section 57 (*b*) of the Act. Does it expressly or by necessary intendment provide for the determination of a dispute of the kind I have specified above, that is, a claim to succeed to the office of hereditary trustee?

If the dispute is, whether the office of trustee of a given religious institution is hereditary, it would certainly come within the scope of section 57 (*b*). In my opinion, that is all that section 57 (*b*) provides for. A dispute between the claimants to succeed to an office, which it is admitted on all hands is hereditary, is, in my opinion, not within the scope of section 57 (*b*) of Act XIX of 1951.

The learned counsel for the first respondent urged that the dispute between the first respondent and the petitioners came within the purview of section 57 (*b*). The learned counsel contended that one of the questions he asked the Deputy Commissioner to decide was whether the first respondent held the office of hereditary trustee of the temple and whether he was dispossessed of that office. That, he argued, came within the scope of the expression "whether a trustee held office as hereditary trustee" within the meaning of section 57 (*b*). The learned counsel also contended that the question, whether the petitioners, who are now in possession of the office, are entitled to remain in possession, would come within the scope of the expression "whether the petitioners held office as hereditary trustees" in section 57 (*b*). These contentions, however, do not alter the nature of the claim that the first respondent presented, to the Deputy Commissioner for determination, whether the first respondent was entitled to succeed to the office of hereditary trustee of the temple and to recover possession of that office from the petitioners who are now in possession. Since it is accepted that the office itself is hereditary, the real dispute between the parties is, who is entitled to hold that office, is it the first respondent or the petitioners?

In determining the scope of section 57 (*b*) of the Act, it should be useful to compare the language of section 57 (*b*) with that employed in section 47 of the Act. The only dispute that falls within the scope of section 57 (*b*) is the dispute whether a trustee holds or held office as hereditary trustee? That, in my opinion, does not include within its ambit a dispute respecting a right to succession to a hereditary office. Section 47 (1) provides:

"When a permanent vacancy occurs in the office of the hereditary trustee of a religious institution, the next in the line of succession shall be entitled to succeed to the office."

That is only declaratory of the hereditary right. Admittedly the vacancy that arose in this case was a permanent one. The relevant portion of section 47 (3), runs:

"When a permanent....vacancy occurs in such an office and there is a dispute respecting the right of succession to the office......the Deputy Commissioner may appoint a fit person to discharge the functions of the trustee of the institution until......another hereditary trustee succeeds to the office of for such shorter term as the Deputy Commissioner may direct."

The language of section 47 (3), which refers to a dispute respecting the right of succession to the office, is significant, when it is compared with the language of section 57 (*b*). whether the trustee holds or held office as hereditary trustee. If section 57 (*b*) had been meant by the Legislature to include such a dispute also, that is, a dispute respecting the right of succession to the office, the language of section 57 (*b*) should have been different. It should be noticed that section 47 (3) and section 57 (*b*) confer jurisdiction on the same Deputy Commissioner. Section 47 (3) of the Act certainly contemplates determination of the dispute respecting the right of succession to the office. Section 47 however does not vest in the Deputy Commissioner the jurisdiction to determine that dispute. Nor does section 47 (3) imply that the determination of such a question should be under the provisions of this Act, that is, under section 57 (*b*).

If the position for which section 47 (3) of the Act provides has arisen, that is, if after the death of the last holder of the office there is a scramble for succession, and none of the claimants gets possession, and a temporary appointment is made under section 47 (3) and a person is appointed by the Deputy Commissioner to discharge the functions of the trustee until the person entitled to the office succeeds to that office, can the claim of any of the persons to succeed to that office come within the scope of section 57 (*b*)? The claimant in such a case cannot claim either that he held the office or that he holds office as hereditary trustee. His claim can only be that he is entitled to hold office as hereditary trustee. That will not fall within the scope of section 57 (*b*). It is not enough to show that the last holder held the office as hereditary trustee. There can be no dispute about that; and there can be no need to determine that, because the dispute is only who is entitled to succeed to the hereditary office. Obviously a claim to succeed to the office under such circumstances would fall outside the scope of section 57 (*b*).

It should be difficult to interpret section 57 (*b*) to mean that while one class of claimants to succeed to the office of hereditary trustee of a temple is excluded by the language of section 57 (*b*), other classes of such claimants could be brought within the scope of section 57 (*b*). So the contention of the first respondent in this case, that he held office for a time until he was dispossesed as hereditary trustee, would not make his claim to succeed to the office a dispute within the meaning of section 57 (*b*). All classes of claims to succession to a hereditary trusteeship would appear to be outside the scope of section 57 (*b*).

If we examine the scheme underlying Act XIX of 1951, the scope of section 57 (*b*) becomes clearer. The Act provides for determination of certain disputes in the first instance by the Deputy Commissioner, and they are mainly disputes that affect directly the day-to-day administration of a religious institution. If, for example, there are no hereditary trustees in a given religious institution the appointments of trustees have to be made under section 39 of the Act to carry on the administration of the temple. If a dispute arises whether the office of trustee in the institution is hereditary or not, for on that would depend the answer to the question whether there are no hereditary trustees within the meaning of section 39, such a dispute is specifically brought within the jurisdiction of the Deputy Commissioner under section 57 (*b*) of the Act. If there is no dispute that the office is hereditary, but the dispute is who should succeed to that hereditary office, section 47 (3) of the Act provides for interim arrangements being made by the Deputy Commissioner till the dispute over succession is decided. In either event, whether the appointment is under section 39 or under section 47 (3), that appointment safeguards the interests of the institution. A dispute whether the office is hereditary affects the administration of the temple, and that explains the provision for the determination of that question by the Deputy Commissioner under section 57 (*b*) of the Act. It should be remembered that the powers conferred upon the Deputy Commissioner by section 57 of the Act could be exercised *suo motu*. Taking for example the determination of the question, whether the office of a given religious institution is hereditary, the Deputy Commissioner can take up the question *suo motu* without any need for any applicant to bring up such a question before him, That again is consistent with the scheme underlying the Act, that the administration of the temple is the primary concern of the statutory authorities including the Deputy Commissioner. A dispute over succession to the office of a hereditary trustee cannot obviously affect the temple or its administration to the same extent as a dispute whether the office itself is hereditary. To the extent such a dispute can affect the administration of the temple provision is made in section 47 (3) of the Act. That power also can be exercised *suo motu* by the Deputy Commissioner. In deciding the scope of section 57 (*b*) a relevant consideration could be whether the Legislature intended to clothe the Deputy Commissioner to decide also disputes respecting the right of succession to the office in proceedings initiated *suo motu*, that is, without any need for any claimant to the office coming up before the Deputy Commissioner with a request to adjudge the dispute.

A trustee appointed under section 39 or section 47 (3) of the Act could avail himself of the provisions of section 87 of the Act. That again is a provision for safeguarding the interests of the institution and its administration. Section 87 is also helpful in determining the scope of section 57 (*b*) of the Act.

A person who succeeds to the office of hereditary trustees, for which section 47 (1) provides, is not a person "appointed" within the meaning of section 87 of the Act. Succession in such a case is based upon the hereditary right and not upon the recognition of that right by the Deputy Commissioner; and certainly it does not depend upon any appointment by the Deputy Commissioner. If succession to the office of a hereditary trustee is without any dispute from rival claimants, there should normally be no further difficulty. There should normally be no occasion for a person succeeding to the office without any dispute to ask for possession of that office. If, however, succession to the hereditary office is after the determination of a claim to succeed to the office, still it would be a case of succession under section 47 (1) of the Act, and in that case also no question of appointment as such could arise. And as he would not be a person appointed within the meaning of section 87, a person who succeeds to the office of hereditary trustee after disputes between the rival claimants have been settled by a competent tribunal, he could not apply either to the Deputy Commissioner under section 87. Thus, if the determination of a dispute respecting a right of succession to the office is to be brought within the scope of section 57 (*b*) of the Act, the successful claimant would still have to go to the civil Court to recover possession of the office and whatever goes with it. It is not possible to accept the construction of the language of section 57 (*b*) which involves so anomalous a position, that it takes away the jurisdiction of the civil Courts to determine the right to office but leaves the civil Courts with the jurisdiction to determine whether the claimant whose right is established should be given possession.

The learned counsel for the first respondent referred to *Gopalaswami Mudaliar* v. *Thyagaraja Mudaliar*[1]. That may not be helpful in deciding the question at issue before me, the scope of section 57 (*b*) of Act XIX of 1951. The language of section 84 (*b*) of Act II of 1927 as it was finally amended by Act X of 1946 was, whether a trustee is a hereditary trustee as defined by this Act. That is not quite the same as section 57 (*b*) of Act XIX of 1951. Besides, there are other provisions of Act XIX of 1951 to some of which I have referred above which are not quite the same as those in Act II of 1927. Further, as I have already pointed out, the only question that arose for determination in the proceedings before the Deputy Commissioner in this case was whether it was the first respondent or the petitioners that was entitled to succeed to the office of hereditary trustee, and that was not the position in *Gopalaswami Mudaliar* v. *Thyagaraja Mudaliar*[1].

Neither by express terms nor by necessary intendment does section 57 (*b*) of Act XIX of 1951 divest the Civil Court of its jurisdiction to take cognisance of a claim to succeed to the office of hereditary trustee, which, as I said, is a claim to property. I therefore hold that section 57 (*b*) does not vest that jurisdiction in the Deputy Commissioner.

Since the Deputy Commissioner had no jurisdiction at all to take cognisance of or to decide the dispute respecting the right of succession to the office of hereditary trustee, the order of the Deputy Commissioner, deciding that dispute in favour of the first respondent, must be set aside.

Learned counsel for the first respondent urged that, even if the Deputy Commissioner acted without jurisdiction, this is not a case where the petitioners should be granted the discretionary relief of a writ of *certiorari*.

The learned counsel for the first respondent pointed out that what in form the petitioners asked for was to set aside the order of the Deputy Commissioner, dated 27th January, 1955; but that order was confirmed on appeal by the Commissioner,

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1. (1951) 1 M.L.J. 248.

and there was no prayer to set aside the order of the Commissioner. That may not be a bar to the exercise of the jurisdiction vested in this Court under Article 226 of the Constitution. If the order of the Deputy Commissioner is set aside as one passed by a Tribunal wholly devoid of jurisdiction, the order of the Commissioner, which confirmed that order, would have no basis by itself.

The next contention of the learned counsel for the first respondent was that, since section 62 of the Act provided an alternative remedy, this Court is not called upon to exercise its jurisdiction under Article 226 of the Constitution. No doubt the petitioners could file a suit under section 62, and in that suit the question of the jurisdiction of the Deputy Commissioner to decide the dispute could also be gone into. The existence of an alternative remedy is not a statutory bar to the exercise of jurisdiction under Article 226 of the Constitution, though it is well settled that the Court would be slow to exercise its discretion in favour of the issue of a writ if there is an alternative remedy open to the petitioners. One of the facts that could be taken into account in this case is that the Deputy Commissioner, who had no jurisdiction at all to decide the dispute, decided it ex-parte. Though, of course, the petitioners were mainly responsible for that position, in the circumstances of this case, I do not think the existence of an alternative remedy should result in my maintaining the order of the Deputy Commissioner.

The third contention of the learned counsel for the first respondent was that the petitioners were disentitled to the discretionary relief under Article 226 of the Constitution, because they submitted to the jurisdiction of the Deputy Commissioner, and further they themselves invoked the jurisdiction of the Commissioner by preferring an appeal to him. Here again, normally, when a party voluntarily submitted to the jurisdiction of a Tribunal which had no jurisdiction, he would not be heard in proceedings under Article 226 of the Constitution to say that the Tribunal had no jurisdiction, merely because the decision of the Tribunal went against him. Of course, it is not that submission to jurisdiction that confers jurisdiction on the Tribunal. It is merely a case of a factor being taken into account before the Court decides whether it should exercise its discretion in favour of the applicant before it. In this case, however, it could not be said there was real submission to the jurisdiction of the Deputy Commissioner to adjudge the dispute. Though in the counter statement filed by the petitioners before the Deputy Commissioner the question of jurisdiction was not raised in the specific form in which it has been raised in the proceedings before me, it should have been open to the petitioners to raise that question before the Deputy Commissioner. The parties were not bound by the strict rule of pleadings that could be enforced by a Civil Court. The case, as I have already pointed out, was decided ex-parte. In the appeal to the Commissioner, the main point urged was that the Deputy Commissioner should have granted the adjournment asked for by the petitioners and that he should not have decided the case ex-parte. Under such circumstances, neither the fact that the petitioners participated up to a stage in the enquiry before the Deputy Commissioner, nor the fact that they appealed to the Commissioner to set aside the order of the Deputy Commissioner is enough to disentitle the petitioners to the grant of relief under Article 226 based on the finding, that the Deputy Commissioner acted wholly without jurisdiction.

In the view I have taken on the question, whether the Deputy Commissioner had jurisdiction, it is not necessary to go into the other contentions put forward by the learned counsel for the petitioners, that the Deputy Commissioner did not give a real and effective opportunity to the petitioners to be heard in their defence.

This petition is allowed. The rule is made absolute. The order of the Deputy Commissioner, dated 27th January, 1955, is set aside as one passed wholly without jurisdiction. No order as to costs.

R.M. *Rule made absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

V. S. V. Thangavelu Mudaliar .. *Appellant**

v.

G. Thirumalswami Mudaliar and another .. *Respondents.*

Transfer of Property Act (IV of 1882), section 100—Charge—Scope of—Charge created by a decree of Court—If within the scope of section 100—Extinguishment of charge—Property charged with several debts—Sale in execution of one debt—If extinguishes the other charges.

A single charge, as distinct from a simultaneous charge in favour of more than one party for different amounts, stands on a different footing. A single charge over property in favour of a creditor can become extinguished if the property is sold in execution of the decree creating the charge, but the same cannot be said to be the result when one of two simultaneous charges is enforced and the property is sold in the course of such enforcement.

(Analogy of property charged with payments of maintenance—sale for arrears of maintenance does not extinguish the charge for future maintenance—pointed out). When there are more charges than one in respect of the same property if it is sold in the enforcement of one charge, it cannot amount to the extinguishment of the other charge which has not been enforced.

Even on a consideration of the language of section 100 of the Transfer of Property Act itself it seems to be reasonable to hold that the section does not include within the scope of the phrase 'by operation of law' what is furnished between transfer by operation of law and that by or in execution of a decree by a competent Court would afford sufficient indication of the intention of the legislature that the charge created by operation of law must be understood to be distinct and different from a charge created by a decree of Court and the former cannot include the latter. A charge created by a decree of Court cannot be a charge created by act of parties or by operation of law. It is altogether a different category not contemplated by section 100, Transfer of Property Act. The scope of section 100 is limited only to charges created by Act of parties or by operation of law.

Durga Prasad v. *Mt. Tulsa Kuar,* A.I.R. 1939 All. 579 ; *Ghasiram* v. *Kundanbai,* I.L.R. (1941) Nag. 513 : A.I.R. 1940 Nag. 163 ; *Debendra Nath Giri* v. *Smt. Trinayani Dasi,* I.L.R. 24 Pat. 245 : A.I.R. 1945 Pat. 278 ; *Prem Kuer* v. *Ram Lagan,* A.I.R. 1948 Pat. 199, followed.

Goswami Maheshpuri v. *Ramchandra Sitaramji,* A.I.R. 1944 Nag. 1 ; *Basumati Kuer* v. *Harbansi Kuer,* I.L.R. 20 Pat. 86 : A.I.R. 1941 Pat. 95 ; *Venkatachal Pillai* v. *Rajagopal Naidu,* (1945) 2 M.L.J. 388, differed.

Appeal against the order of the District Court of North Arcot at Vellore, dated the 7th July, 1952 and made in E.A. No. 19 of 1950 in E.P. No. 15 of 1948 in O.S. No. 71 of 1927 (Sub-Court, Vellore).

N. R. Raghavachariar, V. C. Srikumar and *P. S. Varadan* for Appellant.

S. Ramachandra Ayyar for Respondent.

The Judgment of the Court was delivered by

Basheer Ahmed Sayeed, J.—This appeal arises out of the order passed by the learned District Judge of North Arcot, in E.A. No. 19 of 1950 in E.P. No. 15 of 1948 in O.S. No. 71 of 1927 on the file of the Sub-Court, Vellore. The appellant is the 1st respondent in Application 19 of 1950. The first of the two respondents in the appeal before us was the petitioner in the lower Court.

The first respondent in his petition filed under section 47, Civil Procedure Code, prayed to the District Court that the properties described in his petition which are comprised in Schedule A to the execution petition should be exonerated from liability under the decree in execution on the ground that the second respondent Kanniappa Mudaliar had no saleable interest in the suit properties and that the first respondent was entitled to the same by virtue of his purchase in Court auction held in E.P. No. 2 of 1943 in the suit O.S. No. 71 of 1927 on the file of the Sub-Court, Vellore. O.S. No. 71 of 1927 was a suit for partition by two plaintiffs as against 10 defendants. A preliminary decree was passed on the 4th August, 1930 and against that decree an appeal was filed by the first defendant in the suit. The appeal was A.S. No. 330 of 1930 on the file of the High Court. The first defendant in the suit also filed an application for staying of further proceedings in the

* A.A.O. No. 726 of 1952. 29th April, 1955.

suit which was C.M.P. No. 3514 of 1930 and he prayed for staying the passing of the final decree as well on condition that the petitioner therein, namely the first defendant furnished security for Rs. 12,000 to the satisfaction of the Sub-Court, Vellore. Further proceedings in the suit and the passing of the final decree appears to have been actually stayed on the acceptance of the security offered by defendants 1 and 2 and another. Meanwhile, both the first plaintiff and the first defendant died and plaintiffs 2 to 4 were impleaded as legal representatives of the first plaintiff. Similarly the second defendant was recognised as the representative of the first defendant. A final decree was passed on the 1st November, 1941, in which various sums were decreed to be paid by the second defendant to plaintiffs 2 to 4 as one group and to defendant 3 and 4 forming the second group. The direction in the decree material to the present appeal was the creation of a simultaneous charge over the shares of the second defendant in the immovable properties for payments of the amounts decreed to plaintiffs 2 to 4 and defendants 3 and 4 respectively.

Thereafter plaintiffs 2 to 4 filed E.P. No. 2 of 1943 for recovery of a sum of Rs. 25,958-13-0 as against the second defendant and their surety by sale of the charged properties as well as the properties covered by the security bond already referred to and prayed for other reliefs as well. Notice of this execution application was issued to the second defendant and to the 12th defendant who was the representative of the surety. Objections raised against the execution petition were heard and overruled by the Judge. The 12th defendant would appear to have deposited on the date of sale namely 11th September, 1944, a sum of Rs. 12,000 in Court and consequently the sale of his properties which were offered as security appears to have been averted; but the other properties covered by the execution application were sold and the 1st respondent petitioner who is a stranger third party purchased them for Rs. 15,500 at the Court auction. This sale was duly confirmed and a certificate of sale was issued on the 21st December, 1944. Under this sale certificate, the auction purchaser took possession of the properties and has been in enjoyment.

Thereafter the present appellant before us who was the first respondent in the lower Court obtained an assignment of the decree from the 4th defendant by a registered deed, dated 26th January, 1948. He became entitled to recover the sum due under the decree by virtue of this assignment and therefore he filed E.P. No. 15 of 1948 for recovery of a sum of nearly Rs. 60,000 from the second defendant and sought the sale of the properties. The second defendant judgment debtor did not object to the recognition of the assignment in favour of the appellant and the transfer was accordingly recognised and the Court ordered execution of the decree to be proceeded with.

Thereupon the first respondent impleaded himself in the Execution Petition namely No. 2 of 1943 and filed E.A. No. 19 of 1950 out of which the present appeal has arisen. In his application as already stated, he claimed that the properties purchased by him in Court auction and which were in his possession and enjoyment should be exonerated from being proceeded with in execution. In his petition he raised three grounds in support of his prayer. The first ground was that he had a priority of charge since his charge really arose out of the security bond executed by defendants 1 and 2 and the surety covered by Exhibit A-3 and that it was intended to operate only in favour of the plaintiffs in whose foot-steps he had entered as auction purchaser. His point was that the preliminary decree was only in favour of the plaintiffs and though the final decree created charges in respect of the sums payable to the plaintiffs and also to the defendants 3 and 4, the charge of the plaintiffs had a priority under the circumstances. The second ground urged by the first respondent was that the appellant was estopped by conduct and notice of Exhibit P-2 in which the first respondent became the auction purchaser. He also urged that the appellant's assignor, the 4th defendant in the suit was aware of the execution petition filed by the plaintiffs and that the appellant who became the assignee of the 4th defendant was himself conducting the litigation on behalf of the plaintiffs, that the 4th defendant also filed an execution petition 8 of 1945

for delivery of possession of the properties allotted to him under the decree when E.P. No. 2 of 1943 in which the sale was held was pending. The first respondent also urged that the 4th defendant and the present appellant accepted the Court sale by applying for rateable distribution of the assets in E.A. No. 164 of 1946. The third and the most important ground which is material for the purpose of this appeal was that where properties are sold in the enforcement of a single indivisible charge created under a decree, even though the sale was for the amount due to one party alone, the property passed free of encumbrances to the Court-auction purchaser, and the charge if any in favour of another creditor became extinguished by such sale and that the remedy of any other interested party entitled under the charge would be only against the moneys realised by the sale by rateable distribution.

The learned District Judge did not accept the first two grounds urged by the first respondent and held that the first respondent was not entitled to any priority and that the final decree created a simultaneous charge not merely in favour of plaintiffs 2 to 4 but also defendants 3 and 4. The learned District Judge also held that, notwithstanding the fact that it might be said that the 4th defendant was aware of the execution petition and that he also applied for rateable distribution of the assets in E.A. No. 164 of 1946 which was dismissed, if the properties were still liable to be proceeded by way of enforcement of the charge, it was no defence to contend that there was some kind of estopped by conduct because the appellant-first respondent must be deemed to have acquiesced in the Court sale. The learned Judge also held that actually in E.P. No. 2 of 1943 no notice of the application was issued to defendants 3 and 4 though the 4th defendant was impleaded in the proceedings before him as legal representative of the third defendant who died. But on the third question, the learned District Judge however, held that the first respondent was entitled to succeed on the principle of law governing mortgages and held that the properties having been sold for full value to third party in enforcement of the single indivisible charge at Court auction, the Court auction purchaser took them free of any further liability under that very charge and therefore allowed the petition. The first respondent the assignee of the decree in favour of defendants 3 and 4 has preferred this appeal against the said order of the learned District Judge.

Mr. N. R. Raghavachari appearing on behalf of the appellant urged that the principle of the extinguishment of mortgage rights when properties are brought to sale in execution of mortgage rights when properties are brought to sale in execution of mortgage decrees cannot apply to charges created by a decree of Court and that the rule laid down in section 100 of the Transfer of Property Act, does not apply to such charges created by decrees of Court. The first part of section 100 relating to the charges is to the following effect :

> "Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property and all the provisions herein before contained which apply to a simple mortgage shall so far as may be apply to such charge."

The second part of section 100 is to the following effect :

> " Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust and save as otherwise expressly provided by any law for the time being in force no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."

Relying on this section it is that the learned counsel for the first respondent vigorously contends that since the auction purchaser the first respondent had paid consideration and since the sale has taken place in the enforcement of a single indivisible charge, the charge cannot be enforced against the properties in the hands of the auction purchaser as the section lays down that all the provisions which apply to simple mortgages also apply to such charges. It is true that the auction purchaser has paid full consideration for the property which he has purchased in Court auction but that does not mean that he has paid also the value of the charge in favour of defendants 3 and 4. But even granting that section 100 applies to a

charge created by a Court decree, it is difficult to see how merely because the auction purchaser has paid consideration towards the enforcement of one charge which had no relation or reference to the other charge, the property could not be proceeded against in the enforcement of the other charge infavour of defendants 3 and 4 whose assignee the present appellant is. Many other conditions will have to be satisfied before the auction purchaser could claim immunity in respect of the properties purchased by him. In the first place he must be a purchaser without notice of the charge. In this case by no stretch of imagination could it be said that the auction purchaser purchased the property without notice of the charge in favour of defendants 3 and 4. For the very decree in execution of which the property has been brought to sale by the assignors of the first respondent creates a charge not merely in favour of his assignors but also in favour of the assignors of the appellant. As has been pointed out by the learned District Judge the proclamation of sale itself appears to have restricted the scope of the sale only to the charge in favour of the first respondent's assignors and no auction purchaser could be heard to say that he purchased the properties in Court auction without the knowledge of even the very decree itself under which the properties were brought to sale. It is clear, therefore, that this important requirement, namely, want of notice, which will entitle the auction purchaser to get the properties purchased by him exonerated, has not been complied with; for he must be deemed to have had notice of the charge created by the decree in the execution of which he was purchasing.

In the second place, the charge created by the final decree in favour of defendants 3 and 4 is admittedly simultaneous with the charge created in favour of plaintiffs 1 and 2. By no means could it be said to be a subsequent charge in point of time as in the case of a subsequent pusine mortgagee in order to give any priority or any greater right to the first respondent herein. The effect of this simultaneous charge in favour of two sets of parties under the same decree is not that one charge is prior and the other is later and the learned District Judge has therefore rightly rejected the contention of the first respondent that he has any priority, which claim the first respondent wanted to butress by reason of the preliminary decree also the security bond and other circumstances. When a simultaneous charge is created in respect of two different sets of parties, it means that two charges are created one in favour of each set and especially so, when the parties are different. Again when the charges created are also in respect of two different amounts payable by the judgment debtor, it cannot be said that the charge is one and the same or that it is single and indivisible. It is but reasonable, on the other hand, to construe the simultaneous charge as two charges created in respect of two different sets of individuals and in respect of two different amounts. Consequently, though the creation of a charge may be simultaneous under the same decree, the contention that the charge is one single indivisible charge seems to carry no meaning in the circumstances of this case. When two charges are created in respect of two different amounts, it means that the two sets of individuals are entitled to enforce the charge created in their favour separately and independently, though it may be against one and the same judgment-debtor and in respect of the self same properties. The learned District Judge has laboured hard on the point that since the charge is simultaneous, it is single and indivisible and therefore once such a charge is enforced, it amounts to an enforcement of the charges in their entirety, the party purchasing the property sold in enforcement of the charges takes the entire property without its being in any way subject to the other charge created in respect of the other individuals which has not, however, been yet enforced. It is impossible to understand how when there existed two charges, one of which alone was sought to be enforced and the properties brought to sale in enforcement of the charge, the other charge also gets extinguished though the party entitled to that charge has not sought to enforce it, nor any property brought to sale in execution of that charge.

In this case, the matter has been made worse by the fact that the other charge holders, namely, defendants 3 and 4 the assignors of the appellant have not been given any notice of the enforcement of the charge by the assignors of the first res-

pondent. The case is different in the case of a simple mortgage; if a subsequent pusine mortgagee is given notice and is made a party the mortgagee right that exists in favour of the pusine mortgagee gets extinguished, when the mortgaged properties are brought to sale in execution of the mortgage decree, to which the pusine mortgagee has been made a party. But in this case, as the learned District Judge has held that no notice was given to defendants 3 and 4, so the enforcement of the charge by the plaintiffs cannot in any way prejudice or take away the right of defendants 3 and 4 to enforce the charge created in their favour. The charge, therefore, subsists and it may be enforced at any time. Naturally their assignee also will not be affected by any enforcement of the charge in favour of the plaintiffs 2 and 3. The enforcement of the charge cannot *ipso facto* make the other charge become non-existent unless it is done in a legal manner.

Mr. Raghavachari for the appellant, however, urged that so long as the charge created in favour of the appellant's assignors subsists without having been enforced or disposed of by any other means known to law, any purchase in execution of the charge in favour of plaintiffs 1 and 2 would also be affected by the law of *lis pendens* for though the charge created in favour of defendants 3 and 4 has been simultaneous, still it being a separate and an independent charge created in respect of a different sum payable by the second defendant to defendants 3 and 4, any sale of the property in enforcement of the charge in favour of the plaintiffs would only be still subject to the charge which remains yet to be enforced by the other charge-holders. The mere sale of the properties with the distinct statement in the proclamation of sale that it is being sold for the enforcement of the charge in favour of only the plaintiffs without making mention of the other charge under the self same decree, cannot by any means put an end to the charge in favour of the other charge-holder, and cannot assure the purchaser a title free from all encumbrances in the property sold. He cannot be said to have purchased the property free of the charge. A single charge as distinct from a simultaneous charge in favour of more than one party for different amounts stands on a different footing. A single charge, over a property in favour of a creditor can become extinguished if the property is sold in execution of the decree creating the charge, but the same cannot be said to be the result, when one of the two simultaneous charges is enforced and the property is sold in the course of such enforcement. The analogy of charges created for maintenance appears to be opposite in this case, for when a charge is created for maintenance payable to any decree-holder, if for arrears of such maintenance, the charge is sought to be enforced and property is sold in the course of such enforcement, any purchaser who buys the property, does not buy the same to the complete extinction of the maintenance charge. On the other hand, so long as the decree for maintenance is a charged decree in respect of the property, any purchaser who buys the property in execution of the decree for arrears of maintenance will only buy that property subject to the charge which still subsists in respect of future maintenance. The liability in respect of future payments of maintenance always remains even after one or two sales have taken place after the realisation of the arrears payable under the decree. It cannot be argued that the effect of the sale of the property to satisfy the claim for the arrears extinguishes the charge completely and once for all. It is only a sale to satisfy the particular claim for the arrears and not to satisfy the maintenance decree as a whole, even as the charge for future maintenance still remains attached to the property and the auction purchaser gets the property only subject to the charge. So also when there are more charges than one in respect of the same property, if it is sold in the enforcement of one charge, it cannot amount to the extinguishment of the other charge which has not been enforced.

The more important and substantial point urged by the learned counsel for the appellant and which remains to be considered is that the principle enunciated in section 100 does not apply to the charges created by decrees of Court. Even at the outset, it may be mentioned that what the section specifically mentions is only the charge created by the Act of parties or by operation of law. Obviously the charge now in question was not one created by the act of parties nor could it be

said to be a charge created by operation of law. It is difficult to see how rights created by virtue of directions under a decree could be the same as those created by operation of law. Even so, liabilities created under a decree of Court cannot be the same as liabilities created by operation of law. As against the two categories of rights or obligations created by act of parties and those by operation of law, it is easily conceivable that rights or obligations created by directions contained in decrees or orders of Court form a distinct and different category altogether. It is not necessary for us in this appeal to go into the numerous instances of rights and obligations created by the operation of law, as distinct from rights and obligations created under decrees or orders of Court. Suffice it to say that the rights of the Government or any Public body to recover its dues by way of taxes or other fees in respect of properties, trades or professions or other transactions which become payable by virtue of sections of the law enacted by the State Legislature are always distinct and different from what the parties are awarded and become entitled to recover or enforce by virtue of decrees or orders of Court. Such being the case, even on a consideration of the language of section 100 itself, it seems to be reasonable to hold that section 100 of the Transfer of Property Act, does not include within the scope of the phrase by 'Operation of law' what is brought into existence by reason of orders or decrees of Court.

The question whether a charge created by a decree is within the scope of this section or not seems to have been a subject of conflicting decisions. One view appears to be that where a decree incorporates a compromise creating a charge upon some immovable property of the judgment debtor it should be considered to be a charge within the meaning of section 100 of the Transfer of Property Act. The argument advanced in support of this view is that since the charge is the outcome of a compromise, it should be classified as a charge created by act of parties. The underlying principle being that the compromise is a contract and when it is embodied in a decree, it does not cease to be a compromise. Another view appears to be that a charge created by a decree based upon an award will be treated as a charge created by operation of law. This is based on the view that the expression 'operation of law' means working of the law. A third view is the one which we have already referred to, namely, that a charge created by a decree is not a charge within the meaning of this section. There are numerous decisions in support of each one of the views set forth above. As already indicated we are inclined to hold the view that the scope of section 100 of the Transfer of Property Act, is limited only to charges created by act of parties or by operation of law. If it were otherwise, the section would not have left out charges created under a decree of Court from being included within the scope of the section. We are not also convinced that a charge created by a decree would be considered to be a charge by operation of law. The reasonable view in our opinion to take will be that the legislature did not intend to include charges created by decrees to come within the scope of section 100. The distinction furnished between transfer by operation of law and that by or in execution of a decree by a competent Court would afford sufficient indication that the legislature could not have intended to bring within the scope of the expression 'operation of law' what is sought to be done by decrees or orders of Court. In our opinion the charge created by operation of law must be understood to be distinct and different from a charge created by decree and the former cannot include the latter.

In *Durga Prasad* v. *Mt. Tulsa Kuar*[1], where a decree for future maintenance in favour of a Hindu Widow had declared a charge for future maintenance on the property in possession of the husband's family, it was held that the immovable property has not been made security for the payment of money by the act of parties or by operation of law, but it was only by virtue of a decree that a charge has been created on certain specified immovable properties and therefore, Order 34, rule 14 was not a bar in her way. On the analogy of maintenance charge created by decree which is enforceable every time the maintenance fell into arrears without

1. A.I.R. 1939 All. 579.

the charge being extinguished by one or more sales of the property on prior occasions, we think that the second charge created simultaneously by virtue of a decree cannot come within the scope of section 100 so as to have the effect of the same being extinguished by reason of a prior sale in execution of the first charge.

In *Ghasiram* v. *Kundanbai*[1], and *Debendra Nath Giri* v. *Smt. Trinayani Dasi*[2] which are again cases of maintenance decree creating a charge on certain properties of the judgment debtor entitling the decree holder to realise the same by taking out execution without the necessity for fresh suits after every default in the payment of the decree, it was held that the decree was in the nature of a composite decree which is not one single decree but comprised as many decrees for payment and realisation of the properties charged as and when there were defaults and that the purchase by the decree-holder in any previous execution of one of the items of the properties charged could not attract the operation of section 60 when a fresh execution was taken for realisation of the further maintenance accrued due by the default of the judgment-debtor. It was further held that a charge created by a decree of the Court was neither the charge created by the Act of parties nor one created by operation of law and that therefore section 100 could not apply.

To similar effect is the decision in *Prem Kuer* v. *Ram Lagan*[3]. The Bench is this decision held that a charge created by a decree of the Court is neither a charge created by act of parties or created by operation of law and that such a charge did not fall under section 100.

In *Goswami Maheshpuri* v. *Ramchandra Sitaramji*[4], however it has been held that when a charge is created by a decree, there is no privity of estate between the charge holder and the judgment-debtor is free to deal with the property and a person taking *bona fide* without notice of such a charge ought to be protected. But there is also an *obiter dictum* that there is no difference in principle between a charge created by a decree and also created by a contract and that if a charge does not create any interest in the immovebale property, it should make no difference whether it is created by act of parties or by terms of a decree. In our opinion this decision does not help the respondent to any extent.

In *Basumati Kuer* v. *Harbansi Kuer*[5], it was held that where a particular right is charged on specific immoveable property by a decree of Court, such right cannot be enforced against a subsequent transferee for valuable consideration and without notice of the charge. It was also held that a charge created by a decree in pursuance of an agreement between the parties would be a charge created by act of parties and consequently one contemplated under section 100. We do not think that this decision has any application to the facts of the present case for the charge in the present case has not been created by agreement between the parties, but it was one created by a final decree passed by the Court.

In *Venkatachala Pillai* v. *Rajagopal Naidu*[6] Bell, J., has held that the words 'Operation of law' occuring in section 100 of the Transfer of Property Act, included a charge brought into being by a decree of a competent Court. We are not inclined to agree with the learned Judge that section 100 included within its scope charges created by decrees of Court.

On a consideration of the conflicting decisions that we have referred to above, we do not think that we shall be justified in holding that the charge created by a decree is one that comes within the scope of section 100 of the Transfer of Property Act. In our view, it cannot be a charge created either by act of parties by operation of law. It is altogether a different category not contemplated by section 100 of the Transfer of Property Act and the respondent therefore, cannot take advantage of his purchase of the property sold in enforcement of the charge created by the decree to the detriment of the other charge created by the same decree but which is still subsisting and which is yet to be enforced by the party in whose favour it was created.

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1. I.L.R. (1941) Nag. 513 : A.I.R. 1940 Nag. 163.
2. I.L.R. 24 Pat. 245 : A.I.R. 1945 Pat. 278.
3. A.I.R. 1948 Pat. 199.
4. A.I.R. 1944 Nag. 1.
5. I L.R. 20 Pat. 86 : A.I.R. 1941 Pat. 95.
6. (1945) 2 M.L.J. 388.

The learned counsel for the respondent also raised a further point, namely, that the application E.A. No. 164 of 1946 made by assignors of the present appellant for rateable distribution had the effect of extinguishing the charge in favour of the said defendants 3 and 4. His argument was that since the Court held that the assignee of defendants 3 and 4 was not entitled to rateable distribution of the proceeds brought into Court by virtue of the sale of the property in the enforcement of the charge held by the plaintiffs, the appellant cannot once again re-open the question and that the order also acted as *res judicata*. We do not think we can agree with the learned counsel for the respondent on this point. If anything, the order refusing rateable distribution to the assignee of the defendants 3 and 4 meant only that he was entitled to enforce his charge independently of the prior execution in enforcement of the charge. In other words, the order merely had the effect of confirming the right of the assignee of defendants 3 and 4 to enforce his charge and not to claim any rateable distribution out of the moneys brought into Court as a result of the enforcement of the charge held by the plaintiffs, that is to say, the assignee of the defendants 3 and 4 was not entitled to claim the money which did not belong to him because it was not brought into Court in execution of his charge on the properties. The money in Court did not really represent the value of the proceeds of both the charges that the parties were entitled to and out of which only one was enforced. We are not convinced that the order in E.A. No. 164 of 1946 in any way precludes the appellant from enforcing his charge which still subsists in his favour and which in our opinion has not been extinguished by the enforcement of the charge in favour of the plaintiffs.

In the result, we set aside the order of the learned District Judge and remand the application to the lower Court with a direction that the decree-holder may be made a party to it and ordered to bring into Court the sale proceeds which will be dealt with in accordance with law either by returning the sale proceeds to the auction-purchaser and ordering a fresh sale making all interested persons as parties or by confirming the sale and distributing the sale-proceeds among the charge-holders rateably.

No costs.

R.M. ——— *Order set aside : Application remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI GOUNDER.

Subramanya Bhatta .. *Appellant**

v.

Devadas Nayak (as kartha of the family) and others .. *Respondents.*

Arbitration Act (X of 1940), sections 2 (c) and 21—'Court'—If includes an appellate Court—Power of appellate Court to refer disputes between litigants for arbitration.

The definition of ' Court ' in section 2 (*c*) of the Arbitration Act includes an appellate Court and so under section 21 of the said Act an appellate Court can refer disputes between litigants for the decision of arbitrators. The provisions of section 107 (2) of the Code of Civil Procedure would still empower an appellate Court to refer disputes to arbitration, notwithstanding the fact that the provisions relating to arbitration contained in Schedule II of the said Code has been repealed and re-enacted as a separate Act of 1940.

Moradhwaj v. *Bhudar Das*, A.I.R. 1955 All. 353, referred.

Thakur Prasad v. *Baleshwar Ahir*, A.I.R. 1954 Patna 106, followed.

Abani Bhushan Chakrabarti v. *Hem Chandra Chakrabarti*, I.L.R. (1946) 2 Cal. 492, differed.

Appeal against the order of the District Court of South Kanara, dated the 28th August, 1952 and made in I.A. No. 228 of 1952 in A.S. No. 29 of 1950 (O. S. No. 44 of 1947, Sub-Court, South Kanara.)

T. Krishna Rao for Appellant.

A. Narayana Pai for Respondent.

* A.A.O. No. 663 of 1952. 8th July, 1955.

The Court delivered the following

JUDGMENT.—In this appeal, the learned counsel for the appellant raised a question of law, not covered by any decision of our High Court, as to the powers of an appellate Court to refer the disputes between the parties to arbitration. During the pendency of the appeal A.S. No. 29 of 1950, the District Judge of South Kanara, on the joint application of both the parties to the appeal, referred the matter to arbitration ; and on receipt of the award which went against the third respondent, he filed a petition, R.I.A. No. 228 of 1952, to set aside the award and to hear the appeal on the merits. Before the learned District Judge, two grounds were taken by the petitioner : (1) that the notices required by section 14 were not given, and (2) that the appellate Court cannot refer a dispute to arbitration and that the reference itself was therefore bad. The learned District Judge negatived both the contentions and held that the reference to arbitration was proper and within the powers of the appellate Court, and accordingly dismissed the petition. As against that order, the present appeal has been preferred. In this appeal, the only contention that was advanced for the appellant was the same as ground No. 2 raised before the learned District Judge, namely, that an appellate Court has no powers to refer the matter to arbitration under section 21 of the Arbitration Act.

The provisions relating to arbitration were originally embodied in schedule II of the Civil Procedure Code. But those provisions were repealed and re-enacted into a separate code by Arbitration Act X of 1940. We have therefore to look to the provisions of that enactment to answer the contention advanced for the appellant. Prior to the enactment of Act X of 1940, there was no difficulty in holding that an appellate Court had powers to refer the disputes between the parties to the appeal to arbitration under schedule II of the Code of Civil Procedure by reason of the provisions of section 107 of the Code, under which an appellate Court is given the same powers and authorised to perform the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein. Reference may made to an old decision of our High Court reported in *Sankaralingam Pillai*, In re[1]. It is contended for the appellant that after the repeal of the second schedule and the re-enactment of those provisions into a separate Code, it is not open to resort to section 107 of the Code, and emphasis is placed on the words " by this Code," occurring in clause 2 of that section. But that contention has been answered by a Full Bench decision of the Allahabad High Court reported in *Moradhwaj* v. *Bhudar Das*[2]. The learned Judges held that by reason of section 8 of the General Clauses Act, the provisions of section 107 (2) of the Code would still empower an appellate Court to refer the dispute to arbitration. At page 358, their Lordships have observed :

> " The Arbitration Act repeals and re-enacts the provisions of schedule II of the Civil Procedure Code. Section 107, Civil Procedure Code, conferred upon the Appellate Court the same powers and the same duties as nearly as may be conferred and imposed by the Code on the Courts of original jurisdiction in respect of suits instituted therein. The word 'Code' included schedule II also, and therefore, it was held that under schedule II an appellate Court has, in exercise of the powers conferred upon it under section 107, the power to refer matters to arbitration. The words ' any other enactment' in section 8 must, in our opinion, include the non-repealed part of the former enactment. The word ' Code ' in section 107 would therefore include a reference to the Arbitration Act which has incorporated the provisions of schedule II of the Civil Procedure Code. This would become apparent if the word ' Code ' in section 107 was amplified and in its place the following words were written : 'the sections and schedules of the Code'. The repeal of schedule II, and its re-enactment in the Arbitration Act, therefore, does not make any difference so far as the powers of the appellate Court under section 107 are concerned, because those powers will still refer to the provisions of the Arbitration Act which have taken the place of the second schedule."

Even apart from that view, it seems to me that there is no insuperable difficulty in reaching the same conclusion by interpreting the word "Court" occurring in section 21 of Chapter IV of the Arbitration Act, as including an appellate Court. Chapters II and III of the Act deal with cases of arbitration where there is no suit pending, and Chapter IV deals with arbitration in pending suits. Section 21 occurring in Chapter IV, provides that in any suit, if all the parties interested

1. (1880) I.L.R. 3 Mad. 78.
2. A.I.R. 1955 All. 353.

agree that any matter in difference between them in the suit shall be referred to arbitration, they may apply in writing to the Court for an order of reference. The question is whether the word 'Court' in that section means only the Court of original jurisdiction and does not include an appellate Court. That word has been defined in clause (*c*) of section 2 as meaning

> " a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under secion 21, include a Small Cause Court."

It is appropriate to make two observations in regard to that definition. One is that the definition refers to a civil Court having jurisdiction and not original jurisdiction. Secondly, the definition excludes only a Small Cause Court (except under section 21) and not an appellate Court. If the intention of the Legislature were to exclude an appellate Court to deprive the parties to an appeal of a very important right of referring their disputes to arbitration even at that stage it would have been quite easy for the Legislature to put into the definition appropriate words which would convey that idea. It is obvious that the civil Court having jurisdiction to decide the questions forming the subject-matter of reference, if the same had been the subject-matter of a suit, would include both the classes of Courts, namely, Courts of original jurisdiction as well as appellate Courts, for, both the Courts have jurisdiction to decide those questions. That was the view adopted in *Thakur Prasad* v. *Baleswar Ahir*[1], where their Lordships observed at page 107 thus :—

> "Examining the definition of the term 'Court' as given in section 2 (*c*), Arbitration Act, quoted above, there seems no valid ground for holding that it excludes an appellate Court. Just as a Court of first instance has ' jurisdiction to decide the questions forming the subject-matter of the reference, if the same had been the subject-matter of a suit', so also an appellate Court has the same ' jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit. This is the function of an appellate Court as well."

I respectfully agree with the above view. However, that interpretation was not adopted by the Calcutta High Court in a decision reported in *Abani Bhushan Chakrabarti* v. *Hem Chandra Chakrabarti*[2], Their Lordships gave two reasons: The first was, to quote their own words :—

> " The lower appellate Court has of course the power to enter into and to decide questions of fact, and to that extent, it may be said that they have jurisdiction to decide questions forming the subject-matter of the reference, but this jurisdiction is the special jurisdiction of an appellate Court and in that capacity they would have no jurisdiction to decide those questions if they had been the subject-matter of a suit. In this view of the matter, we do not think that a 'Court' as defined in the Arbitration Act, will include an appellate Court."

The second reason was :—

> " And we cannot think that it was ever intended that the question whether an appellate Court was empowered to refer matters to arbitration should depend on any such question as whether that Court had pecuniary jurisdiction to decide the questions at issue if they had formed the subject-matter of a suit."

With great respect, I do not feel impressed with those reasons ; and I definitely prefer to follow the view expressed in *Thakur Prasad* v. *Baleshwar Ahir*[1], referred to above. It is also true that in the Allahabad Full Bench case referred to above, the view was taken that according to the definition of the word 'Court' in section 2 (*c*) of the Arbitration Act, it must mean Court of original jurisdiction and cannot include an appeal or execution proceedings. That view appears to have been on the ground that for the purpose of Chapters II and III of the Arbitration Act, the Court that is called upon to function is the Court of original jurisdiction and so, the word "Court" occurring in section 21 of Chapter IV, which must convey the same meaning, necessarily excluded an appellate Court. But it seems to me that under Chapters II and III, an appellate Court will not be called upon to function, because there is the Court of original jurisdiction to exercise those functions on the principle embodied in section 15 of the Civil Procedure Code, and not because there is anything in the definition itself necessarily excluding an appellate Court.

For these reasons, I am of the view that the definition of "Court" in section 2 (*c*) of the Arbitration Act includes an appellate Court, and so, under section 21 an

1. A.I.R. 1954 Pat. 106. 2. I.L.R. (1946) 2 Cal. 492 at 445 and 496.

appellate Court can refer disputes between litigants for the decision of arbitrators. "The word" suit in that section can present no difficulty, because an appeal has always been held to be a continuation of the original suit. In the Patna case referred to above, it was observed :

" I see, therefore, no reason why a restricted meaning should be given to the word 'suit' as used in section 21, Arbitration Act. In my opinion the term 'suit' in that section ought not to be taken to exclude an appeal. I, for myself, find no good ground for the legislature, while giving power to the Court of original jurisdiction to make an order of reference under section 21, Arbitration Act, to exclude an appellate Court from making such an order."

As no other point was argued in this appeal, it will stand dismissed with costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

S. N. Surendra .. *Petitioner**

v.

G. A. Ajiwani .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 7 (3) (a) (i)—Protection of Government servant from eviction—If available to Government servant under suspension.

So long as a Government servant continues to be a Government servant, *i.e.*, till his dismissal. he is 'engaged' in Government service for thepurposes of section 7 (3) (*a*) (i) of the Madras Buildings (Lease and Rent Control) Act, 1949, and if that employment is notified as an essential service by the Government he is entitled to the exemption created by that section. A Government servant though under suspension is still entitled to the benefit of the protection afforded by the said section.

Petition under section 12 (*b*) of the Madras Buildings (Lease and Rent Control Act) (XXV of 1949) as amended by Act VII of 1951 praying the High ourt to revise the decree of the Court of Small Causes at Madras, dated 3rd December, 1952 and passed in H.R.A. No. 272 of 1952 preferred against the order of the Rent Controller, Madras, in H.R.C. No. 5217 of 1951.

D. B. Jagannadha Rao for Petitioner.

A. Sambasiva Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This is a Civil Revision Petition filed by a landlord against the decision of the Court of Small Causes in H.R.A. No. 272 of 1952 wherein the order of the Rent Controller refusing to evict the Petitioner's tenant was affirmed.

The building in question is a residential building and the application for eviction was filed under section 7 (3) (*a*) (i) that the landlord required it for his own occupation. The defence of the tenant was that "he was engaged in an employment or class of employment notified by the State Government as an essential service" and so no order of eviction could be passed against him under section 7 (3) (*a*) (i); there is no dispute that the tenant was a member of the Madras Veterinary Service on the date of the application.

The point, however, raised by learned counsel for the petitioner was that the respondent did not satisfy the requirements of section 7 (3) (*a*) referred to above, because the latter was under suspension. The argument is that a Government servant under suspension is not "engaged" in Government service so as to be entitled to the benefit of the exemption. Both the Rent Controller as well as the appellate authority have held that so long as a Government servant continues in service, he is for the purpose of the exemption under section 7 (3) (*a*) "engaged" in Government service. Several authorities were placed before me as to the status of a Government servant, who had been suspended from service. But there can be no doubt that he still continues to be a Government servant.

The contention that the expression "engaged" in the section and in the notification in pursuance thereof means that the Government servant must be in a position

* C.R.P. No. 473 of 1953. 5th August, 1955.

actively to perform the duties of his office, is in my opinion unsound. So far as the notification under this section is concerned it is in these terms :—

" In exercise of the powers conferred by section 7 (3) (*a*) (i) of the Madras Buildings (Lease and Rent Control) Act 1949, His Excellency the Governor of Madras hereby notifies that the following tenants shall be deemed to be engaged in an essential service for the purpose of the said section, namely:

(*i*) Employees of the State and Union Governments........"

If the notification had alone to be construed, there could be no doubt that the respondent is an employee of the State Government and continues to be so notwithstanding that he is under suspension pending an enquiry into his conduct. Just to mention an analogy, a Government servant on leave, would certainly be an employee of the State and "engaged in an employment" notwithstanding that, so long as he continues on leave, is not required to nor can be compelled to render any active service by way of discharging the duties of any office. The suspension, in the present case, is not a punitive suspension, but one pending enquiry into his conduct. This might at any time cease and the Respondent would be enabled to perform the duties of his office immediately the suspension ceased. In my opinion, the object of this provision would be frustrated if the construction sought to be placed upon it by learned counsel for the petitioner were upheld. I am of the opinion that so long as the Government servant continues to be a Government servant, *i.e.*, till his dismissal, he is "engaged" for the purposes of section 7 (3) (*a*) (i) in an employment and if that employment is notified as an essential service by the Government, he is entitled to the exemption created by the section.

There are no merits in the contention raised on behalf of the petitioner and the Civil Revision Petition fails and is dismissed with costs.

R.M. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P.V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

V. K. John and another .. *Appellants**

v.

G. Vasanta Pai and another .. *Respondents.*

Representation of the People Act (XLII of 1951), *sections* 81, 84, 98, 100 *and* 101—*Cumulative effect of—Election petition—If could pray for more than one relief—Conduct of Election and Election Petition Rules—Rule* 119.

Section 81 of the Representation of the People Act provides that an election petition calling in question any election under the Act may be presented on one or more of the grounds specified in sub-sections (1) and (2) of section 100 and section 101 of the Act. Sub-section (1) of section 100 relates to relief (*c*), sub-section (2) to relief (*a*) and section 101 to relief (*b*) in section 84 of the Act. Section 81 permits an election petition on one or more of the grounds specified in these several provisions. There is nothing to prevent an election petitioner from alleging in the same petition grounds some of which would fall within sub-section (1) and others under sub-section 2 of section 100. It follows that an election petition may pray for more than one relief. But it is clear that the Tribunal can actually grant only one of the three reliefs or dismiss the entire petition under section 98 of the Act. The language, namely " a petitioner may claim any one of the following declarations " in section 84 of the Act is not inconsistent with a petitioner claiming any one of the three alternatively.

Andesh Pratab Singh v. *Brij Narain*, A.I.R. 1954 All. 245; *Mahadeo* v. *Jwala Prasad*, A.I.R. 1954 Nag. 26 and *Durga Shankar Mehta Raj Singh* v. *Thakur Raghu*, (1954) S.C.J. 723, referred.

The two clauses of rule 119 of the Election Petition Rules, 1951, must be taken to provide for any election petition that may be presented, whatever the relief or reliefs prayed for might be. Clause (*a*) would apply to every petition, in so far as it is directed against a returned candidate. If there is only one returned candidate clause (*a*) will apply whether the relief prayed for is that his election should be set aside or the election should as a whole be set aside because the result comes to the same thing, though the grounds may be different. When there are more returned candidates than one, an election petition may pray for a declaration that the election of any one of them to be void. Even then, clause (*a*) would apply. It would equally apply when the election of more than one candidate is impugned individually. In such a case though an election petition may comprise reliefs directed

* W.A. No. 25 and 26 of 1955. 29th April, 1955.

against several candidates for the purpose of limitation such a petition should be deemed to comprise several petitions, each directed against one of the candidates returned, and time must be calculated under clause (*a*) of the rule with reference to each of them.

Clause (*b*) of rule 119 would apply only to a case where there are more returned candidates than one and the election petitioner prays that the election should be declared to be wholly void. The words " calls in question the election as a whole " in the rule must be construed with reference to the provisions of section 84 (*c*) and section 100 (1). The expression " as a whole " in the rule should be understood in the context with reference to the specific relief which is allowed to be claimed, namely, a declaration that the election is wholly void.

Writ Appeals against the order of Mr. Justice Rajagopala Ayyangar, dated 11th January, 1955 and made in Writ Petitions Nos. 723 and 719 of 1954, Petitions under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* or any other writ calling for the records relating to the order of the Election Tribunal, Madras, dated 1st November, 1954 and made in I.A. Nos. 7 and 8 of 1954 in Election Petition No. 28 of 1954 and quashing the said order and to award costs.

M. K. Nambiar, T. Ramaprasada Rao, N. Srivatsamani and *V. P. Raman* for Appellants.

K. V. Venkatasubramania Aiyar, T. Krishna Rao and *A. Narayana Pai* for Respondents.

The Order of the Court was delivered by

Rajamannar, C.J.—These two appeals are from the judgment of Rajagopala Ayyangar, J., disposing of two writ petitions Nos. 719 and 723 of 1954. By the same judgment, the learned Judge disposed of two other writ petitions also ; but we are not concerned with them. The two petitions were filed under Article 226 of the Constitution praying for the issue of a writ of *certiorari* calling for the records of the Election Trubunal, Madras, in Election Petition No. 28 of 1954, and the proceedings of the Tribunal in I.A. Nos. 7 and 8 of 1954 in the said Election Petition, dated 1st November, 1954 and to quash the same.

There was a bye-election for two seats in the Madras Legislative Council from the Graduates' Constituency. There were four candidates for the two seats, namely, Dr. John, Dr. A. Srinivasan, Dr. M. Santhosham, and Mr. G. Vasanta Pai. The election was by postal ballot. The date of the poll was 8th April, 1954. On 9th April, 1954, the votes were scrutinised and counted, and Dr. John and Dr. Srinivasan were declared elected as having polled the largest number of votes. The result of the election was published in the *Fort St. George Gazette* on 12th April, 1954. On 21st July, 1954, Mr. G. Vasanta Pai filed an election petition, subsequently numbered as No. 28 of 1954, calling in question the said election. The two returned candidates, as well as the third candidate, Dr. Santhosham, were impleaded as respondents 1 to 3. The Election Commissioner, New Delhi, constituted an Election Tribunal at Madras for the trial of the petition. The petitioner prayed for an order (*a*) declaring the election to be wholly void, (*b*) declaring the election of both the returned candidates as void, (*c*) giving a finding that the 1st respondent has been guilty of the corrupt practices specified in paragraphs 8, 9 (*a*), and 11, and the illegal practice specified in paragraph 12 of the petition, and the 2nd respondent has been guilty of the corrupt practices specified in paragraphs 8 and 11 of the petition, and (*d*) for costs of the petition. The petition contained several allegations, which were directed against the first two respondents, Dr. John and Dr. Srinivasan individually, and also allegations and circumstances which would render the whole election void, as for example, that the election was not a free election. Dr. John and Dr. Srinivasan took out two applications I.A. Nos. 7 and 8 of 1954 respectively, *inter alia* praying that the Tribunal may be pleased to (1) direct the striking out of prayers (*b*) and (*c*) in paragraph 18 of the petition and (2) direct the striking out of paragraphs 5 to 7, the latter part of paragraph 8, and paragraphs 9 to 16. The main grounds on which these applications were taken out were two : (1) that under the Representation of the People Act, a petitioner

in an election petition can claim only one of the reliefs specified in section 84 of the Act and therefore the petitioner in the present election petition was not entitled to claim both the reliefs, namely, that the whole election was void and also that the election of the two returned candidates, respondents 1 and 2, should be set aside, and (2) that the petition in so far as it prayed for the relief of having the election of the returned candidates set aside, was barred by time, as it had not been filed within the period of limitation prescribed by rule 119 (*a*) of the Rules framed under the Representation of the People Act. The Election Tribunal found that neither ground was sustainable and rejected both the petitions. It is to quash the order of the Election Tribunal dismissing these applications that Writ Petitions 719 and 723 were filed. Rajagopala Ayyangar, J., agreed with the Election Tribunal on both the points and dismissed the writ petitions. Hence these two appeals.

Before us, the same points were again pressed. The first ground of attack against the election petition, namely, that the petitioner was not entitled to claim more than one relief in his petition is founded on the terms of section 84 of the Representation of the People Act. That section runs thus :

" *Relief that may be claimed by the petitioner.*—A petitioner may claim any one of the following declarations :—

(*a*) that the election of the returned candidate is void ;

(*b*) that the election of the returned candidate is void and that he himself or any other candidate has been duly elected ;

(*c*) that the election is wholly void."

In what circumstances each of these three reliefs may be claimed is set out in sections 100 or 101 of the Act. Section 100 (1) gives the grounds for declaring the election to be wholly void, and sub-section (2) the grounds for declaring that the election of the returned candidate is void. Section 101 deals with a case where a person who has filed an election petition has in addition to calling in question the election of the returned candidate, claims a declaration that he himself or any other candidate has been duly elected. Section 98 was also relied on in this connection.

It says :

" At the conclusion of the trial of an election petition the Tribunal shall make an order :

(*a*) dismissing the election petition ; or

(*b*) declaring the election of the returned candidate to be void or ;

(*c*) declaring the election of the returned candidate to be void ; and the petitioner or any other candidate to have been duly elected ; or

(*d*) declaring the election to be wholly void."

The contention on behalf of the appellants before us, respondents 1 and 2 in the election petition, is that section 84 read with section 98 of the Act precludes an election petitioner claiming more than one of the declarations, (*a*), (*b*) and (*c*) in section 84, and as the petition in this case prays both for declarations (*a*) and (*c*), either the petition should be dismissed or the petitioner should be compelled to elect one or other of these two reliefs. The Tribunal in their order observed that the petitioner would not state if he was claiming the reliefs cumulatively or alternatively and he persisted in this attitude even at the hearing of arguments. They then proceeded to say :

" We may state that there is no question under the Act of granting such reliefs cumulatively because section 98 already referred to empowers the Tribunal to pass one of the orders specified therein. Such reliefs cannot therefore be asked for cumulatively and we treat the relief sought in this petition only as being prayed for in the alternative."

The learned Judge, Rajagopala Ayyangar, J., agreed with the Tribunal that this was the proper method of approaching the problem, and it was for the Tribunal to decide eventually the relief which may be granted to the petitioner in the election petition. Before us, Mr. Venkatasubramania Aiyar for the respondent (election petitioner) conceded that the respondent will not be entitled to obtain both the reliefs having regard to the terms of section 98 of the Act, and that though the petition did not expressly mention the two reliefs as alternative, they may be treated

as such. Apart from this concession, we are of opinion that the petition is not liable to be dismissed on this ground. Section 81 of the Act provides that an election petition calling in question any election may be presented on one or more grounds specified in sub-sections (1) and (2) of section 100 and section 101. Sub-section (1), relates to relief (*c*), sub-section (2) to relief (*a*) and section 101 to relief (*b*) in section 84 of the Act. Section 81 permits an election petition on one or more of the grounds specified in these several provisions. There is nothing, therefore, to prevent an election petitioner from alleging in the same petition grounds, some of which would fall within sub-section (1) and others under sub-section (2) of section 100. If so, it follows that the election petition may pray for more than one relief. What, however, is clear is that the Tribunal can actually grant only one of these two reliefs or dismiss the entire petition under section 98 of the Act. The language, namely, "a petitioner may claim any one of the following declarations" is not inconsistent with the petitioner claiming any one of the three alternatively. That this must be so will become evident by reference to a case where the petitioner not only seeks to set aside the election of the returned candidates but claims that he should be declared duly elected. In such a case, cannot the petitioner claim relief (*b*) in the first instance, and in the alternative relief (*a*)? Obviously he can. The petitioner can claim that even if he cannot be declared duly elected the election of the returned candidate may be declared void. It would be for the Tribunal to give the appropriate relief. Otherwise, a most absurd result will follow. If the argument on behalf of the appellants were to be accepted, in such a case the petitioner will be compelled to choose either relief (*a*) or relief (*b*). Suppose he chooses relief (*b*), namely, that the election of the returned candidate is void and that he himself or any other candidate has been duly elected and the Election Tribunal find that there are grounds to declare the election of the returned candidate void, but the Tribunal do not think that the petitioner is entitled to be declared duly elected. In such a case, what is to happen? Should the petition be dismissed? In our opinion there can only be one answer, namely, that the alternative and lesser relief, namely, a declaration that the election of the returned candidate is void, can certainly be granted.

It may be pointed out that section 85 lays down when an election petition is liable to be dismissed by the Election Commission, namely if the provisions of sections 81, 83 or 117, are not complied with. Section 84 is not among the sections mentioned. The decisions in *Audesh Pratab Singh* v. *Brij Narain*[1] and *Mahadeo* v. *Jwala Prasad*[2] support the view that we are taking; and though the point did not fall to be considered directly, the decision of the Supreme Court, in *Durga Shankar Mehta* v. *Thakur Raguraj Singh*[3] lends support to the contention that an election petition can seek alternative reliefs. We agree with Rajagopala Ayyangar, J., that there is no substance in this ground.

The second ground depends entirely on the construction of rule 119 of the Rules made under the Representation of the People Act. Section 81 (1) of the Act provides that an election petition may be filed within such time but not earlier than the date of publication of the name or names of the returned candidate or candidates at such election under section 67, as may be prescribed. It is in pursuance of this provision that rule 119 was made. It is as follows:

"*Time within which an election petition shall be presented.*—An election petition calling in question an election may—

(*a*) in the case where such petition is against a returned candidate be presented under section 81 at any time after the date of publication of the name of such candidate under section 67 but not later than fourteen days from the date of publication of the notice in the official Gazette under rule 113 that the return of election expenses of such candidate and the declaration made in respect thereof have been lodged with the Returning Officer; and

(*b*) in the case where there are more returned candidates than one at an election and the election petition calls in question the election as a whole be presented under the said section 81 at any time after the date of publication of the names of all the returned candidates under section 67

1. A.I.R. 1954 All. 245.
2. A.I.R. 1954 Nag. 26.
3. (1954) S.C.J. 723.

but not later than sixty days from the expiration of the time specified in sub-rule (1) of rule 112 for the lodging of the returns of election expenses of those candidates with the Returning Officer.'"

It is not necessary to refer to rules 112 and 113 mentioned in clauses (*a*) and (*b*) of the above rules, as it is common ground that the present election petition is beyond the time specified in clause (*a*) and within the time specified in clause (*b*). The question is which of the two clauses applies to the present petition. Every one has agreed, the Tribunal and Rajagopala Ayyangar, J., as well as counsel on both sides, that the language of the rule gives rise to several difficulties. One thing is obvious ; the two clauses of rule 119 must be taken to provide for any election petition that may be presented, whatever the relief or reliefs prayed for might be. There is no direct decision dealing with this rule, which gives us any assistance. Counsel expended, therefore, all their ingenuity in persuading us to construe the two clauses of the rule to suit their respective contentions. The construction of the respondent, election petitioner, which was accepted by the Tribunal, and by Rajagopala Ayyangar, J., is this : where the petition calls in question the election of more returned candidates than one, it does not fall within clause (*a*), and clause (*b*) would apply, when there are more returned candidates than one and the election petition calls in question the election of each of the returned candidates, whatever be the grounds.

We are free to confess that rule 119 is not easy to construe and it will be difficult to apply either clause (*a*) or (*b*) to certain election petitions. Giving the question our deep consideration, we have arrived at the following construction of the two classes, taking into account the implication of the two different periods in the two clauses. Clause (*a*) would apply to every petition, in so far as it is directed against a returned candidate. If there is only one returned candidate, clause (*a*) would apply, whether the relief prayed for is that his election should be set aside or the election should as a whole be set aside because the result comes to the same thing though the grounds may be different. When there are more returned candidates than one, an election petition may pray for a declaration that the election of any one of them to be void. Even then, clause (*a*) would apply. It would equally, in our opinion, apply when the election of more than one candidate is impugned individually. In such a case, though an election petition may comprise reliefs directed against several cándidates, for the purpose of limitation such a petition should be deemed to comprise several petitions, each directed against one of the candidates returned, and time must be calculated under clause (*a*) with reference to each of them. We have come to this definite opinion because under clause (*a*) the material date for computing time may differ with reference to each of the returned candidates, because the material date is the date of publication of the notice in the official Gazette under rule 113, that the return of election expenses of such candidate and declaration made in respect thereof have been lodged with the Returning Officer. The date may not be the same for all returned candidates. In such a case, obviously, it is in consonance with principles of equity and justice that the time within which an election petition could be presented against the election of a particular candidate should be connected with the date relating to the return of his election expenses.

Clause (*b*) of rule 119 would, in our opinion, apply only to a case where there are more returned candidates than one and the election petition prays that the election should be declared to be wholly void. With due respect to Rajagopala Ayyangar J, we think that the words " calls in question the election as a whole " must be construed with reference to the provisions of section 84 (*c*) and section 100 (1). If what was intended was that clause (*b*) should apply to a case where the election petition calls in question the election of each of several returned candidates, then appropriate language could have been used, such as for example : " in the case where there are more returned candidates than one at an election and the election petition calls in question the election of all of them." We think that the expression " as a whole " should be understood in the context with reference to the specific relief which is allowed to be claimed namely, a declaration that the election is wholly void. In our opinion, this is the only reasonable construction of rule 119, which avoids many anomalies which would arise on any

other construction. For instance, in a case where a petition is filed to declare the election of one of several candidates to be void, if a petitioner finds that it will be out of time under clause (*a*) all that he has got to do is to attack the election of the other candidates as well, and the petition would be in time. Or to give an extreme illustration if according to rule 119 (*a*), the time has elapsed within which a petition could be presented against every one of the returned candidates individually as for instance, where several petitions are filed, each of them impugning the election of one of the candidates, nevertheless if in a single petition the election of all the candidates is sought to be declared void, then the period of limitation would be that provided in clause (*b*), and the petition might be in time. In our opinion, such a result could not have been contemplated. The division of rule 119 into (*a*) and (*b*) provides for several contingencies, namely (1) where there is only one returned candidate, (2) where there are more returned candidates, than one, (3) when the election of a particular candidate is challenged, and (4) when the entire election is sought to be declared wholly void. It is only by adopting the construction which we have indicated above, that the two clauses can cover all the contingencies. We think it is a sound principle to deal with a single petition in which the election of more candidates than one is individually impeached as really comprising several petitions against each of the candidates. Just as a suit brought against several defendants may be in time against some of the defendants but out of time against others, or a suit brought for several reliefs may be barred by time in respect of some of the reliefs and be in time in respect of others, an Election Petition may be in time in respect of some of the respondents but out of time as against others, and equally it may be in time in respect of one relief but barred in respect of another relief. The position then, according to our above construction, is that the petition against both respondents 1 and 2, so far as relief (*b*) in paragraph 18 of the petition is concerned, is out of time under rule 119 (*a*). The petition, in so far as it seeks a declaration that the election is wholly void, is in time.

The next question is, whether because we have come to a conclusion different from the Tribunal's on the question of limitation, we should interfere. Mr. Venkatasubramania Ayyar, learned counsel for the respondent, raised the objection that even assuming that the Election Tribunal erred in law on a construction of rule 119, it would only amount to a wrong decision, and this Court should not issue a writ of *certiorari* to quash the order of the Tribunal on the ground that it embodies a wrong decision in law. He drew our attention to the latest pronouncement of the Supreme Court in *Hari Vishnu* v. *Ahmad Ishaque*[1], in which there is an exhaustive consideration of the powers of the High Court under Article 226, and in particular to the following passage :

> " The Court issuing a writ of *certiorari* acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior Court or Tribunal even if they be erroneous. This is on the principle that a Court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well as right and when the Legislature does not choose to confer a right of appeal against that decision it would be defeating its purpose and policy if a superior Court were to re-hear the case on the evidence and substitute its own findings in *certiorari*. These propositions are well settled and are not in dispute."

Reference may also be made to the prior decision of the Supreme Court in *T. C. Basappa* v. *T. Nagappa*[2], in which the law was thus stated :

> " An error in the decision or determination itself may also be amenable to a writ of *certiorari* but it must be a ' manifest error apparent on the face of the proceedings ', *e.g.*, when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by *certiorari* but not a mere wrong decision."

On the other hand, Mr. M.K. Nambiar for the appellants relied upon a statement of the law contained in the decision of this Court in *Lakshmanaswami Ayyar* v. *Mohanlal Binjani*[3], and the decision of the English Court of Appeal in *R.* v. *Northumberland Compensation Appeal Tribunal*[4]. In our opinion, the proper order to be passed by us under Article 226 in this case is not an order directing the issue of a writ of *certiorari*

1. 1955 S.C.J. 267: (1955) 1 M.L.J. (S.C.) 157 : 1955 An.W.R. (S.C.) 157 : A.I.R. 1955 S.C. 233.
2. 1954 S.C.J. 695 : A.I.R. 1954 S.C. 440.
3. (1948) 2 M.L.J. 559.
4. (1952) 1 A.E.R. 122.

but really an order in the nature of a writ of prohibition. The result of our construction of rule 119 is that the election petition is not maintainable against the Respondents 1 and 2 so far as relief (*b*) in paragraph 18 is concerned. The Election Tribunal will, therefore, have no jurisdiction to proceed with the trial of the petition in respect of this relief. The fact that after listening to the parties they overruled the objection as to their jurisdiction in this behalf does not make any difference. If, as we have now found, the Tribunal was not competent to entertain the petition so far as that relief is concerned, the appropriate writ will, therefore, be a writ of prohibition prohibiting the Election Tribunal from proceeding with the trial of the election petition, so far as relief (*b*) in paragraph 18 of the petition is concerned. We accordingly direct such a writ of prohibition to issue to the Election Tribunal.

The appeals are, therefore, dismissed. No order as to costs.

R.M. ——— *Appeals dismissed* : *Direction given.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P.V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE PANCHAPAKESA AYYAR AND MR. JUSTICE RAJAGOPALA AYYANGAR.

The Board of Revenue of Madras, the Chief Controlling Revenue Authority by its Secretary .. *Applicant**

v.

Moideen Rowther and others .. *Respondents.*

Indian Stamp Act (II of 1899), *section* 33—*Action under—Suit for partition—Parties not furnishing the requisite stamps—Court if has power to draw up a decree on plain paper or on insufficient stamp and send the same to the Collector for impounding and levy of penalty—Civil Rules of Practice, rule* 12 (3)—*Validity.*

A final decree for partition passed by a Civil Court is an instrument of partition as defined in section 2 (15) of the Stamp Act. It follows that such a decree can only be engrossed on stamp papers of sufficient value and till then it has no existence as a decree.

Jotindra Mohan Tagore v. *Bejoy Chand Mahatap*, (1904) I.L.R. 32 Cal. 483 and *Satyanandan* v. *Nammayya*, A.I.R. 1938 Mad. 307 referred.

But in a suit for partition, on the failure of the parties to furnish the requisite stamps the Court has no power to draw up a decree for partition. In such a case the Court can certainly refuse to draw up the final decree and sign it. But if the parties choose to take that risk and do not furnish the stamp papers the Court has no power to draw up a decree on unstamped paper and sign it. The Court is precluded from drawing up a final decree for partition on unstamped paper and if it is so drawn up the Court is obviously doing a wrong thing. It may be open to the parties to approach the Court for a final decree at any time after supplying the necessary stamp papers. *Koyatti* v. *Imbichi Koya*, (1946) 1 M.L.J. 454 referred.

It is too much of a strain on the language of section 33 (1) of the Stamp Act to say that such a decree which the Court draws up and signs, knowing that it is not duly stamped, "comes before it in the performance of its functions" and "appears to the Judge to be not duly stamped."

Rule 12 (3) of the Civil Rules of Practice is *ultra vires* and in the absence of an express provision in the Stamp Act which enables a Court to adopt the procedure indicated in the said rule a Court cannot make a party liable to stamp duty and penalty for omission to furnish stamp papers to enable the Court to draw up a valid decree for partition.

Reference made by the Assistant Secretary, Board of Revenue (Land Revenue) Chepauk, Madras, in his letter No. L-12984 of 54-3, dated 30th August, 1954, for the decision of the High Court on the following points, *viz.*

" (*a*) Whether the learned Subordinate Judge, South Malabar, on the failure of the parties in this case to furnish the requisite stamps, had the power to draw up the decree for partition.

(*b*) Whether the learned Subordinate Judge can impound the decree for partition drawn up by him under section 33 of the Stamp Act."

The Government Pleader (*C. A. Vythialingam*) on behalf of the State.

M. R. Krishnan and *R. Sitaraman* for the Respondents.

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*Case Referred No. 79 of 1954. .. 7th October, 1955.

The Order of the Court was pronounced by

Rajamannar, C.J.—This is a reference under section 57 of the Stamp Act by the Board of Revenue. One Moideen Rowther filed a suit for partition, Original Suit No. 23 of 1951, in the Court of the Subordinate Judge of South Malabar, at Palghat, against his brothers. The parties entered into a compromise and put into Court a memorandum of compromise and prayed that the Court may be pleased to pass a decree in terms thereof. A decree was accordingly passed, but as it was a decree for partition, the parties were called upon to produce the stamps required for drawing up the final decree. Though the stamp duty amounted to Rs. 1747-8-0, stamps only of the value of Rs. 90 were produced. The learned Subordinate Judge drew up the final decree on the insufficient stamp-papers produced by the parties and then purported to impound the same under section 33 (1) of the Stamp Act and forwarded it to the Sub-Collector, Palghat, under section 38 of the Act. In his letter forwarding the decree, the learned Judge stated that it was being forwarded to the Sub-Collector for collecting the deficit stamp duty and penalty from the parties who had defaulted to produce the necessary stamp papers. The Sub-Collector, Palghat, levied a penalty of Rs. 5,000 in addition to the stamp duty of Rs. 1657-8-0, under section 40 (1) (*b*) of the Act. On appeal, the Collector confirmed the order of the Sub-Collector but reduced the penalty to twice the duty payable. The parties filed a revision petition to the Board of Revenue against the order of the Collector. They contended on the merits that the amount of stamp duty levied was incorrect. They also raised the question of jurisdiction. They contended that the Subordinate Judge has no power to draft the final decree in the circumstances and to impound it, and that the provisions of section 33 of the Act were erroneously invoked. The parties also prayed that a reference may be made to this Court if necessary. The Board of Revenue held that the stamp duty had been correctly calculated. The Board was also of the opinion that the action of the Subordinate Judge in impounding the instrument on the ground that it was not duly stamped was correct and legal, since the instrument was produced or came before him in the performance of his functions. They, however, considered that the question whether the learned Subordinate Judge, on the failure of the parties to furnish the requisite stamps, would have the power to draw up a final decree for partititon, was not free from difficulty, and, it was necessary to obtain an authoritative decision on the point from this Court. The Board, therefore, have referred the following two questions to this Court for decision :

" (1) Whether the learned Subordinate Judge of South Malabar, on the failure of the parties in this case to furnish the requisite stamps, had the power to draw up the decree for partition?

(2) Whether the learned Subordinate Judge can impound the decree for partition drawn up by him under section 33 of the Stamp Act?"

There can be no doubt that a final decree for partition passed by a Civil Court is an instrument of partition as defined in clause (15) of section 2 of the Stamp Act. It follows that such a decree can only be engrossed on stamp papers of sufficient value. It was held in *Jotindra Mohan Tagore* v. *Bejoy Chand Mahatap*[1], that a decree for partition to be operative must be engrossed on stamp paper, as required by the Stamp Act, and, until the Judge signs the decree so engrossed, it cannot be said that the suit has terminated. In *Satyanandan* v. *Nammayya*[2], this decision was followed by a Division Bench of this Court. The learned Judges in that case observed :

" It is well settled that a final decree for partition has no existence as a decree until it is engrossed on the proper non-judicial stamp paper ; till that is done the suit is pending."

The question is if the parties do not furnish stamp papers of the requisite value on which the decree could be engrossed, whether the Court could proceed to draw up the decree on unstamped paper or on stamp paper of insufficient value? It is only if the Court has power to follow this course that the next question arises whether having thus drawn up the decree the Court could impound it under section 33 of the Act and forward it to the revenue authority for further action by way of collection of the proper stamp duty and such penalty as may be fixed.

1. (1904) I.L.R. 32 Cal. 483. 2. A.I.R. 1938 Mad. 307.

The learned Government Pleader drew our attention to rule 12 of Chapter 3 of Part II of the Civil Rules of Practice. The Chapter contains rules relating to partition suits under the Code and under the Partition Act of 1893. The rule runs thus :

"12. *Final Decree.*—(1) The final decree shall in all cases specify the several portions of the joint property assigned to the several parties as their respective shares.

(2) The decree in partition suits shall be engrossed on non-judicial stamp paper as provided by Article 45, Schedule 1 of Act II of 1899 as amended by Article 38 of Schedule I of Madras Act VI of 1922.

(3) On the failure of the party in whose favour the order is made to produce the necessary non-judicial stamp paper within the time fixed or granted by the Court, the Court shall have the decree drawn up on unstamped paper and deal with it as an instrument within the operation of Chaper IV of the Indian Stamp Act II of 1899 and send the unstamped decree to the Collector for realization of the stamp duty under section 48 of the Stamp Act and return of the decree, duly stamped, to the Court passing the decree with a certificate, by endorsement thereon that the proper stamp duty has been collected."

Undoubtedly, sub-rule (3) of the above rule enables the Court to draw up the decree on unstamped paper and then deal with it as an instrument within the operation of Chaper IV of the Act and send it to the Collector for realization of the stamp duty under section 48 of the Act. The validity of this sub-rule has, however, been impugned. We have referred to the P.Dis. No. 237 of 1928 proceedings of the High Court in pursuance of which this sub-rule was added in 1928. This Court purported to make that sub-rule under the provisions of section 122 of the Code of Civil Procedure. That section enables the Court from time to time, after previous publication, to make rules regulating its own procedure and the procedure of the Civil Courts subject to its superintendence. It appears to us to be very doubtful if the sub-rule in question can be said to relate to a procedure of the Court. In so far as sub-rule (2) directs the decree in a partition suit to be engrossed on non-judicial stamp paper, no exception can be taken, not because it relates to procedure, but because it states the effect of the provisions of the Stamp Act. If the parties do not furnish the Court with stamp papers of sufficient value, the Court can certainly refuse to draw up the final decree and sign it. The parties run the risk of the decree not being signed and issued. For instance, a party may not be able to enforce any of the terms of the decree by execution because a valid decree is essential for execution. In *Venkatappa* v. *Venkatappa*[1], it was held that before a decree for partition could be executed the holder must pay the stamp duty required by Article 45 of the Indian Stamp Act and have the decree drawn up on non-judicial stamp paper. But if the parties choose to take that risk and do not furnish the stamp papers, we do not think that the Court has power to draw up a decree on unstamped paper. and sign it. That will mean that the Court is doing an obviously wrong thing. A Court is precluded from drawing up a final decree for partition on unstamped paper. Somayya, J., in *Koyatti* v. *Imbichi Koya*[2], held that it may be open to the parties to approach the Court which passed the decree and to request the Court to pass a final decree after supplying the necessary stamp papers at any time, because as pointed out in *Jotindra Mohan Tagore* v. *Bejoy Chand Mahatap*[3], the suit must be deemed to be pending. Be that as it may, the question which falls for our decision on this reference is whether the Court itself can bring into existence an unstamped decree and then proceed to impound it. In our opinion it is too much of a strain on the language of section 33 (1) of the Act to say that the decree which the Court draws up and signs is produced or comes before it in the performance of its functions. It is equally inappropriate to speak of such an instrument as appearing to the Judge to be not duly stamped. The Judge knew even when he drew up the document that it was not duly stamped.

One can at least understand a Judge drawing up a decree on unstamped paper and signing it, and when such a decree is produced in some other proceeding or even in the same proceeding in execution of the decree, the judicial officer before

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1. (1943) 2 M.L.J. 112 : I.L.R. 1944 Mad. 266.
2. (1946) 1 M.L.J. 454.
3. (1904) I.L.R. 32 Cal. 483.

whom it is produced (it may be the same Judge who passed the decree) can impound it as not duly stamped under section 33 (1) of the Act. But we think that the Court cannot itself draw up an invalid document and then take action consequent on its invalidity.

There is no provision in the Stamp Act which enables a Court to adopt the procedure indicated in Rule 12 (3) abovesaid. Section 122 of the Code of Civil Procedure will not cover such a rule. In the absence of an express statutory provision to that effect we hold that a Court cannot make a party liable to stamp duty and penalty for omission to furnish stamp papers to enable the Court to draw up a valid decree for partition. Rule 12, sub-rule (3) above-mentioned is, in our opinion, *ultra vires*.

Our answers to the two questions are as follows : (1) On the failure of the parties to furnish the requisite stamps the learned Subordinate Judge had no power to draw up the decree for partition.

(2) It follows from the above answer that the learned Subordinate Judge cannot impound under section 33 of the Stamp Act, the decree so drawn up.

R.M. ——— *Reference answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice.*

Murugan .. *Pertitioner**

v.

Sivaraman and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 33—*Application for permission to sue* in forma pauperis—*Failure to disclose certain insignificant assets—When a ground for dismissal of application—Factors to be considered whether suppression was deliberate and* mala fide.

It is not correct to say that an omission to mention even the most insignificant items of moveable properties must by itself lead to a dismissal of an application for leave to sue *in forma pauperis* under Order 33, Civil Procedure Code. The rule as to dismissal of such an application on the ground of suppression of assets must be confined to cases where the suppression is deliberate and not *bona fide.*

To find out whether an omission was deliberate and *mala fide* one test is to ascertain whether the intention was to conceal the omitted item, because if that were included, the Court would find the petitioner had means to pay the Court-fee. But if the omitted item is small or insignificant compared with the quantum of Court-fee payable, it cannot be said that the omission was deliberate and *mala fide* for the obvious reason that even if he had mentioned it the petitioner could still have easily maintained that he was not in a position to pay the required Court-fee, and therefore, he was entitled to sue as a pauper. But a mere statement by the petitioner that the omitted item of property is of no value would not suffice.

Kuppuswami Naidu v. *Varadappa Naidu,* (1942) 2 M.L.J. 345 and *Chellammal* v. *Muthulakshmi Ammal,* (1945) 1 M.L.J. 53, referred and explained.

Ramakrishna Chetti v. *Govindammal,* (1954) 1 M.L.J. 26, followed.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Ramanathapuram, at Mathurai, dated 18th June, 1953 and made in O.P. No. 146 of 1952.

K. Parasaran for Petitioner.

A. Shanmugavel for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner filed an application for permission to sue *in forma pauperis*. The Court-fee payable was Rs. 329-15-0 He alleged that he was possessed of the plaint B-Schedule properties, which he valued at Rs. 600 but those properties were subject to an encumbrance for Rs. 450. Therefore he did not have the means to pay the Court-fee. The respondent denied that the petitioner was a pauper. They also alleged that he had fraudulently suppressed the existence of certain moveables. The learned Subordinate Judge found that the petitioner was

*C.R.P. No. 1832 of 1953. 15th September, 1955.

not possessed of sufficient means to enable him to pay the Court-fee. He also found that the petitioner was guilty of fraudulent suppression of one of his assets, *viz.*, two bulls. The petitioner denied having any bulls, while R.W. 1, the 2nd respondent, deposed that he was possessed of bulls and goats. The learned Judge acted on the evidence of R.W. 2 the mortgagee of the petitioner's land who said that the petitioner had two small bulls worth Rs. 120. On these facts the learned Judge found that there was a fraudulent suppression of assets, which must result in the dismissal of the application under Order 33, Civil Procedure Code. He relied on the decisions of this Court in *Kuppuswami Naidu* v. *Varadappa Naidu*[1], and *Chellammal* v. *Muthulakshmi Ammal*[2], in support of his conclusion. He therefore dismissed the petition.

The finding that the petitioner was possessed of two bulls is a finding of fact; though I am not satisfied with the finding, it is binding on me in revision. That finding by itself, however, would not lead to the dismissal of the application. Neither the decision in *Kuppuswami Naidu* v. *Varadappa Naidu*[1], nor that in *Chellammal* v. *Muthulakshmi Ammal*[2], should be understood as laying down that even the omission to mention the most insignificant moveable must itself lead to a dismissal of the application for leave to file the suit *in forma pauperis*. Indeed Chandrasekhara Aiyar, J., in *Kuppuswami Naidu* v. *Varadappa Naidu*[1], referring to *Mt. Chamela Kuar* v. *Purusottam Das*[3], distinguished that case on the ground that there the omission related to trifling moveable properties a couple of trunks and an almirah. In *Ramakrishna Chetti* v. *Govindammal*[4], Venkatarama Ayyar, J., discussed the scope of the said two decisions. The learned Judge pointed out that the rule laid down in those decisions must be limited to cases where a suppression is deliberate and not *bona fide*. I accept that as the correct law on the point.

In my opinion, to find out whether an omission was deliberate and *mala fide* one test is to ascertain whether the intention was to conceal the omitted item, because if that were included, the Court would find that the petitioner had means to pay the Court-fee. To give a concrete illustration, if the Court-fee payable is, say, Rs. 1000 and the petitioner seeking leave to file the suit *in forma pauperis* has omitted to disclose some moveable property worth Rs. 50 or Rs. 100 it cannot be said that the omission was deliberate and *mala fide* for the obvious reason that even if he had mentioned it, he could still have easily maintained that he was not in a position to pay the Court-fee of Rs. 1000 and, therefore, he was entitled to sue as a pauper. It is quite true that a mere statement by the petitioner that the omitted item of property is of no value would not suffice. In *Chellammal* v. *Muthulakshmi Ammal*[2], for instance, it was said that the equity of redemption in certain property which was omitted to be mentioned was of no value, but the learned Judges were not prepared to accept that statement. Actually, it appeared in that case that the so-called pauper had sold certain immoveable property for a sum of Rs. 1300 after she had been allowed to file the suit *in forma pauperis*.

In the present case, keeping this circumstance in mind, I cannot agree with the learned Subordinate Judge that there has been a deliberate and *mala fide* suppression of any item of property, assuming that the petitioner had owned two bulls. I therefore allow the Civil Revision Petition and grant the application of the petitioner to file the suit *in forma pauperis*. There will be no order as to costs.

R.M. *Petition allowed.*

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1. (1942) 2 M.L.J. 345.
2. (1945) 1 M.L.J. 53.
3. A.I.R. 1932 Pat. 308.
4. (1954) 1 M.L.J. 26.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

The State of Madras .. *Appellant**

v.

The Madras Electric Tramways (1904) Limited, by its duly constituted attorney, J.B. Beardsell .. *Respondent.*

Indian Companies Act (VII of 1913) sections 162, 166 and 276—Foreign Companies—If could be wound up by Indian Court—Application for the provisions of the Act to winding up of unregistered companies—Directors of a Company—If can apply for winding up.

Under section 271 (3) of the Indian Companies Act a company incorporated outside India which has been carrying on business in India ceases to carry on business in India it may be wound up as an unregistered company under Part IX of the Act notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated. Section 276 of the Act enacts that the provisions of Part IX of the Act relating to unregistered companies shall be in addition to and not in restriction of any provisions in the Act with respect to winding up of a company by the Court. But an unregistered company shall not except in the event of its being wound up be deemed to be a company under the Act and then only to the extent provided by that part. Section 166 of the Act will apply to the winding up of unregistered companies as well and as such an application to the Court for winding up of a foreign company as an unregistered company can be presented either by the company or by any creditor or contributory.

The directors of a company can validly present a petition for its winding up even without the sanction of the general body of share-holders.

In re Galway, etc., Tramways Co., (1918) 1 Ir. Rep. 62 differed.

Palmer's 'Company Law', 19th edition and Palmer's 'Company Law Precedents' 16th edition, referred and followed.

In re Patiala Banaspati Electric Co., A.I.R. 1953 Pepsu 195 differed.

Appeal against the order of Mr. Justice Balakrishna Ayyar, dated 20th January, 1954 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O.P. No. 419 of 1953.

The Advocate-General (*V. K. Tiruvenkatachari*) and the Assistant Government Pleader (*K. Veeraswami*) for Appellant.

O. T. G. Nambiar instructed by *Messrs. King and Partridge* for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the order of Balakrishna Ayyar, J., winding up the Madras Electric Tramways (1904), Limited, on an application made on behalf of the company by one J. B. Beardsell purporting to be its duly constituted attorney. The petition was filed under section 271 of the Indian Companies Act. The petitioner is a limited liability company incorporated under the English Companies Act with its registered office in England. The principal place of business of the Company, however, is situated in Madras. The company purchased in 1904 from the Electric Construction Co., Ltd., which was then carrying on the business of running tramways in the City of Madras, its undertaking at Madras including the tramways and equipment thereof, and was carrying on the business of running tramways in the city of Madras under the powers granted to them by the Government of Madras by various orders under the provisions of the Indian Tramways Act, 1886. On 11th April, 1953, the receiver appointed by the trustees for the mortgagee-debenture-holders of the company took possession of its undertaking and all its assets and thereafter the Company ceased to carry on its business. The Government thereupon by notification, dated the 29th September, 1953, declared the powers of the company conferred on it by the Indian Tramways Act and by orders and rules made under the Act as to the construction, maintenance and use of the tramways to be at an end. The two grounds alleged to justify a winding

*O.S. Appeal No. 36 of 1954. 19th August, 1955.

up were (1) the company had ceased to carry on business and (2) the company was unable to pay its debts. The petitioner prayed that the company may be wound up by the Court as an unregistered Company under the provisions of the Indian Companies Act. The attorney who filed the petition on behalf of the company filed an affidavit stating that he was the duly constituted attorney of the company authorised to file the petition for winding up. Two of the creditors of the company supported the application by affidavits. Notice of the petition was given to persons desirous of supporting or opposing the application. The State of Madras appeared and opposed the petition. In the counter-statement filed on their behalf, none of the facts alleged in the petition was denied. The only plea that was taken was that the petition purporting to be by the company was not maintainable. The objection to the maintainability of the petition was thus set out :

"The provisions relating to the winding up of a foreign company pertain to its Indian branch which is statutorily allowed to be wound up for the protection of Indian nationals. The Indian Courts cannot deal with and an Indian order will not operate on the company in England. The company itself cannot treat itself as two companies. Accordingly a foreign company cannot itself petition for winding up as an unregistered company. While sections 162 and 166 of the Indian Companies Act, 1913, in so far as they relate to winding up by the Court are inapplicable, even under those sections a company can petition under sub-section (1) of section 162 on the basis of a special resolution. This or the company provisions in the English Act would apply only to a company in England and not in India."

Besides this legal plea, it was also stated that as the petitioners' company supported the debenture-holders in their claim to keep the entire assets in India outside the winding up, the petition was meaningless from its point of view and was an abuse of the process of the Court and was intended only to prejudice the claim of the State of Madras and Indian creditors. Balakrishna Ayyar, J., overruled the objections of the State and directed by his order, dated 20th January, 1954, that the company be wound up and appointed the Official Receiver of Madras as the Official Liquidator of the company for the purpose of winding up of the company. The State of Madras has filed this appeal against the order.

The learned Advocate-General for the State of Madras developed his argument with far more precision than was attempted in the counter-statement. His first contention was that a foreign company doing business in India cannot under any circumstance itself file an application for being wound up. He admitted and it is common ground, that a foreign company doing business in India can be wound up as an unregistered company. His point was that it could be done only at the instance of a creditor or contributory but not at the instance of the company itself. Part IX of the Indian Companies Act deals with the winding up of unregistered companies. It is not disputed that the petitioner will fall within the meaning of an "unregistered company". Section 271 (1) in so far as it is material for this appeal runs as follows:

" 271 (1).—Subject to the provisions of this Part any unregistered company may be wound up under this Act and all the provisions of this Act with respect to winding up shall apply to an unregistered company with the following exceptions and additions :

(*i*) an unregistered company shall for the purpose of determining the Court having jurisdiction in the matter of the winding up be deemed to be registered in the province where its principal place of business is situate or if it has a principal place of business situate in more than one province, then in each province where it has a principal place of business ; and the principal place of business situate in that province in which proceedings are being instituted shall for all the purpose of the winding up be deemed to be the registered office of the company ;

(*ii*) no unregistered company shall be wound up under this Act voluntarily or subject to supervision :

(*iii*) the circumstances in which an unregistered company may be wound up are as follows (that is to say) :

(*a*) if the company is dissolved or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs :

(*b*) if the company is unable to pay its debts ;

(*c*) if the Court is of opinion that it is just and equitable that the company should be wound up."

Section 271 (3) provides for special cases. This sub-section was added in 1936 by an amending Act. It provides that where a company incorporated outside India which has been carrying on business in India ceases to carry on business in India, it may be wound up as an unregistered company under Part IX, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the company under which it was incorporated. Section 276 enacts that the provisions of that Part (IX) with respect to unregistered companies shall be in addition to, and not in restriction of, any provisions in the Act contained with respect to winding up of a company by the Court. But an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under the Act, and then only to the extent provided by that Part.

The learned Advocate-General confessed that there was nothing in Part IX of the Act which expressly prohibited a foreign company from presenting a petition for winding it up. According to him, this prohibition must be implied because of the disabilities under which a winding up Court would suffer in the case of foreign companies because of the possibility of large assets being situate outside the jurisdiction of Indian courts and because the order of winding up passed by an Indian Court would not *per se* bind the company in the country of incorporation. The idea behind this contention was that a foreign company with large assets outside India and very little assets in India may incur large debts in India and then apply to be wound up as an unregistered company under the Indian Companies Act, with the result that Indian creditors would be deprived of the foreign assets of the company. The provisions of the Indian Companies Act which enable a foreign company to be wound up as an unregistered company in this country, according to the learned Advocate-General, were intended for the benefit of the creditors in India, principally Indian nationals, and not to enable a foreign company to escape from liability in case the assets within India were unable to meet its liabilities. Whether the assumption of the learned Advocate-General is correct or not I do not wish to say in this appeal. I will only say that such a situation might well arise even when a company incorporated under the Indian Companies Act has large assets outside India.

It was not denied by the learned Advocate-General that section 166 will apply to the winding up of unregistered companies as well. Under that section an application to the Court for the winding up of a company can be presented either by the company or by any creditor or contributory. There is nothing in section 271 or any other provision of Part IX which excepts this provision of section 166 in the case of an unregistered company. The learned Advocate-General cited to us the decisions in *Russian and English Bank and Florence Montefiore Guedalla* v. *Baring Brothers & Co.*[1], *Re Banque Des Marchands De Moscou*[2], and *Rudow* v. *Great Britain Mutual Life Assurance Society*[3], and cited a passage in Dicey's "Conflict of Laws", 6th edition, page 294; but I have been unable to derive any assistance from any of them on this point. I am unable, therefore, to accept this contention of the learned Advocate-General.

The next contention was that even assuming that a foreign company as an unregistered company can file a petition for winding it up, it can do so only when the company at a meeting of its shareholders has resolved to file such a petition. In the present case there has been no such decision or resolution. Though the Directors may have large powers in the conduct of the affairs of the company, they cannot themselves decide to put an end to the corporate existence of the company. He sought support for this contention in the provisions of section 162 of the Indian Companies Act as interpreted by him. That section runs as follows:

"162.—A company may be wound up by the Court

(*i*) if the company has by special resolution resolved that the company be wound up by the Court;

(*ii*) if default is made in filing the statutory report or in holding the statutory meeting.

1. L.R. (1936) A.C. 405.
2. (1954) 2 All E.R. 746.
3. (1881) 17 Ch.D. 600 at 611.

(*iii*) if the company does not commence its business within a year from its incorporation or suspends its business for a whole year ;

(*iv*) if the number of members is reduced, in the case of a private company below two or, in the case of any other company below seven ;

(*v*) if the company is unable to pay its debts ;

(*vi*) if the Court is of opinion that it is just and equitable that the company should bwe ound up."

According to the learned Advocate-General, it follows from the provisions of this section that a company can be wound up by the Court on an application by the company only if the requirement of clause (i) is complied with, that is to say, only if the company has by special resolution resolved that the company be wound up by the Court. In the absence of such a resolution, even if one or other of the other conditions in clauses (ii) to (vi) is satisfied the Directors on behalf of the company cannot file a petition for winding up the company. There is nothing in section 162 or section 166 of the Indian Companies Act which compels one to come to this conclusion. The only direct authority which the learned Advocate-General was able to cite in support of his contention is a decision in *In Re Galway and Salthill Tramways Co.*[1]. There the directors of a company presented a winding up petition in the name of the company. An objection was taken by some of the shareholders who opposed the petition that the petition not having been authorised by a meeting of the shareholders was incompetent. O'Connor, M. R., held that the directors as such had no power to present the petition. This was because the powers of the directors were only powers of managing and the object of management is the working of the company's undertaking while the object of a winding up is its stoppage. Therefore the powers of the directors would not include a power to bring about the stoppage of the company's affairs without the authority of the shareholders. The learned Master of the Rolls, however, did not think it fit to dismiss the petition on this ground. In his opinion the proper course to adopt was to adjourn the hearing so as to enable the directors duly to summon a meeting of the shareholders with the object of getting authority from them to proceed on the petition, because it was open to the company to ratify the unauthorised proceeding of the directors. Though this case was decided in 1917, the learned Advocate-General could not give any instance where the decision was followed in the English Courts. On the other hand in Palmer's "Company Law," 19th edition (1949), this decision is dealt with thus :

" Petitions by the company are not very common ; for if a company desires to wind up it has only to pass a special resolution or an extraordinary resolution for voluntary winding up. But if the directors find the company to be insolvent owing to matters which ought to be investigated by the Court it may well be that their proper course is to apply at once to the Court by petition for a compulsory order. It has been held in Ireland that the directors cannot present a petition in the name of the company without the sanction of a general meeting ; but there seems to be no justification for this ruling in the words of the Act and it has not been followed in English cases. In any case a general meeting can ratify the action of the directors."

In Palmer's "Company Precedents," 16th edition (1952), Part II, we have a more definite statement as to the practice in England :

" Where the company gets into great difficulties the directors acting on the companies' behalf occasionally present a petition for winding up but such petitions are rare.

It has been held in an Irish case that the directors cannot present the petition without authority of a general meeting. This decision is, however not followed in England and many orders have been made on petition presented by the directors without the sanction of a general meeitng."

The petition in In Re City *Equitable Fire Insurance Company, Limited*[2] appears to be one such instance.

I am inclined to follow the practice in England to which reference is made in Palmer's text-books.

Even assuming that the Irish precedent should be followed by us, the petition cannot be dismissed, but it should be adjourned to enable the directors to summon a meeting of the shareholders and obtain their authority. I am not sure if this is

1. (1918) 1 Ir.R. 62. 2. (1925) 1 Ch. 407.

what the learned Advocate-General wants, because it is obvious that the shareholders are not against this petition, as by this time they should have been aware of the proceeding and no one has come up to protest against the action of the directors. The shareholders must in the circumstances be deemed to have impliedly ratified the action of the directors.

Our attention was also drawn to the decision of a single learned Judge of the Pepsu High Court in *In Re Patiala Banaspati, etc., Co.*[1] which certainly supports his contention but with respect I am not inclined to follow it.

The argument of the learned Advocate-General that the directors only cannot put an end to the company's existence by filing a winding up petition does not appeal to me because the Court is not bound to direct a winding up merely because the directors have presented a petition. The Court will make a winding up order only if it is satisfied that the requirements of the law are satisfied and the facts justify the course. Moreover, it will be open to the shareholders to oppose the petition and to apprise the Court of the fact that the majority of the shareholders are opposed to the petition. It will be then open to the Court before passing final orders to have a meeting of the shareholders convened to ascertain the wish of the majority.

Article 99 of the Articles of Association of the petitioner company provides *inter alia* that the Directors

" may exercise all such powers and do all such acts and things as may be exercised or done by the Company and are not hereby or by statute expressly directed or required to be exercised or done by the company in or with the consent of a general meeting."

It is not suggested that there is any statutory provision expressly requiring the consent of a general meeting for the presentation of a winding up petition. It follows therefore that the directors have the power to do what the company could have done, namely to present the petition. I agree with Balakrishna Ayyar, J., that the petition was validly presented.

The appeal fails and is dismissed with costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

H. J. Mascreen .. *Petitioner**

v.

Dr. (Mrs.) R.K. Mascreen .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 488—Maintenance of children— Duty of—Children in the custody of the mother as guardian—Mother earning more than the father—If liability to maintain shifts.

Under the Code of Criminal Procedure the duty of maintaining a child is cast upon the father. No such duty is cast on the mother by the Code and there is no scope for invoking any general principles whether the mother or anyone else is liable. The Court is entitled to order a certain amount to be paid to the guardian of the minor children towards the maintenance of the children.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Third Presidency Magistrate of the Court of Presidency Magistrate at Saidapet, dated 17th December, 1954, in M.P. No. 169 of 1954.

S. Mohan Kumaramangalam for Petitioner.

M. S. Venkatarama Aiyar for Respondent.

State Prosecutor (*S. Govind Swaminadhan*) for the State.

The Court made the following

ORDER.—This is a revision against the order of maintenance passed against the petitioner herein who was the respondent in the lower Court. The maintenance

1. A.I.R. 1953 Pepsu 195.

* Crl. R.C. No. 179 of 1955. 28th July, 1955.
Crl.R.P. No. 174 of 1955.

is claimed by the mother on behalf of her three children. She claimed maintenance only on behalf of her children. There was no marriage between her and the petitioner herein. The lower Court directed the petitioner herein to pay maintenance at the rate of Rs. 20 for the first child, aged 6 years at the time of the petition, and Rs. 10 each for the other two children aged 3 and 1 at the time of the petition. The evidence shows that the mother was a doctor earning about Rs. 270 to Rs. 300 a month, whereas the petitioner herein is a postal employee earning only Rs. 170. After deductions the net income is only Rs. 123-15-0. In fact the mother of the children earns twice as much and more than the father of the children. On these facts it is contended by Mr. Mohan Kumaramangalam that under section 24 of the Guardians and Wards Act, as the guardian of the person of the ward must look to his support, it is the duty of the mother to support the children. It is contended that section 488 has been introduced in the Criminal Procedure Code to prevent vagrancy and in this case the mother is possessed of suffiicient means and as she is the natural guardian of the person and she being charged with the custody of the ward, she must also look to their support, which means that she must maintain them out of her own income. But the very wording of the section, merely, 'must look to his support' in section 24 of the Guardians and Wards Act indicates that the guardian must look elsewhere for support. As pointed out in *Victor Justin Walter* v. *Marie Josephin Walter*[1], it is the duty of the father to maintain and educate the children who are incapable of supporting themselves and although the law has always recognised this duty, the civil Courts have no direct means of enforcing this obligation so as to compel him to maintain them out of the property in which they have no interest. This is with regard to the law which governs parties who are Christians.

Then the learned Judges referred to the judgment of Lord Eldon, L.C., in *Wellesley* v. *Duke of Beaufort*[2], and pointed out the rules governing such cases in England. The observations of Lord Eldon, L.C., are these :

> "You may go to the Court of King's Bench for a *habeas corpus* to restore the child to the father, but when you have restored the child to the father can you go to the Court of King's Bench to compel that father to subscribe even to the amount of five shillings a year for the maintenance of that child? A Magistrate may compel a trifling allowance but I cannot believe that there was ever a mandamus from the Court of King's Bench......The Courts of law can enforce the rights of the father but they are not equal to the office of enforcing the duties of the father."

But under the Criminal Procedure Code, the duty of maintaining the child is cast upon the father, and whatever may be the civil law, the provisions of section 488, Criminal Procedure Code, are quite 'equal to the office of enforcing the duties of the father' which is to maintain the child, legitimate or illegitimate. No such duty is cast on the mother, either under the Code or any other law. There can therefore be no question of invoking any general principles with regard to the maintenance of a child, whether it is obligatory on the part of the mother as in the present case, or on the tavazhi as in the case of a Malabar tarwad. Under the Criminal Procedure Code, it is clear that it is the father who has got to maintain the child and therfore the Court is entitled to order a certain amount to be paid to the guardian of the minor children towards the maintenance of the children. The maintenance contemplated in that section is food and clothing. It does not include education and other matters. The Court can order only as much as is necessary for the food and clothing of the children. Though in this case the lower Court has referred to the fact that the first child is likely to go to school, I am not prepared to say that the sum of Rs. 20 granted to the first child is excessive even for maintenance as such. I would therefore direct this sum of Rs. 20 per month be paid to the first child as maintenance pure and simple and not for any other purpose. It is not disputed that the sum of Rs. 10 each granted for the other two children was for the purpose of maintenance only.

The only other argument advanced is that after making all compulsory deductions which the petitioner has got to pay from out of his income, what remains is barely sufficient even for himself, and therefore the maintenance awarded is exces-

1. (1927) I.L.R. 55 Cal. 730 at 739-740.
2. (1827) 2 Russ. 1 at 22.

sive. But the finding of the lower Court is that his salary and allowance come to Rs. 170 and it is only after making the compulsory deduction that his income comes to Rs. 123-15-0. Out of this, Rs. 40 for three children for whom he is responsible can never be said to be excessive. The lower Court's order is confirmed and this revision dismissed.

The arrears which the petitioner has got to pay after stay has been granted by this Court will be paid in four monthly instalments of Rs. 25 each commencing from 1st September, 1955.

R.M. — *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE MACK.

Taxi Kannappa Mudaliar and others .. *Petitioners.**

Criminal Procedure Code (V of 1898), section 107—Proceedings under—Jurisdiction.

Under section 107 (2), Criminal Procedure Code, no proceedings shall be taken before any magistrate other than a Chief Presidency Magistrate or a District Magistrate unless both the persons informed against and the place where the breach of peace or disturbance is apprehended are within the local limits of the Magistrate's jurisdiction.

A first-class Magistrate could have jurisdiction only if at the time proceedings were initiated the person concerned was in that Magistrate's jurisdiction though a non-resident.

Petition under section 561-A, Criminal Procedure Code, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to quash the proceedings, dated 3rd December, 1953, on the file of the Court of the ex-officio First Class Magistrate, Chingleput, in M.C. No. 31 of 1953.

A. S. Sivakaminathan for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—The petitioner describes himself as the proprietor of the English Taxi Company of Umpherson St., G.T., Madras. He seeks to have revised an order by the District Magistrate, Chingleput, dismissing his petition to quash the proceedings instituted against him under section 107, Criminal Procedure Code, by the Inspector of Police, Chingleput, before the ex-officio First Class Magistrate, Chingleput. He was the first of seven respondents against whom the order under section 107, Criminal Procedure Code, was issued on 3rd December, 1953, alleging acts of violence on earlier dates. The ground which the petitioner gave was that he was not a resident of Chingleput District and that, therefore, the First Class Magistrate had no jurisdiction. The District Magistrate rejected this plea following the decision in *Varadarajulu Naidu* v. *Emperor*[1] which is not in point. In that case, there was no dispute that the petitioner was within the local limits of the jurisdiction of the Magistrate when the proceedings under section 107 were initiated. In this case, the learned Public Prosecutor concedes that there is nothing to show that the petitioner, a permanent resident of Madras, was in Chingleput on the date on which the proceedings were initiated. Under section 107 (2), Criminal Procedure Code, no proceedings shall be taken before any Magistrate other than a Chief Presidency Magistrate or District Magistrate, unless both the person informed against and the place where the breach of the peace or disturbance is apprehended, are within the local limits of the Magistrate's jurisdiction. The First Class Magistrate could have had jurisdiction if, at the time the proceedings were initiated, the petitioner, although a resident of Madras, was in his jurisdiction. This not being the case, it is only the District Magistrate who would have jurisdiction to institute and try these proceedings.

The order of the learned District Magistrate is set aside with the direction that he issues himself a fresh order under section 107, Criminal Procedure Code, if he considers it necessary and deals with it according to law.

K.S. — *Order set aside.*

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* Crl. M.P. 1520 of 1954. 10th December, 1954.

1. (1934) M.W.N. (Cr.) 76.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Karri Venkayamma .. *Appellant**

v.

Goluguri Tirapayya .. *Respondent.*

Practice—Appeal—Memorandum of cross-objections by one respondent directed against co-respondent—Maintainability—Decree for dissolution of partnership and rendition of accounts by first defendant—Appeal by first defendant—Memorandum of objections by plaintiff claiming second defendant also was liable to account—Maintainability.

As a general rule the right of a respondent to urge an objection should be limited to his urging it only against the appellant; but there may be exceptions to the general rule when the appeal opens up questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents.

Venkataswarulu v. *Ramamma* (1950) 1 M.L.J. 54 : I.L.R. (1950) Mad. 874 (F.B.) referred to and followed.

Where there was a decree for dissolution of partnership for rendition of accounts by the first defendant and for the allotment of moneys to the various partners and the first defendant alone preferred an appeal a memorandum of objections filed by the plaintiff claiming that the second defendant also was liable to render accounts to him is maintainable though directed against a co-respondent.

Appeal against the decree of the District Judge of East Godavari at Rajahmundry in Appeal Suit No. 75 of 1947, preferred against the decree of the Subordinate Judge of Rajahmundry, in Original Suit No. 71 of 1944.

B. V. Subramaniam for the Appellant.

A. Kuppuswamy for the Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This is a second appeal by the thirteenth defendant, the legal representative of the second defendant, against the judgment and decree of the District Judge, East Godavari, reversing that of the Additional Subordinate Judge of Rajahmundry in Original Suit No. 71 of 1944. The said suit was filed by the respondent for a declaration that the suit partnership became dissolved on 22nd April, 1944, or for a dissolution of the suit partnership by Court as from the date of the suit, for taking accounts of the partnership and to recover the plaintiff's share therein. The case of the plaintiff may be briefly stated. Plaintiff and defendants 1 to 9 and another Karri Suryanarayana Reddi, husband of the tenth defendant and father of defendants 11 and 12, entered into a partnership on or about 5th September, 1939, at Anaparti for the purpose of purchasing and selling plantain, mango and other fruits and also doing commission business in fruit and carried on business under the name and style of Karri Vira Reddi & Co., at Anaparti. They also opened a branch at Jambagh, Hyderabad, and carried on business there from 5th September, 1939. The head-office of the suit partnership was managed by the second defendant and the other branch by the first and second defendants. Accounts for the business carried on for both the Head and Branch Offices were kept by defendants 1 to 3. One of the partners, Karri Suryanarayana Reddi died on 22nd April, 1944 and the suit partnership became dissolved by reason of his death from that date. Defendants 1 and 2, taking advantage of the fact that large moneys were lying with them, were not settling the accounts. The suit was therefore filed for the aforesaid reliefs. The thirteenth defendant, the legal representative of the 2nd defendant, filed a written statement denying most of the material allegations made in the plaint. It was alleged that the original partnership business was dissolved in December, 1939. A new firm was formed in December, 1939, but it was dissolved in 1941, after settlement of accounts. In 1943-44, another firm was formed and the death of Karri Suryanarayana Reddi in April, 1944, had the effect of dissolving that firm. She denied that the firm started at Hyderabad was the branch of the plaint firm and stated that the firm at Hyderabad was formed with

*S.A. No. 262 of 1950. 21st April, 1954.

defendants 1 and 2 as sole partners. She also denied that they were managing the partnership of Karri Vira Reddi & Co., at Anaparti. The first defendant adopted the written statement filed by the second defendant. On the aforesaid pleadings, the following issues were framed :

(1) Whether the suit partnership on 5th September, 1939, is true ?

(2) Who are the partners and what are its terms ?

(2) (*a*) Are defendants 1 to 3 liable to account ?

(3) Was it dissolved by death on 22nd April, 1944 ?

(3) (a) If not, is the plaintiff entitled to dissolution from the date of suit ?

(4) What relief ?

Additional issues :

(1) Whether the suit partnership was dissolved by December, 1939, and whether the suit is barred ?

(2) Whether the firm at Hyderabad is a branch of the suit partnership ?

(3) Whether this Court has jurisdiction in so far as the accunts of the Hyderabad business are concerned.

The learned Subordinate Judge found on additional issue 2, that the firm at Hyderabad was a separate and distinct firm, though the partners and their shares were the same in both the firms. On issue 2, he held that the plaintiff, defendants 1 to 9 and K. Suryanarayana Reddi were partners in the Hyderabad business, that the plaintiff and defendants 1 to 7 and K. Suryanarayana Reddi have got one share each and defendants 8 and 9 together have got one share and that the partners were entitled to share the profits and loss in that proportion. On issue 2 (*a*), he expressed the opinion that the first defendant was the manager of the business at Hyderabad. On issue 3, he gave the finding that the firm at Hyderabad was dissolved by the death of Suryanarayana Reddi on 22nd April, 1944. In regard to the Anaparti business he held that the partnership entered into in the year 1939 was dissolved in December, 1939, but the partnership business that was entered in the year 1939 and carried on business under the name and style of Satti Veereddi, Karri Ganireddi & Co., was dissolved on 22nd April, 1944, by the death of one of the partners, K. Suryanarayana Reddi. In the result he gave a decree in favour of the plaintiff declaring that the Hyderabad firm stood dissolved on 22nd April, 1944, and for rendition of accounts of the Hyderabad business. The first defendant was made liable to account. The first defendant preferred an appeal against the decree of the learned Subordinate Judge, being Appeal Suit No. 75 of 1947, on the file of the District Judge, East Godavari. In the grounds of appeal he questioned all the findings given by the first Court. The plaintiff filed a memorandum of objections claiming that the second defendant also should be made liable to account to the plaintiff. The appeal was heard by the learned District Judge of East Godavari. In the memorandum of objections he held that the second defendant was also liable to account to the plaintiff along with the appellant for the assets of the partnership business at Hyderabad. In the result he dismissed the appeal and allowed the memoradum of cross-objections making the assets of the second defendant in the hands of the thirteenth defendant also liable for the suit claim. The thirteenth defendant preferred the above appeal.

Mr. Subramanian, the learned counsel for the appellant, raised before us three points :

(*i*) the memorandum of objections filed by the plaintiff claiming that the second defendant also was liable to render accounts to him was not maintainable as it was only directed against the co-respondent ;

(*ii*) the legal representative of a deceased partner cannot be made liable to render accounts to the other partners :

(*iii*) accounts should be taken on the basis that the second defendant was not in the management of the Hyderabad business.

The first contention was based upon a decision of the Full Bench in *Venkateswarlu* v. *Ramamma*[1]. The facts there were: the defendants 1 to 3 in Original Suit

1. (1950) 1 M.L.J. 54 : I.L.R. (1950) Mad. 874 (F.B.).

No. 54 of 1945, in the Court of the Subordinate Judge of Guntur preferred an appeal against a preliminary decree for partition passed in favour of the plaintiffs who were respondents 1 and 2 in the appeal. The plaintiffs filed an application to implead defendants 5 and 6 as respondents 5 and 6 to a memorandum of cross-objections. Defendants 5 and 6 were made parties to the suit, because it was alleged by the plaintiffs that they were in possession of properties belonging to the joint family consisting of them and defendants 1 to 3. The fifth defendant was made a party to the suit on the allegation that item 24 of Schedule A of the plaint was family property, whereas the fifth defendant claimed that the said item was his own. The plaintiff's claim was disallowed. In an appeal filed by defendants 1 to 3 against a preliminary decree for partition of the family properties, the dispute between the plaintiff and the fifth defendant was sought to be agitated by a memorandum of objections. The learned Judges held that the memorandum of objections was not maintainable. The reason for the decision has been summarised by the learned Chief Justice at page 894, as follows :

> " In my opinion, such an objection should, as a general rule, be primarily against the appellant. In exceptional cases, it may incidentally be also directed against other respondents."

The learned Judges accepted the opinion expressed by the other High Courts in preference to the view stated in the earlier Full Bench decision in *Muniswamy Mudaly* v. *Abbu Reddy*[1]. The view expressed therein is that, as a general rule, the right of a respondent to urge an objection should be limited to his urging it only against the appellant ; but there may be exceptions to the general rule when the appeal opens up questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents. As the Full Bench decision finally and authoritatively stated the law on the subject, it is neither necessary nor fruitful to consider the other cases cited at the Bar. The question therefore is, whether the memorandum of objections filed by the respondent was primarily aimed against the appellant, or whether the question raised between the respondents was necessary for disposing of the appeal completely. In the instant case, the decree was for dissolution of partnership, for rendition of accounts by the first defendant and for the allotment of the moneys to the various partners. The first defendant alone preferred an appeal to the District Court. The memorandum of grounds filed by him disclosed his contention that the Hyderabad business was not a partnership business, that the suit was liable to be dismissed as the main partnership was dissolved and that the suit was barred by limitation. If he succeeded in any one of those contentions, the entire suit against the first and second defendants would be dismissed. Indeed under Order 41, rule 4, Civil Procedure Code, where there are more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the defendants, any one of the defendants may appeal from the whole decree and thereupon the appellate Court may reverse or vary the decree in favour of all the defendants. As the first defendant preferred the appeal setting up the common defence which he had along with the second defendant to the plaintiff's suit, the second defendant would be entitled under the aforesaid rule to get the benefit of the decision of the appellate Court in the first defendant's favour. In effect and substance, the appeal filed in those circumstances was also for the benefit of the second defendant. From this perspective it would be obvious that the memorandum of objections was really aimed against the appellant who was also fighting the cause of the second defendant. Further, the disputes specifically raised in the memorandum of objections between the plaintiff and the second defendant, if decided in a particular way, would have repercussions on the extent of the appellant's liability. To illustrate, under the first Court's decree, the first defendant was liable to render accounts on the basis that he was in actual management of the Hyderabad business. If the memorandum of objections were allowed, the second defendant also would be liable on the same basis. In any accounting that may be taken on the footing that both of them were in management of the business, and therefore liable to render accounts, under certain circumstances the lia-

1. (1913) I.L.R. 38 Mad. 705 (F.B.).

bility for mismanagement or misappropriation may be apportioned between the two defendants, in which case the liability of the first defendant may be less than that for which he might be liable if he was solely bound to render accounts. In that contingency, the decision on the dispute between the respondents would be necessary to completely adjudicate the rights of the appellant. What is more, in a partnership action, in almost every case, all the parties would be in the position of the plaintiffs and their rights would be so interconnected that the right of one cannot be disposed of without reference to the other. In this case, after the accounts are taken and after the amounts due to the partnership are ascertained, they would be divided between the partners according to their shares. The amounts due to the partnership could be ascertained only after the persons liable to render accounts discharge their duty. The liability of the second defendant to render accounts is as necessary as that of the first defendant to do so. The appellant would equally be entitled to share along with the other partners in any additional amount that might be found due to the partnership by reason of the second defendant's liability to render accounts. To put it shortly, the rights and liabilities of the appellant cannot be finally and completely disposed of without at the same time fixing the liability of the other partners to render accounts or otherwise. From whatever angle it is looked at, it is obvious that the appellant is primarily interested in the disposal of the question raised in the memorandum of objections. We therefore hold that the memorandum of objections filed in the Court below was maintainable.

It is then contended that the lower Court was wrong in directing the thirteenth defendant to render accounts to the plaintiff. It is settled law that the legal representative of a partner is not liable to render accounts to the other partners. The other partners must allege and establish the liability of the deceased partner, and the amounts so ascertained could be recovered from the assets of the deceased in the hands of his legal representative. The learned District Judge, in our opinion, kept the aforesaid principle in view when he held that the assets of the second defendant in the hands of the thirteenth defendant would be liable for the plaintiff's claim. He did not either expressly or by necessary implication direct the thirteenth defendant to render accounts to the plaintiff. His observation in paragraph 7 to the effect that the second defendant who was admittedly in charge of that business also was liable to account to the plaintiff along with the appellant is unexceptionable, for, if both of them were in management of the business, they would certainly be liable to account. But, in the next sentence he confined the liability of the thirteenth defendant for the suit claim only to the assets of the second defendant in her hands. Even in the decree, no liability to render account on the part of the thirteenth defendant is found.

Even so, it is contended that though the thirteenth defendant was not liable to render accounts, the basis for taking accounts against the second defendant would affect the liability of the thirteenth defendant. To put it differently, if the extent of the second defendant's liability was ascertained on the footing that he was in management of the business, the amounts that might be found due from him might be larger than his liability as an ordinary partner. It may be so. But the learned Judge found that the second defendant, who was admittedly in charge of the Hyderabad business was also liable to account to the plaintiff along with the first defendant. Being a second appeal, it is not ordinarily permissible to question that finding. But it is contended that the finding is not based upon any evidence in the case and indeed it is contrary to the entire evidence adduced. We cannot agree. The plaintiff's case as we have already indicated in the beginning of the judgment, was that the Hyderabad business was the branch business of the Anaparti business and that the said business was managed by the first and second defendants. In the written statements filed, the defendants denied that the Hyderabad business was a branch business of the Anaparti business. Their positive case was that the firm at Hyderabad was formed with defendants 1 and 2 as sole partners. The first and thirteenth defendants did not raise the alternative plea that even if the Hyderabad business was part and parcel of the main business, the first defendant was in sole management thereof and that the second defendant did not take any part in the

management. P.W. 1 no doubt, in his chief-examination states that the first defendant used to manage the Hyderabad business and the second defendant used to manage the Anaparti business. P.W. 3, the sixth defendant, also says in his evidence that they entrusted the business at Nizam to the first defendant and that the Anarparti business used to be managed by the defendants 2 and 3. But in the cross-examination he admits that he does not know personally how the first defendant was carrying on the business at Hyderabad. He says in the cross-examination that the first defendant wrote to the second defendant asking him to get Rs. 10,000 for the business at Hyderabad, and that defendants 2 and 5 raised Rs. 10,000 and took it to the first defendant to Nizam. He further admits that he does not know personally how the first defendant was carrying on business at Hyderabad. D.W. 1 the third defendant deposes that the first defendant used to look after the business at Hyderabad and that the second defendant was going to Hyderabad now and then. In the cross-examination he adds that he deputed the second defendant to manage the business and that the second defendant used to go to Hyderabad twice or thrice in a year. D.W. 2, the first defendant, admits in clear terms that he and the second defendant jointly did business at Hyderabad for commission under the name of S.V.K.G. & Co. In the cross-examination he says that he and the second defendant did not settle the accounts of the Hyderabad business and that they had equal shares in it. In this state of evidence, we cannot say that there was no evidence to sustain the finding of the Court below. Though P.Ws. 1 and 3 say that the first defendant used to manage the Hyderabad business, P.W. 3 admits that the second defendant took some part in carrying on that business. D.W. 1, another partner, also speaks to the fact that the second defendant also used to go to Hyderabad, now and then, presumably in connection with the business. The first defendant clearly admits that the business was a joint business of defendants 1 and 2. As the Court held that the Hyderabad business was connected with the Anaparti business, it would follow that they were jointly managing the branch of the said business at Hyderabad. Though there is some ambiguity in the evidence, and though the first Appellate Court might have come to a different conclusion, we cannot say, in second appeal, that there was no evidence supporting the finding of the Court below. We therefore accept the finding of the Court below.

We may make it clear that this finding cannot make the thirteenth defendant liable for rendition of accounts. The plaintiff must prove, before fastening the liability on the thirteenth defendant, the periods during which the second defendant was in management, his acts of management and also the amounts for which he would be liable on the basis of the mismanagement or misapplication of funds. The amounts so fixed could be recovered from the assets of the second defendant, if any, in the hands of the thirteenth defendant.

In the result, the appeal fails and is dismissed with costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

The Public Prosecutor .. *Petitioner**

v.

Kanniappan .. *Respondent.*

Criminal trial—Sentence—Statute providing for imprisonment for particular offence—Imposing imprisonment till rising of Court—Propriety—Duty of persons administering criminal law.

When the statute says that for an offence the offender shall be imprisoned, it normally means that he should be sent to jail. To impose a sentence of imprisonment till the rising of the Court is an evasion of the statutory provision and such an evasion would be justified only in very exceptional circumstances, as for instance, where the offence is found to be very severely technical or where there are extenuating circumstances possessing unusual force.

* Cr.R.C. No. 134 of 1954 (Cr.R.P. No. 126 of 1954). 19th November, 1954.

Those who are called upon to administer the Criminal Law must bear in mind that they have a duty not merely to the individual accused before them, but also to the State and to the community at large.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Assistant Sessions Judge of the Court of Session of the North Arcot Division in S.C. No. 66 of 1953.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) for petitioner in person.

Respondent not represented.

The Court made the following

ORDER.—The Assistant Sessions Judge of North Arcot convicted one Kanniappan of an offence under section 330 read with section 511, Indian Penal Code and sentenced him to imprisonment till the rising of the Court and to pay a fine of Rs. 25. The learned Public Prosecutor has moved for an enhancement of the sentence. The convicted person has not appeared.

The facts are perfectly clear : A boy Periaswami was suspected of having committed theft in the house of Kanniappan the 1st accused. When questioned by Kanniappan Periaswami denied knowledge of the theft whereupon Kanniappa took him towards the police station. On the way they had to pass the house of the 2nd accused, who joined them. Accused 1 and 2 tried to extort a confession from the boy. With that end they brought together both his hands, wrapped pieces of cloth round the hands, poured kerosine oil over the wrapping and set fire to it. Naturally, the boy's hands were burnt. The injuries were such that the boy had to remain as an in-patient in the hospital for 12 days. The learned Assistant Sessions Judge acquitted the 2nd accused, and in the view that the act of the 1st accused amounted only to an attempt he convicted him under section 330 read with section 511, Indian Penal Code as already stated.

In taking this view, the learned Assistant Sessions Judge was going as far as he possibly could in favour of the 1st accused. But the sentence imposed upon him is grossly disproportionate to the gravity of the case. Under section 330, Indian Penal Code, the imposition of a term of imprisonment is obligatory. Now, when the statute says that for an offence the offender shall be imprisoned, it normally means that he should be sent to jail. To impose a sentence of imprisonment till the rising of the Court, and I have no doubt about it at all, is an evasion of the statutory provision and such an evasion would be justified only in very exceptional circumstances, as for instance, where the offence is found to be very severely technical or where there are extenuating circumstances possessing unusual force. None such exists in this case. The boy was an in-patient in the hospital for 12 days and the injuries might very easily have been much more serious, he might have been easily crippled for life. The Assistant Sessions Judge in imposing the grossly inadequate sentence that he did was betraying weakness and sloppy sentimentalism. Those who are called upon to administer the criminal law must bear in mind that they have a duty not merely to the individual accused before them, but also to the State and to the community at large. If I had been trying the case, I would have imposed a sentence of anything up to two years' rigorous imprisonment. The learned Public Prosecutor pointed out that considerable time had elapsed since the offence was committed and more than one year, after the Assistant Sessions Judge pronounced his judgment. This last is a complicating factor.

In view of that, I enhance the sentence imposed by the Assistant Sessions Judge to one years' rigorous imprisonment. The fine imposed will stand.

K.S. *Sentence enhanced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Annamalai & Co., Ltd., a private company by its Managing Director, S.Rm. C.T.A. Annamalai Chettiar .. *Appellant**

v.

C.H. Cibgathulla Saheb by power of Attorney Agent M. S. Mahadeva Ayyar .. *Respondent.*

Madras City Tenants Protection Act (III of 1922), *sections* 3, 9 *and* 11—*Applicability—Protection under Act not available when there are no buildings on the land from which defendant is sought to be evicted—Land in question forming part of a larger block in portions of which there were buildings—Decision in prior suit that protection under the Act was available in respect of entire block—If operates as* res judicata *:*

In a prior suit for eviction against the lessees of an entire block of land it was held that the lessees were entitled to the protection under the Madras City Tenants Protection Act as there were buildings on portions of that block.

The entire block of land was purchased by the plaintiff subsequently. Portions of the land came to be in the occupation and enjoyment of the descendants of the lessee as a result of partition and defendants were alienees from such descendants of separate portions. In a suit by plaintiff for recovery of possession of pieces of vacant land from the defendants,

Held : (1) The decision in the prior suit did not operate as *res judicata*. (2) As admittedly there was no building on the several pieces of land in the possession of different defendants they are not entitled to the protection afforded by the City Tenants Protection Act.

When there is no building on the land in question there can be no question of the defendants being "paid as compensation the value of the building" under section 3 of the Act. It is equally clear that the landlord could not have given a notice under section 11 "offering to pay compensation for any building" when there is none. So section 11 cannot apply. And section 9 in terms confers a right only on a tenant who is entitled to compensation under section 3.

On appeal from the judgment and decree of Rajagopalan, J., dated 19th April, 1951 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 132 of 1948.

K. Rajah Iyer, M. Murugappa Chettiar and *C. R. Venkatachala Ayyar* for Appellant.

T. S. Raghavachari and *O. K. Ramalingam* for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—These three appeals are from the judgment of Rajagopalan, J., in C.S. No. 132 of 1948. The 5th defendant is the appellant in O.S. Appeal No. 131 of 1951 and the 2nd defendant is the appellant in O.S. Appeal No. 29 of 1952. The suit was for the recovery of possession of pieces of vacant land in O.S. No. 27 corresponding to R.S. No. 4693 in Tyagarayanagar, Madras, in the separate possession of defendants, of whom there were seven. These plots were comprised in a big block of 8 cawnies 7 grounds 2160 square feet, which originally was situated in the zamindari village of Mambalam. The Sri Parthasarathy Swami Temple, Triplicane, owned this block of land in inam. The plaintiff purchased this entire block from the temple by a sale deed dated 14th March, 1947. The title of the temple and the plaintiff as the vendee from the temple is not disputed. The said lands appear to have been originally leased to one Balu Mudali, and after his death, they were in the occupation of his son, Ramaswami Mudali, after whose death the lands came to be occupied by his sons. Subsequently, the sons, evidently as a result of a partition, were in separate occupation and enjoyment of portions of the said block. The defendants were alienees from the descendents of one or other of the sons of Ramaswami. The defendants raised several defences, namely, that the suit lands were ryoti lands in an estate within the meaning of the Estates Land Act that they were entitled to rights of permanent occupancy, that they were tenants within the meaning of the City Tenants Protection Act entitled to the benefit of sections 9

* O.S. As. Nos. 131 and 132 of 1951 and 29 of 1952. 17th February, 1955.

and 11 of the Act and the suit should fail because of the absence of valid notices under section 11 of that Act, and that the suit was bad for misjoinder of parties and causes of action. The learned Judge, who tried the suit, Rajagopalan, J., passed a decree for possession against defendants 1, 2, 4 and 5. The suit had been dismissed against defendants 6 and 7, and there was a consent decree against the 3rd defendant. O.S.A. No. 131 of 1951 and O.S.A. No. 29 of 1952 are appeals against this decision of Rajagopalan, J., by defendants 5 and 2, respectively. Defendant 5 filed an application under section 9 of the Madras City Tenants Protection Act for a direction to the plaintiff to sell him the lands in his occupation for a price to be fixed by the Court. That application was dismissed and O.S.A. No. 132 of 1951 is against the order dismissing it.

On behalf of the appellants, no objection was taken to the finding of the learned Judge that the defendants had failed to prove that they were entitled to permanent rights of occupancy under the Madras Estates Land Act. The main contention on behalf of the appellants before us was that they were entitled to the benefits of the Madras City Tenants Protection Act. This contention was practically founded on the decision in a prior suit, C.S. No. 758 of 1936 on the file of the Madras City Civil Court. It is therefore necessary to set out the circumstances under which that suit was filed and what exactly was decided in that suit. That suit was filed by the trustees of Sri Parthasarathy Swami Temple, Triplicane, against the descendants of Balu Mudali for recovery of possession of the entire block of 8 cawnies odd. It was stated in the plaint that the trustees of the temple had granted a lease to the four sons of Ramaswami mentioned above in fasli 1292 and that they were in occupation of the lands as tenants and after them their descendants and heirs had been likewise holding and enjoying the lands as tenants and that the tenancy of the defendants had been determined by notices to quit. The main defence was that the defendants were entitled to the benefit of the provisions of the City Tenants Protection Act. There was also a plea of misjoinder of parties and causes of action. The learned City Civil Judge dismissed the suit on the ground that as framed it was not maintainable, because there were separate tenancies and the suit was bad for misjoinder of parties and causes of action. The learned Judge, however held that the defendants were not entitled to the benefit of the City Tenants Protection Act. There was an appeal to this Court which was heard and disposed of by Patanjali Sastri, J., as he then was. The learned Judge held, differing from the City Civil Judge, that the suit as framed was not vitiated by misjoinder of parties and causes of action ; but he held, also differing from the learned trial Judge, that the suit should fail because of the provisions of the City Tenants Protection Act. The chief reason why the City Civil Judge held that the defendants were not entitled to the benefits of the Act was that it did not apply to the lands in suit, as they were not part of the City of Madras at the time the Act was passed. Patanjali Sastri, J., took a different view and held that the Act was applicable to the lands in suit. Another objection raised by the plaintiffs was that there were no buildings or superstructures on the entire lands and that some portions of the land had been let for building purposes and other portions for cultivation, and in any event, the Act could apply only to that portion of the land which had been let for building purposes. The learned Judge overruled the objection on the ground that no differentiation could be made between lands let for building and lands let for cultivation and that the whole block of land should be treated as a single item of property and as there were buildings on portions of the land, the Act would apply to the entire block and as the requirements of section 11 of the Act had not been complied with, the suit should fail. The appeal was accordingly dismissed. The trustees of the temple filed a letters patent appeal against the judgment of Patanjali Sastri, J. This was dismissed by a Division Bench consisting of Sir Lionel Leach, C.J., and Lakshmana Rao, J. The learned Judges agreed with Patanjali Sastri, J., on both points, namely, misjoinder and the application of the Act.

It was during the pendency of the suit O.S. No. 758 of 1936 that the 5th defendant purchased a portion of the block of lands which formed the subject-matter of that suit from some of the descendants of Balu Mudali. . The 2nd defen-

dant purchased another portion of the block of lands in 1941 during the pendency of the appeal to this Court. The sale to the plaintiff was in 1947, long after the final termination of the prior litigation.

There is one important difference between the prior suit and the present suit. In the prior suit, the defendants were the descendants of the original lessees and the suit was in respect of the entire block of land on which admittedly there were superstructures. The present suit, however, is only against some of the persons occupying portions of the land, and it is common ground that there are no superstructures on the lands which form the subject-matter of the present suit. It was represented to us that the plaintiff had dealt with the persons who were alienees of the portions of the land on which there were superstructures on the footing that they were tenants entitled to the benefits of the City Tenants Protection Act. The plaintiff's contention was that so far as the contesting defendants are concerned, they would not be tenants within the meaning of the Act, because there were no buildings on the lands in their occupation.

Mr. Rajah Ayyar, learned counsel for the appellants, relied on the decision in the prior suit as being conclusive in favour of the appellants being entitled to the benefits of the Act. His argument was that as the predecessors of the appellants were held to be entitled to the benefits of the Act, they who were transferees from the parties to that litigation could take advantage of the decision.

This argument is in our opinion fallacious. The question for decision in the present case is whether a particular defendant is entitled to the benefits of the City Tenants Protection Act. To decide that question, all that we have to do is to take the relevant provisions of the Act and see if the defendant is or is not entitled to the benefit of the material provisions of the Act. We shall assume for the purpose of this argument that each of the defendants is a tenant within the meaning of section 2 (4) of the Act and that the plaintiff is a landlord within the meaning of section 2 (3).

Section 3 runs thus :

> " Every tenant shall on ejectment be entitled to be paid as compensation the value of any building which may have been erected by him, by any of his predecessors in interest, or by any person not in occupation at the time of the ejectment who derived title from either of them and for which compensation has not already been paid. A tenant who is entitled to compensation for the value of any building shall also be paid the value of trees which may have been planted by him on the land and of any improvements which may have been made by him."

Section 9 (1) permits a tenant " who is entitled to compensation under section 3 " to make an application to the Court for an order that the landlord shall be directed to sell the land in his occupation for a price to be fixed by the Court. Section 11 relates to notice before institution of suits or applications in ejectment, and runs as follows :

> " No suits in ejectment or applications under section 41 of the Presidency Small Cause Courts Act, 1882, shall be instituted or presented against a tenant until the expiration of three months next after notice in writing has been given to him requiring him to surrender possession of the land and building and offering to pay compensation for the building and trees if any and stating the amount thereof.
>
> A copy of such notice shall at the same time be sent to the Commissioner of the Corporation of Madras."

Admittedly, there is no building on the land in the occupation of either the 2nd defendant or the 5th defendant. So there can be no question of either of them being paid as compensation the value of the building under section 3. It is equally clear that the landlord could not have given a notice under section 11 offering to pay compensation for any building, when there is none. So section 11 cannot apply. And section 9 in terms confers a right only on a tenant who is entitled to compensation under section 3. It is therefore clear that neither the 2nd defendant nor the 5th defendant can today claim to be entitled to the benefit of either section 3 or section 11, and consequently of section 9. Mr. Rajah Ayyar was indeed compelled to agree that this would be so. The only way in which he tried to escape from this clear conclusion was to rely on the previous judgment of this Court. Now, that judgment proceeded on the footing that the suit was for possession of the entire

block of 8 cawnies odd in the occupation of the descendents of the original lessees, and admittedly there were superstructures on portions of the land. We have nothing like that here now. The lessees appear to have divided the land into several plots, and it is only on some plots that buildings exist. The respondent's advocate conceded that the tenants in occupation of those portions on which there are superstructures would be entitled to the rights conferred by sections 3, 9 and 11 of the Act. But the other defendants are only in occupation of vacant pieces of land. How they can be held to be entitled to the benefit of the Act we are unable to conceive. From the practical aspect of the matter, the anomaly that would result from an acceptance of Mr. Rajah Ayyar's argument would become evident. Supposing we were to hold that the 2nd defendant is entitled to the benefit of the Act, then what is the proper notice that should have been given by the landlord under section 11 of the Act? What is the compensation which the landlord could offer to pay? Surely it could not be compensation for the building existing on somebody else's land, because the landlord may have to offer the value of that building when he seeks to eject the person in occupation of the land on which the building is situated. It would be literally impossible for the landlord to comply with section 11 in the case of either defendant 2 or defendant 5 and yet if we accept Mr. Rajah Ayyar's argument, the landlord's suit must be dismissed, because he did not comply with section 11. Nothing compels us to accept an argument which leads to this extraordinary position. The same anomaly would exist in the application of section 3 and section 9 also. In this connection, the following observations of Krishnaswami Aiyangar , J., in *Vedavalli Thayar Ammal* v. *Junus Chettiar*[1] are apposite :

"It is clear that the notice referred to in this section (section 11) is one requiring the tenant to surrender possession of the land and building and offering to pay compensation for the building and trees if any. There is nothing in the section or in the Act which enables the tenant to ask for compensation when he does not own the building. In a case where the tenant is not the owner of the superstructure it is impossible to see how he can ask for compensation in respect of something which does not belong to him or why the landlord should offer by his notice to pay compensation for a building which he himself owns. The entire scheme of the Act as the preamble shows it, is to afford protection to a tenant who has constructed a building on another's land and not to throw obstacles in the way of a landlord enforcing his rights, even where there are no rights of a tenant to be protected. This is apparent from the language of the section itself, which seems to limit its operation to the case where the tenant is the owner of the superstructure."

The rule of *res judicata* cannot apply to cases where the applicability of an Act would depend upon the circumstances actually present at the time when the Act is sought to be applied. Taking the very defendants who were parties to the prior suit, if sometime after that litigation owing to some reason or other all the superstructures had been destroyed or removed from the land, then could it be contended on the strength of that decision they would nevertheless be entitled to the benefit of the Act? We agree with the learned Judge, Rajagopalan, J., that the decision in the prior suit O.S. No. 758 of 1936 is no bar to the investigation of the claim of the several defendants in the present suit, namely, that they are tenants and that they are entitled to the protection afforded by the City Tenants Protection Act. And we also agree with him that they are not entitled to that protection, as none of them satisfies the necessary requirements.

We were unable to follow the arguments of Mr. Rajah Ayyar as regards the defect in the frame of the suit. Before the learned trial Judge, the objection which was pressed was that the suit was bad for misjoinder of parties. There was nothing in this objection, and learned Counsel did not reiterate that objection. But he sought to rely on Order 2, rule 2, Civil Procedure Code. We fail to see, however, how this provision can have any application to this case. It is not alleged that against any of these defendants the plaintiff could have claimed any further relief. So far as we are aware, Order 2, rule (2) has always been applied to the case of a cause of action which the plaintiff has against a particular defendant. The objection in this form was not raised before the learned trial Judge, and there is no substance either in it. O.S. Appeals Nos. 131 of 1951 and 29 of 1952 are dismissed with costs.

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1. (1939) 2 M.L.J. 112 at 113, 114.

O.S. Appeal No. 132 of 1951 is an appeal against an order dismissing the application of the 5th defendant in the suit under section 9 of the City Tenants Protection Act. As we have held that the Act does not apply to him, his application was rightly dismissed. This appeal is dismissed. No order as to costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Leslie Davison Miller .. *Petitioner.**

Court-fees Act (Madras Act XIV of 1955), *section* 56—*Fee for grant of probate or Letters of Administration—How estimated.*

Ordinarily the estate of a person as on a certain date would, in the eye of law, be the original corpus *plus* all the accretions that have been lawfully made to it less everything that has been lawfully taken away from it. The dividends payable on certain shares in a company would therefore be accretions to the estate unless they have been lawfully subtracted from it. The fact that the dividends have been remitted abroad makes no difference, if the remittance was without legal authority. Such a deduction from the estate of the deceased will be an unlawful one and cannot be recognised for purpose of duty. Hence duty must be paid in respect of the dividends also.

Sampath Kumar for *Messrs. King and Partridge* for Petitioner.

The Assistant Government Pleader (*K. Veeraswami*) for the State.

The Court delivered the following

JUDGMENT.—The facts immediately relevant are these. On 31st December, 1929, one Annie Sibthorpe executed a will whereunder she left her property to her two sisters Louisa Sibthorpe and Emma Sarah Sibthorpe. Annie Sibthorpe died on 19th February, 1932. Lousia Sibthorpe made her last will on 15th July, 1948 and she died on 11th September, 1950. On 10th June, 1932, Emma Sarah Sibthorpe executed a will whereunder she nominated Lousia Sibthorpe and Nathaniel to be her executors. Emma Sarah Sibthorpe died on 17th December, 1932. Probate of all these three wills was obtained at various times in the High Court of Judicature in Eire. The petitioner Leslie Davison Miller holds a power of attorney from the executor of the will of Louisa. Nathaniel, one of the two executors under the will of Emma Sibthorpe took no interest in the matter and the residuary legatee of her estate is the Church of Ireland. Leslie Davison Miller holds a power-of-attorney from " the representative body of the Church of Ireland." On the strength of these powers-of-attorney Mr. Miller has applied for Letters of Administration with the will annexed of the properties of Annie Sibthorpe, Emma Sarah Sibthorpe and Louisa Sibthorpe in this country.

Now, part of the property devised under the wills of these three individuals are some shares in the Buckingham & Carnatic Mills and also in the Imperial Bank. Between the dates of the death of the individuals and the date of the present application the dividends payable in respect of these shares were from time to time remitted abroad.

The first question I have to decide is whether on the dividends that were so remitted duty is payable by virtue of section 56 of the Court-fess Act (XIV of 1955). So far as is now material that section runs as follows :—

" The fee chargeable for the grant of probate or Letters of Administration shall comprise—a fee at the rate or rates precribed in Article 6 of Schedule I, computed—

(*b*) where the application is made after the expiry of one year from such date, *i.e.*, the date of the death of the testator, on the market value of the estate on the date of the application."

It seems to me to be plain beyond dispute that ordinarily the estate of a person as on a certain date would, in the eye of law, be the original corpus *plus* all the accretions that have been lawfully made to it less everthing that has been lawfully taken away from it. Now, the dividends payable on the shares which the deceased individuals held in the Buckingham & Carnatic Mills and in the Imperial Bank would

* Diary Nos. 9318, 9144 and 9145 of 1955. 11th August, 1955.

therefore naturally form accretions to the estate unless they have been lawfully subtracted from it. It is true that certain individuals in this country remitted the dividends abroad. But, so far as I can see, they had no legal authority to do so, since they were only intermeddlers with the estate, and in consequence those dividends must be considered to be accretions to the estate. The result follows that duty must be paid on them.

The learned Assistant Government Pleader cited a number of English cases before me but I shall refer to only two of them. The first is reported in *Attorney-General* v. *New York Breweries Company*[1]. The head note gives an adequate summary of the case :

" Upon the death of a testator, resident and domiciled in America, shares and debentures in an English company, of which he was the registered holder in the books of the Company in London, passed by his will according to the law of his domicile to his executors in America. At their request the company registered them as the holders of two shares and a debenture in the place of the deceased, and paid to them the dividends and interest due upon the shares and debentures at the time of the testator's death. The executors, to the knowledge of the company, had not obtained, and did not intend to obtain, probate of the will in England :

Held: That the company, by so dealing with the assets of the testator in England, constituted themselves executors *de son tort*, and were liable, upon an information filed by the Attorney-General, to pay to the Crown probate duty upon the assets so administered by them."

The observations of Rigby, L.J., on page 220 are also of interest :

" By English Law, with which alone we are concerned in this case, probate duty is payable in respect of all assets of a deceased person, whether domiciled or resident within this country or not, which are within the meaning of the numerous decisions on this point locally situated in England."

This decision was affirmed in *New York Breweries Company* v. *Attorney-General*[2].

It was argued on behalf of the petitioner that the money has gone abroad, and since it is not here it is not liable to pay duty. In my opinion the fact that the money has been remitted abroad makes no difference. As the Lord Chancellor observed in page 70 in *New York Breweries Company* v. *Attorney-General*[2] :

" The company therefore, being now in possession of the share of the profits which belonged to the deceased person, are bound to see that they do not hand it over, or hand over anything that it represents it, to any person who is not entitled to deal with it. That is their duty according to their constitution and according to law, because they are in possession of something which is available as assets of the testator's estate, *bona notabilia* in this country."

In the present case, when the dividends were sent abroad, whoever sent them did so without legal authority in that behalf. Such a deduction from the estate of the deceased is an unlawful one and cannot be recognised for purposes of duty. The duty, must therefore, be paid in respect also of these dividends.

So far as the application for Letters of Administration on behalf of the estate of Emma Sibthorpe is concerned, there is a further difficulty. The executor Nathaniel is alive and he has not formally relinquished his office. Nor is he legally incapable of acting. That being so the residuary legatee has no power to act and a power-of-attorney which he has granted does not place the petitioner in any better position. Section 222 of the Succession Act makes it clear that probate can be granted only to the executor appointed under the will. Section 229 says :

" When a person appointed as executor has not renounced the executorship, Letters of Administration shall not be granted to any other person until a citation has been issued, calling upon the executor to accept or renounce his executorship."

The application for Letters of Administration, so far as it relates to the will of Emma, cannot therefore be entertained. In respect of the other applications, additional duty must be paid to the extent indicated above. Time to pay is two months.

R.M. *Order accordingly.*

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1. L.R. (1898) 1 Q.B.D. 205.
2. L.R. (1899) A.C. 62.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Thandavarayan .. *Appellant.**

Criminal Procedure Code (*V of* 1898), *section* 109 (*a*) *and* (*b*)—*Essentials to be proved for taking action under—Taking precautions to conceal oneself—What amounts to—Person who cannot give a satisfactory account of himself—How proved.*

Before any person could be proceeded against under section 109 (*a*) of the Criminal Procedure Code, he must be proved to be taking precautions to conceal his presence and there must be reason to believe that such precaution is taken with a view to commit an offence. The mere fact that a person concealed his face or moved briskly at the sight of the police or ran when called out does not satisfy the requirements of the sub-clause.

In order to attract sub-clause (*b*) of section 109, either the accused should have no ostensible means of subsistence or he must be one who cannot give a satisfactory account of himself. It is for the Court to decide whether the account given of himself by the accused is satisfactory or not. The mere opinion of the police officer is not sufficient. The fact that the police officer was dissatisfied with the answers given by a person may be a sufficient ground to take action against him. But a Court should have before it the answers given by the accused to the police officer, in order to judge whether they are satisfactory or not. For this purpose the police officer should state before the Court the account given by the accused.

Appeal against the order of the Seventh Presidency Magistrate, of the Courts of the Presidency Magistrates, Egmore, Madras, in M.P. No. 711 of 1954 passed on 13th August, 1954.

A. C. Muthanna for the State Prosecutor (*S. Govind Swaminadhan*) for the State.

The Court delivered the following

JUDGMENT.—This is an appeal from jail. The appellant in this case was proceeded against under section 109 (*a*) and (*b*), Criminal Procedure Code. According to the evidence given by P.W. 1 in the case, on 27th July, 1954, at about 00-15 hours in the night when he was going on rounds along with his men, he saw this appellant on the foot-steps of Bombay Stores at Harrington Road having his face covered with a white cloth. On seeing the policemen the appellant began to hide himself and move briskly. The police constable chased and caught him. When he was questioned by the police officer, the appellant did not give a proper reply. P.W. 1 says he seized from the appellant's waist an iron bar, M.O. 1, and arrested him and brought him to the station. It is stated in his evidence that the appellant has no ostensible means of livelihood. In the first information report that was filed in this case, what is stated is that the appellant on spotting P.W. 1 and the police approaching him began to move quickly, which aroused the suspicion of the police officers, and P.W. 1 called him, and thereupon the appellant took to his heels. Then the party gave chase to him and caught him in Vydianatha Mudali Street, through which street he ran. It is stated in the report that the appellant gave his name as Ramaswami and stated he had come to see his friend. But the other answers which the appellant gave are not mentioned.

The question for consideration in this appeal is whether, in the circumstances, the appellant is liable to be proceeded against under clauses (*a*) and (*b*) of section 109, Criminal Procedure Code, which are as follows :—

" Whenever a Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the First Class receives information—

(*a*) that any person is taking precautions to conceal his presence with the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any offence, or

(*b*) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself,

Such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix."

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* Criminal Appeal No. 616 of 1954. 26th November, 1954.

It is clear that under clause (*a*) before any person could be proceeded against, he must be found to be taking precautions to conceal his presence and there must be reason to believe that such person is taking precautions with a view to committing any offence. The two requirements are, taking precautions to conceal and reason to believe that such person is taking precautions with a view to commit an offence. In this case, the appellant merely because he hid his face by means of a cloth when his presence was noticed by somebody going on the road, it cannot be said that he was taking precautions to conceal his presence. There is no concealment whatsoever of his presence, though undoubtedly there was a concealment of his face. From the mere fact that at the sight of the police officer he began to move briskly and when called out he ran, it cannot be said that he was taking precautions to conceal himself. In my opinion, none of the ingredients necessary to proceed under the first part of clause (*a*), of section 109, Criminal Procedure Code, has been established in this case. On account of the seizure of M.O. 1, there may be reason to believe that he was likely to commit an offence of house breaking. But then it must be preceded by taking precautions to conceal his presence, which has not been established in this case, so that the requirements of clause (*a*) of section 109 cannot be said to have been satisfied in this case.

As regards clause (*b*), either the appellant has no ostensible means of subsistence, or he must be one who cannot give a satisfactory account of himself. In the evidence, the officer does not state what account the appellant gave of himself, so that this Court may find out whether it is a satisfactory account of the person or not. The mere opinion of the police officer that he did not give a proper reply is not sufficient to bring it within the scope of clause (*b*) of section 109. Whether the account given is satisfactory or not, it is for the Court to judge. It is necessary for the police officer therefore to state in Court what exactly the person stated or what account he gave of himself so that the Court may form an opinion as to whether the account given by the person proceeded against is satisfactory or not. No doubt, the police may be dissatisfied with the account given by the person and that will be sufficient ground for the police to proceed against him ; but for the Court to pass an order under section (*b*), it must have before it the account he gave to police officer to judge whether the account given is satisfactory or not. For that reason it is necessary for the police officer to state in Court the account the person gave. In this case, the Court is deprived of all means of judging whether the account given by the appellant is a satisfactory account of himself or not. But the police officer says that the appellant has no ostensible means of livelihood. The appellant has not repudiated this allegation by saying that he has any means of livelihood. In the circumstances, the utmost that can be said in this case is that the appellant would fall within the first part of clause (*b*), requirements of the provisions of clause (*a*) and the second portion of clause (*b*) of section 109, Criminal Procedure Code, not having been complied with.

I think that in the circumstances the bond that is taken may be reduced to a period of six months. With this modification of the terms of the bond, the appeal is dismissed.

R.M. — *Sentence modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Mariyappan, *In re* .. *Accused.**

Madras Probation of Offenders Act (III of 1937), section 3—If applicable to cases which are punishable only with fine.

An offence punishable with fine only is an offence of a minor character of very much less gravity than an offence punishable with imprisonment upto two years. Hence the expression "offences punishable with not more than two years" imprisonment in section 3 of the Madras Probation of

* Crl. Rev. Case No. 316 of 1955. 21st July, 1955.
Case Referred No. 9 of 1955.

offenders Act is intended to cover offences punishable with a less severe sentence than those indicated and therefore to include offences punishable only with fine.

[Sections 562 (1) and 562(1-A) of Criminal Procedure Code compared.]

Emperor v. *Manchershaw*, (1934) I.L.R. 59 Bom. 352 and *Emperor* v. *Vaijappa*, (1935) I.L.R. 60 Bom. 55, followed.

Case referred for the orders of the High Court under section 438 of Criminal Procedure Code by the District Magistrate (Judicial) of South Arcot, in his letter dated 22nd April, 1955, in Crl.R.C. No. 13 of 1955.

N. T. Raghunathan for the Accused.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) for the State.

The Court made the following

ORDER.—There is a reference by the learned District Magistrate of South Arcot under the following circumstances. The accused in this case was convicted under section 2 (16) of the Madras Shops and Establishments Act, 1947. The offence is punishable only with a fine not exceeding Rs. 50. The trial Court applied the provisions of section 3 of the Madras Probation of Offenders Act and released the accused after due admonition. The District Magistrate had taken up this case under the revisional jurisdiction and referred it to this Court on the ground that section 3 of the Madras Probation of Offenders Act does not apply to case which are punishable with fine only. Section 3 of the Madras Probation of Offenders Act is as follows :—

" In any case in which a person is found guilty of the offence of theft, dishonest mis-appropriation, or cheating punishable under the Indian Penal Code or of any offence punishable with not more than two years' imprisonment and no previous conviction is proved against him the Court by which he is found guilty may if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition."

As the section mentions only offences 'punishable with not more than two years' imprisonment, the District Magistrate is of opinion that this will not apply to offences which are punishable only with fine. In *Emperor* v. *Manchershaw*[1], a Bench of the Bombay High Court consisting of Beaumont, C.J. and Wadia, J., were considering whether section 562 (1-A), Criminal Procedure Code, would apply to a case in which the offence was punishable only with fine. They were also dealing with a reference by a District Magistrate on a similar ground. They pointed out :—

"S. 562 is designed to enable the Court to deal leniently with first offenders convicted of offences not of the first gravity, and it is certainly strange to suggest that the section does not apply to offences of such a minor character as to be punishable only with fine. Sub-section (1) deals with offences 'punishable with imprisonment for not more than seven years' and if the words are construed literally, it may be said that they do not cover an offence punishable with fine and not with imprisonment, and this view of the sub-section was taken by this Court in *Emperor* v. *Kasturi*[2]. Sub-section (1-A) deals with offences 'punishable with not more than two years' imprisonment' and taking these words literally, they seem to cover an offence punishable only with fine, which cannot be said to be more than two years' imprisonment.

" I do not suppose that the Legislature intended to found any distinction upon the different phraseology used, and personally I should have been prepared to hold that both sub-sections apply to offences punishable with a less severe sentence than that referred to in the respective sub-sections, and I should say that a fine is a less severe sentence than imprisonment (*See* section 53, I.P.C.) we are bound by the decision of this Court already referred to upon the construction of section 562 (1) but I see no reason why we should not give to section 562 (1-A) a meaning justified by a literal construction of the language and consonant with what appears to be the intention of the section, and hold that the sub-section covers offences punishable only with fine."

In *Emperor* v. *Vaijappa*[3], again the same question arose for reference and a Full Bench held as follows :—

" It is clear that an offence punishable with fine only is an offence of a minor character, of very much less gravity than an offence punishable with imprisonment up to seven years. Reading the section as a whole, I have no doubt whatever that the expression ' offence punishable with impri-

1. (1934) I.L.R. 59 Bom. 352.
2. (1926) 28 Bom.L.R. 1031.
3. (1935) 60 Bom. 55 at pp. 61, 62 (F.B.).

sonment for not more than seven years' was intended to be read in the same sense as the expression in sub-section (1-A) 'offence punishable with not more than two years' imprisonment, and that both expressions were intended to cover offences punishable with a less severe sentence than those indicated, and, therefore to include offences punishable only with fine."

The provisions of section 3 of the Madras Probation of Offenders Act are exactly similar to those of section 562(1) and 562 (1-A); the words are practically the same. Following the reasoning in the above two decisions, I must also hold that in view of the similarity of the provisions, a sentence of fine is certainly included within the meaning of 'punishment of not more than two years' imprisonment.' In the circumstances, the trial Court was justified in applying the provisions of section 3 of the Madras Probation of Offenders Act. This reference is therefore not accepted, and it is returned to the District Magistrate.

R.M.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

P. Hanumanthiah .. *Petitioner**

v.

The Deputy Commercial Tax Officer, Moore Market Division, Madras. .. *Respondent.*

Madras General Sales-tax Act (IX of 1939), section 15 (b)—Prosecution for non-payment of sales-tax—Tax due by a firm of partners—Prosecution of an individual partner—Legality.

It is now settled law that in cases where a firm has been assessed to sales-tax under the Madras General Sales-tax Act, 1939, it is the firm that must be prosecuted for non-payment of the tax. Strictly speaking when a firm is prosecuted, it is against the name of the firm that the prosecution must lie and not merely against the partners as such. But, mere technicalities apart, where all the partners of a firm are prosecuted the firm being represented by its partners the prosecution is deemed to be against the firm. If in the course of such a prosecution the case against one of the partners of the firm is separated then it ceases to be a prosecution against the firm as the firm then collapses by one of the partners being proceeded against separately unless it is specifically stated in the complaint that the prosecution is against the firm as such and the name of the firm is also mentioned therein. For if the firm as such is prosecuted under its name and style then it does not matter whether all the partners are before the Court or only some of them. But, for the liability of a firm, prosecution and conviction of an individual partner alone cannot stand.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the orders of the Fifth Presidency Magistrate of the Court of the Presidency Magistrate, Egmore, Madras, dated 6th March, 1955 and made in C.T. Nos. 92 and 93 of 1955.

J. S. Ullal, Advocate, Bangalore, for *T. S. Krishnamurthi Aiyar* for the Petitioner in both.

The State Prosecutor (*S. Govind Swaminadhan*) on behalf of the State.

The Court made the following

ORDER.—These are revision petitions against the conviction of the Petitioner by the Fifth Presidency Magistrate, Madras, in C.T. Nos. 92 and 93 of 1955.

The petitioner, one P. Hanumanthiah, has been prosecuted for failure to pay the balance of Sales-tax for 1950-1951 and 1951-1952. That he was a partner along with one A. P. Subramania Mudaliar and that they were doing business under the name and style Messrs. P.H.A.P. Subramania Mudaliar & Co., is not disputed. The complaints have been undoubtedly laid against the petitioner and A.P. Subramania Mudaliar for offences under section 15 (*b*) of the Madras General Sales-tax Act, 1939. If both of them have been prosecuted, as has been pointed out in my decision in *Behara Lachanna Patnaick* v. *State*[1], then it can well be contended that the firm was being prosecuted. Under the Act, if a firm is assessed to tax, it is the firm that must be proceeded against and prosecuted for non-payment of tax.

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*Crl.R.C. Nos. 335 and 336 of 1955.
(Crl.R.P. Nos. 320 and 321 of 1955.) 4th August, 1955.

1. (1952) 2 M.L.J. 174 : 1952 M.W.N. (Cr.) 187.

It has been made quite clear by the decision of Subba Rao, J., in *The Public Prosecutor* v. *Jacob Nadar*[1], that for the purpose of assessment

" the firm is treated as one entity and that in default of payment pursuant to the notice, the firm is libale to be prosecuted. It is true that under rule 19 of the Madras General Sales-tax Rules, if a dealer or licensee enters into a partnership with regard to his business, he shall report the fact to the assessing authority within 30 days of his entering into such a partnership and that the dealer or licensee and the partner shall jointly and severally be responsible for the payment of the tax leviable under the Act. But that rule does not override the provisions of the Act which enable the authorities concerned to deal with the *firm* as one entity for the purpose of assessment and prosecution."

In these cases what happened was, after the complaints were laid against the two partners, either on account of absence or some other reason, one of the Accused, *viz.*, the second Accused at the time of the complaints, was separated. In short, each case was split up into two and the Petitioner alone was proceeded against. It has already been held that in case a firm has to be assessed, for non-payment it is the firm that must be prosecuted. It may consist of two or more partners, in which case all of them may be proceeded against by bringing them on record as accused, in which case, as already pointed out, it may be contended that since the firm consists of these partners, it is the firm that is being prosecuted. Strictly speaking, when a firm is being prosecuted, it is against the name of the firm that the prosecution must lie and not merely against the partners as such. But, not to stand on mere technicalities, if the entire partners had been brought on record, there is no objection to treating the entire partners as partners of the firm and the firm being represented by its partners. Then it is the firm that is deemed to be prosecuted as all the partners are before the Court. But, if in the course of the prosecution, the case against one of the partners of the firm is separated, then it ceases to be a prosecution against the firm, as the firm then collapses by one of the partners being proceeded against separately, unless it is specifically stated in the complaint that the prosecution is against the firm as such, and the name of the firm also is mentioned therein. If the firm as such is prosecuted under its name and style, then it does not matter whether all the partners are before the Court or only some of them are before the Court. What happened here is that the second Accused, against whom also the original complaints were laid, the cases against him alone were separated in the course of the trial, and the cases against him having been split up, the cases against the petitioner alone cease to be against the firm as such, and if the firm is not prosecuted, it has been held that the conviction cannot stand against the individual partner alone. It is true that the petitioner has admitted in his statement that he and Subramania Mudaliar were partners of the firm that failed to pay the balance. But his admission has no legal force inasmuch as the prosecutions cannot be laid against him alone and the trial cannot be proceeded against the petitioner alone individually. I am, therefore, reluctantly compelled to set aside the convictions and sentences on the ground that the prosecutions have not been against the firm as such and that, therefore, they must fail.

In the end, the convictions and sentences are set aside and the accused acquitted. The fines, if paid, will be refunded.

R.M. ——— *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE PANCHAPAKESA AYYAR.

V. S. Ramamirtha Ayyar and others .. *Plaintiffs**

v.

M. Narayana Pillai (since deceased) and others .. *Defendants.*

Madras Temple Entry Authorisation Act (V of 1947)—Validity—If opposed to the fundamental rights declared in the Constitution—Constitution of India, Article 25 (2) (b).

The Madras Temple Entry Authorisation Act, 1947, applies only to religious institutions of a public character and under the provisions of the Act all such institutions are thrown open to all classes

* Case referred No. 5 of 1952. 1st November, 1955.

1. (1951) 1 M.L.J. 511.

and sections of Hindus. Article 25 (2) (*b*) of the Constitution expressly saves any existing law and enables the State to make any law providing for social welfare and reform or the throwing open of Hindu Religious Institutions of a public character to all classes and sections of Hindus. This conclusively establishes the validity and constitutional nature of the Madras Act and it is not *ultra vires* or illegal as opposed to any of the provisions of the Constitution.

Case referred to the High Court by the District Munsif of Thiruvayyaru under section 113 of the Code of Civil Procedure as amended by Act XXIV of 1951, and under Article 228 of the Constitution of India, for its decision.

The Advocate-General (*V. K. Tiruvenkatachari*) and the Government Pleader (*C. A. Vydialingam*) for the State of Madras.

K. V. Srinivasa Ayyar, K. V. Venkatasubramania Ayyar and *A. Balasubramaniam* for Plaintiffs.

T. M. Chinnayya Pillai and *R. Sundaralingam* for 8th Respondent.

The Order of the Court was pronounced by

Rajamannar, C.J.—The learned District Munsif of Tiruvayyaru has referred to this Court the following question which was raised as an additional issue in a suit O.S. No. 216 of 1949 pending before him, namely—

"Whether the Temple Entry Authorization Act (Madras Act V of 1947) is *ultra vires* and illegal as opposed to the fundamental rights declared in the Constitution Act?"

Mr. Venkatasubramania Ayyar, learned counsel for the plaintiffs, at whose instance this issue was raised, was unable to convince us that the Act was opposed to any of the provisions of Chapter III of the Constitution. On the other hand, Article 25 (2) (*b*) appears to conclusively establish the validity and constitutional nature of the impugned Act, because it is there laid down that nothing in Article 25, shall affect the operation of any existing law or prevent the State from making any law providing for social welfare and reform or the throwing open of the Hindu religious institutions of a public character to all classes and sections of Hindus. Now the impugned Act applies only to religious institutions of a public character and under the provisions of this Act such institutions are thrown open to all classes and sections of Hindus. The Madras Act has, therefore, done something which the Constitution has expressly permitted. Our answer to the question is that the impugned Act is not *ultra vires*, or illegal as opposed to any of the provisions of the Constitution.

Mr. Venkatasubramania Aiyar, learned counsel for the plaintiffs, represented that there may be contentions which the plaintiffs may raise without attacking the validity of the Act itself, and he also mentioned in this connection Article 26. On this reference, the only question with which we are concerned is the validity of the Act. We are not concerned with any other contentions that may be raised in the suit. The question referred to us we have answered above in unambiguous terms, *viz.*, is not *ultra vires* or illegal. If it is open to the plaintiffs to raise any contentions without affecting this answer, they would certainly be entitled to raise them. More than this we cannot say on this reference. The reference is answered accordingly.

R.M. *Refere nceanswered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

Nedumbullithodiyil Govinda Pathiyar .. *Appellant**

v.

Ananthanarayana Iyer and others .. *Respondents.*

Code of Civil Procedure (V of 1908), *Order* 33, *rules* 1, 6, *and* 7 *and Order* 43, *rule* 1 (nn)—*Application for leave to sue* in forma pauperis—*Leave refused and time granted for payment of court-fees—Non-complicance with order—Main application for leave to sue* in forma pauperis *dismissed—Revision against order refusing leave—Maintainability—Order rejecting the main application—If tantamounts to rejection of a plaint—Failure to appeal from the order rejecting plaint—Appeal from the order refusing leave to sue* in forma pauperis *on the ground of plaint not disclosing a cause of action—Maintainability.*

An order refusing leave to an applicant to sue as a pauper on the ground that the applicant is not a pauper is one from which no appeal is provided but only a revision. But where such an application is rejected on the ground that the allegations do not show a cause of action, an appeal is provided under Order 43, rule 1 (*nn*) of the Code of Civil Procedure. The rejection of such an application for non-payment of the court-fee directed to be paid within the time granted is only a dismissal for default against which no appeal lies. Hence such rejection is no bar to an appeal under Order 43, rule 1 (*nn*) from the original order refusing leave.

Subramaniam, In re (1955) An. W.R. 109 (F.B.) and *Venkatarama Aiyar* v. *Unnamalai Ammal* (1951) 1 M.L.J. 474, followed.

Rangachariar v. *Rangaswami Ayyangar*, (1935) 70 M.L.J. 223 : I.L.R. 59 Mad. 777; *Chockalinga Thevar* v. *Samarappa Naicker*, (1942) 1 M.L.J. 281 and *Kanthimathi Ammal* v. *Ganesa Ayyar*, (1935) 69 M.L.J. 781 : I.L.R. 59 Mad. 805, referred.

The order of rejection of a pauper plaint for non-payment of Court-fee is not appealable and there is a remedy to the applicant by way of a suit. Even if that order is appealable still since the two remedies flow from independent rights, the exercise of one such right is no bar to the exercise of another.

The right to have an appeal against the order refusing leave on the ground that the plaint does not show a cause of action is not lost because the original application for leave to sue *in forma pauperis* itself has been dismissed for non-payment of Court-fees. The rejection for non-payment of Court-fees is only a consequential order, flowing from the non-compliance of a basic order and if the basis goes, the consequence also disappears.

Bommisetty Ramayamma, In re (1954) 1 M.L.J. 544, differed and overruled.

Munian v. *Kesava Pandithan*, (1955) 1 M.L.J. 452, approved.

Chidambaram v. *Nataraja Mudaliar*, (1939) 1 M.L.J. 96 : I.L.R. (1938) Mad. 1060; *Balaguru Naidu* v. *Muthuratnam Aiyar*, (1923) 46 M.L.J. 254 ; *Brahmaramba* v. *Seetharamayya*, (1947) 1 M.L.J. 119 : I.L.R. (1947) Mad. 820 and *Periyaswami Padayachi* v. *Minor Ulaganathan*, (1948) 2 M.L.J. 150 : I.L.R. (1949) Mad. 333, distinguished and explained.

Appeal against the Order of the Court of the Subordinate Judge of Ottapalam, dated 13th November, 1951 and made in O.P. No. 21 of 1950.

N. Sundara Aiyar for Appellant.

C. K. Viswanatha Aiyar for Respondents.

The order of reference to a Bench was made by

Krishnaswami Nayudu, J.—There appears to be a conflict of opinion on the question whether when once leave was refused to an applicant to sue *in forma pauperis* and time was granted to pay the Court-fees which was not complied with and as a consequence of which non-compliance the original petition itself was dismissed, such a dismissal is no bar to the maintainability of a Civil Revision Petition against the original order refusing leave to sue *in forma pauperis* even though the subsequent order of dismissal has not been challenged in any appeal or revision.

There are two decisions holding contrary opinions, one of Panchapakesa Ayyar, J. in *Bommisetty Ramayamma*, In re[1], relying on a Full Bench ruling in *Satyanarayanacharyulu*[2] v. *Ramalingam*,[2], and that of Basheer Ahmed Sayeed, J., in *Munian* v. *Kesava Pandithan*[3]. I consider, therefore, that this appeal requires to be heard by a Bench.

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* A.A.O. No. 487 of 1952. 8th July, 1955.

1. (1954) 1 M.L.J. 544.
2. (1951) 2 M.L.J. 74 (F.B.).
3. (1955) 1 M.L.J. 452.

Place the papers before the Hon'ble the Chief Justice for orders as to posting before a bench.

In pursuance of the order of reference the appeal came on for hearing before a Bench :

The Judgment of the Court was delivered by

Govinda Menon, J.—O.P. No. 21 of 1950 on the file of the Court of the Subordinate Judge of Ottapalam was an application by the present appellant under Order 33, rule 1, Civil Procedure Code, to allow him to sue *in forma pauperis* for the grant of the various reliefs claimed therein, *viz.*, a decree in his favour on behalf of his tarwad, for redemption and recovery of possession of the properties from respondents 1 and 2, future mesne profits at the rate of 1200 paras of paddy from the first respondent and also other reliefs. On objections put forward by respondents 1 and 2, the learned Subordinate Judge proceeded to act under rules 6 and 7 of Order 33 and after examining the petitioner and hearing the respondents' counsel on the points urged, held that it has not been shown that the petitioner is not possessed of sufficient means to enable him to pay the Court-fee prescribed by law for the plaint, and further that the allegations in the petition do not show a cause of action. On both these grounds he came to the conclusion that the petition was not maintainable, but gave the petitioner a period of two weeks from 19th November, 1951, for payment of the requisite Court-fee, adjourning the petition to 8th December, 1951. The petitioner did not comply with the order to pay the Court-fee and therefore his application was dismissed. Thereafter, on 25th December, 1952, the present appeal has been filed under Order 43, rule 1 (*nn*). The appeal has been referred to a Bench on a preliminary objection raised by the respondents that the same is incompetent inasmuch as the rejection of the petition for leave to sue as a pauper amounts to a rejection of a plaint, as contemplated in section 2 (2) from which an appeal lies; and since no proceedings have been taken in that regard, the present appeal is unsustainable. The learned Judge before whom the appeal came up in the first instance was of opinion that there is a conflict between two decisions of this Court, *Bommisetty Ramayamma*, In re[1], and *Munian* v. *Kesava Pandithan*[2], to which one of us, Basheer Ahmed Sayeed, J., was a party, and it is on this ground that the appeal comes before us.

Before dealing with the conflict of decisions, it is necessary to remark that there is one vital distinction between the facts of those cases and what obtains here, namely, that both these decisions were given in Civil Revision Petitions, which were preferred against orders refusing leave to sue as a pauper on the ground that the applicant was not a pauper, from which order no appeal is provided. But where the application is rejected on the ground that the allegations do not show a cause of action, an appeal is provided under Order 43, rule 1 (*nn*), and it is difficult to see how such an appeal can be refused a hearing on account of a circumstance, which has taken place subsequently. It may also be mentioned that Order 33 does not specifically provide for the granting of time to pay the requisite Court-fee, for there is no rule, which states in so many terms, that where the Court rejects an application for permission to sue as a pauper under rule 5 of Order 33 or under rule 7, the Court is bound to grant time to the petitioner to pay the Court-fee for obtaining the reliefs mentioned in the application. This is done under the provisions of section 149 of the Code with a view to obviate unnecessary proceedings. Order 33, rule 15, provides that an order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of a like nature by him in respect of the same right to sue, that is, when once an application to sue *in forma pauperis* is rejected on the same cause of action it is not open to the applicant to resort to another application *in forma pauperis*. But it also provides that the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such a right provided he first pays the costs, if any, incurred by the Government and by

1. (1954) 1 M.L.J. 544. 2. (1955) 1 M.L.J. 452.

the party opposing such application to sue as a pauper. It is, therefore, clear from this rule that there is nothing prohibiting a pauper applicant, whose application for leave to sue has been rejected, from taking back the paper on which that application has been made, and re-presenting it, after payment of the requisite Court-fee, as a regular suit, if he conforms to the conditions mentioned in the last part of the rule by paying the costs to the Government and the opposite party. Under these circumstances, it seems to us, apart from any authority, that the permission given by the Court to pay Court-fee and convert the application into a suit would not take away from the applicant his right to institute a suit. Understood in this light we are of opinion that there could be no objection to the appeal being heard.

The learned counsel for the respondents, who takes objection to the hearing of the appeal, relies upon *Rangachariar* v. *Rangaswami Aiyangar*[1] and *Chockalinga Thevar* v. *Sankarappa Naicker*[2], wherein it has been held that pending an appeal against a decision of a trial Court, if the same subject-matter is finally decided by another Court, then the appeal cannot be proceeded with on the ground of the bar of *res judicata*. From this analogy it is argued that since the rejection of an application for leave to sue *in forma pauperis* for non-payment of the Court-fee within the time allowed by the Court amounts to a rejection of a plaint, which is a decree under section 2 (2) of the Civil Procedure Code and there is no appeal against that order, it is incompetent for the aggrieved party to proceed with the appeal. We are not able to find any resemblance between these cases and the present one. For one thing the Code does not provide an appeal against the rejection of an application for leave to sue *in forma pauperis* for default of payment of Court-fee, and no case has been brought to our notice, where such an appeal has been entertained, though in *Kanthimathi Ammal* v. *Ganesa Iyer*[3], Wadsworth, J., held that a second appeal lies against an order of an appellate Court refusing leave to appeal *in forma pauperis*, on the ground that the refusal to permit the appeal is tantamount to the confirmation of the decree of the trial Court, in which case a second appeal lies to the High Court. In the present case under Order 33, rule 15, it is open to the petitioner to file a fresh suit when his application for leave to sue has been rejected. Moreover it has been held by a recent Full Bench of the Andhra High Court in In re *Subramanian*[4], that if pending a pauper suit the pauper plaintiff is dispaupered and directed to pay the requisite Court-fee which he fails to do, and the suit is dismissed for default of payment of Court-fee, such an order does not fall within the ambit of section 2 (2) of the Civil Procedure Code and is not appealable, because the dismissal under Order 33, rule 11, being one which is excluded from the definition of 'decree', no appeal can lie against that order. In our view, the reasoning of the learned Judges of the Andhra High Court can be usefully followed for the decision of this point, for, if after the pauper application has been registered as a suit and the plaintiff is dispaupered, the dismissal of a suit for non-payment of Court-fee is not a decree, all the more is the rejection of an application for leave to sue *in forma pauperis* for non-payment of Court-fee is a dismissal for default, against which no appeal lies. If, therefore, no appeal lies against such an order no question of *res judicata* arises and the present appeal preferred under Order 43, rule 1 (*nn*) is perfectly competent.

Another way of looking at the question is afforded by the reasoning contained in the decision of a Bench of this Court in *Venkatarama Aiyar* v. *Unnamalai Ammal and another*[5], where the learned Judges held that notwithstanding the fact that after an order of remand the suit was disposed of, the party aggrieved by the order of remand would have a right of appeal against the order of remand. There were conflicting decisions on the point, one by Mack, J., in *Venkatarama Ayyar* v. *Unnamalai Ammal*[6], where the learned Judge held that pending an appeal against an order of remand, if the suit itself after remand has been disposed of, then it is incompetent

1. (1935) 70 M.L.J. 223 : I.L.R. 59 Mad. 777.
2. (1942) 1 M.L.J. 281 : I.L.R. (1942) Mad. 677.
3. (1935) 69 M.L.J. 781 : I.L.R. 59 Mad. 805.
4. (1955) Andhra W.R. 109 : A.I.R. 1955 Andhra 74 (F.B.).
5. (1951) 1 M.L.J. 474.
6. (1948) 2 M.L.J. 404.

for the appellant in the appeal against the remand order to proceed with his appeal, if he has not filed an appeal against the final disposal of the suit. Viswanatha Sastri, J., took a different view in *Kanakayya* v. *Lakshmayya*[1], disagreeing with the reasoning and conclusion of Mack, J. He was of opinion that where in a suit an order of remand was passed and it was carried out and the suit decided, the remedy can also be by an appeal against the order of remand and not merely by way of appeal against the final decision of the suit. Under section 105, clause (2), Civil Procedure Code, if a person aggrieved by an order of remand, against which an appeal lies, does not take advantage of that remedy, it is incompetent for him to appeal from the final decree disputing the correctness of the order of remand. That being the case, as the learned Judge held, the appeal against an order of remand cannot be stifled by the latter proceedings. The Bench in *Venkatarama Ayyar* v. *Unnamalai Ammal and another*[2], followed in its entirety the reasoning and conclusion of Viswanatha Sastri, J. On a parity of reasoning, it is clear that there can be no impediment to the hearing of the present appeal for more reasons than one. Firstly, in our opinion, the order of rejection for non-payment of Court-fee is not appealable and there is a remedy to the applicant by way of suit. Even if that order is appealable, still since the two remedies flow from independent rights, the exercise of one such right is no bar to the exercise of another. The aggrieved party is not faced with alternative remedies. He has not lost the right to have an appeal against the order holding that the plaint does not show a cause of action, because for non-payment of Court-fee the application has been rejected. Moreover, the rejection for non-payment of Court-fee is a consequential one following from the non-compliance of a basic order and if the basis goes the consequence also disappears.

The learned counsel for the respondents relied upon a number of cases to the effect that since an application for leave to sue as a pauper is a composite document containing not only the prayer for being permitted to sue as a pauper but also all the ingredients and essentials requisite for a plaint, the rejection of such a document would amount to the rejection of the plaint, and if such an order is not vacated, an appeal against an intermediate one is unsustainable. In *Balaguru Naidu* v. *Muthuratnam Aiyar*[3], Krishnan, J., held that a pauper application is a combination of a plaint and an application to excuse the payment of Court-fee. When the petition is dismissed on any ground it is only the application that fails. The plaint, however, remains and may be validated by payment of Court-fee within a time to be fixed by Court, if the Court in the exercise of its discretion is prepared to grant time. When within the time granted for payment of Court-fee the same is paid, the plaint must be taken as filed on the day it was originally put into Court along with the pauper application. The learned Judge follows the well-known Privy Council decision in *Stuart Skinner* alias *Nawab Mira* v. *William Orde*[4]. There is nothing in this decision to hold that if the application is rejected for non-payment of Court-fee then the order is tantamount to a decree against which an appeal lies ; or, if any revision had been filed against an intermediate order holding that the petitioner is not a pauper, then such a revision is incompetent after the application has been ultimately rejected. In *Mahadev Gopal* v. *Bhikaji Vishram*[5], Broomfield and Lokur, JJ., were also of the opinion that there is a combination of a plaint and a petition for leave to sue *in forma pauperis* in an application under Order 33, rule 1 and the learned Judges held that when such an application is registered as a plaint after payment of Court-fee, then it should be deemed as if the plaint was instituted on the date when the application for leave to sue was made. But when once the Court passes an order rejecting an application under rule 5, or refusing to allow the applicant to sue as a pauper under rule 7 without keeping the application alive as an unstamped plaint and granting the applicant time to pay the requisite Court-fee, the proceedings come to an end it has no power, by a separate or subsequent order to direct the payment of Court-fee. In such a case the only remedy for the

1. (1950) 2 M.L.J. 379.
2. (1951) 1 M.L.J. 474.
3. (1923) 46 M.L.J. 254.
4. (1879) L.R. 6 I.A. 126 : I.L.R. 2 All. 241 (P.C.).
5. A.I.R. 1943 Bom. 292.

applicant is to file a suit under Order 33, rule 15. In that case, for the purpose of limitation, the suit must be taken as instituted on the date it is actualy filed, but the plaintiff cannot avail himself of the time spent in the pauper proceedings to save the bar of limitation. We do not see any observations in these two cases which prevent the hearing of the present appeal.

Great reliance is placed on a judgment of Yahya Ali, J., in *Periayaswami Padayachi* v. *Minor Ulaganathan*[1], wherein there are observations to the effect that an application for leave to sue *in forma pauperis* embodies a petition as well as a plaint, and is for all practical purposes to be treated as a plaint with the result that interlocutory reliefs could be granted as if it were a plaint and as if the parties to the application were parties to a suit, in which case the provisions of section 141 could be availed of. It cannot be disputed that the application contains the ingredients and elements of a plaint, but as we have already remarked, if its rejection for non-payment of Court-fee is not appealable, there is no insurmountable bar against the party seeking other reliefs, as one under Order 33, rule 15 or anything, from proceeding with an appeal filed under Order 43, rule 1 (*nn*). No question of *res judicata* can arise. For one thing if the earlier appeal succeeds then the subsequent decision based upon the vacated order is automatically dissolved and no binding pronouncement can exist. The learned Judge has no doubt relied upon the observations of Krishnan, J., in *Balaguru Naidu* v. *Muthuratnam Aiyar*[2], and of Gentle, J., in *Chidambaram* v. *Nataraja Mudaliar*[3], for holding that there is a combination of a plaint and an application to excuse the payment of Court-fee in a petition for leave to sue *in forma pauperis* and also that on the presentation of a petition for leave to sue *in forma pauperis*, if the same is allowed, the suit should be deemed to have been instituted on that date. Decisions of other High Courts to the same effect have also been discussed; but it is difficult for us to find any observations analogous to the subject-matter of controversy. Leach, C.J. and Lakshmana Rao, J., in *Brahmaramba* v. *Seetharamayya*[4], took the view that an application for leave to sue *in forma pauperis* embodies a plaint and if the applicant dies during the pendency, his legal representatives are entitled to be brought on record and to continue the suit on payment of the requisite Court-fee. Limitation for the suit must be deemed to have stopped on the date when the application for leave to sue *in forma pauperis* was filed. The learned Chief Justice referred to the observations of Sir Montague E. Smith in *Stuart Skinner* v. *William Orde*[5], and also to the provisions of order 33, rule 15 which allows the pauper, whose prayer to sue in that capacity had been refused, to invoke the aid of the Court, like any other ordinary citizen by payment of proper Court-fee if he complies with the conditions mentioned therein. In none of these cases is any principle discussed or decided that the rejection of an application *in forma pauperis* on the ground of default of payment of Court-fee prevents the applicant from proceeding with an earlier appeal or revision questioning the conclusion about his pauperism or about the absence of cause of action in the embryo plaint. In these circumstances the principle laid down in *Chockalingam Thevar* v. *Sankarappa Naicker*[6], that where during the pendency of an appeal against the finding in a suit the same issue had been raised and decided differently in another suit in the same Court and such a later decision had been allowed to become final, it will operate as *res judicata* in the appeal against the earlier decision, has no application to the present case.

We are unable to find that the Full Bench decision in *Satyanarayanacharlu* v. *Ramalingam*[7], is in any way against the hearing of the appeal. That decision arose out of a regular suit filed after paying Court-fee where it was found that what was originally paid was insufficient. Thereupon an order was made directing the payment of additional Court-fee which order was not complied with. The result was that the plaint was rejected. A revision was filed against the order rejecting

1. (1948) 2 M.L.J. 150.
2. (1923) 46 M.L.J. 254.
3. (1939) 1 M.L.J. 96 : I.L.R. (1938) Mad. 1060.
4. (1947) 1 M.L.J. 119 : I.L.R. (1947) Mad. 820.
5. (1879) L.R. 6 I.A. 126: I.L.R. 2 All. 241 (P.C.).
6. (1942) 1 M.L.J. 281.
7. (1951) 2 M.L.J. 74 (F.B.).

the plaint in which the Full Bench held that as an appeal was competent a revision is not maintainable. Under those circumstances the Full Bench held that the remedy of the aggrieved party was to file an appeal against the rejection of the plaint and not to proceed with the revision. Admittedly, the rejection of a plaint under those circumstances is one under Order 7, rule 11, Civil Procedure Code and is appealable unlike the present case where, as we have held, no appeal lies against the dismissal of the application for non-payment of Court-fee. We find it difficult to agree with the observations of Panchapakesa Ayyar, J., in *Bommisetti Ramayamma*, In re[1], that any party who is aggrieved by an order calling for additional Court-fee should at once take a copy of that order and file a revision to the High Court and get a stay if he does not want to pay the additional Court-fee and only wants time to file a revision. Firstly the remedy by way of revision is a very discretionary one and a party has no vested right in revision like a right of appeal. So no person can be blamed for not invoking the provisions of section 115, Civil Procedure Code, when he has a right of appeal on a final decision. The High Court is not compelled to hear a revision whereas when an appeal comes before it, a statutory duty is cast upon it to hear it. Such being the case we do not think that the facts of the Full Bench case can be applied here.

On the contrary the conclusion arrived at by one of us, Basheer Ahmed Sayeed, J., in *Munian* v. *Kesava Pandithan*[2] relying upon *The Secretary of State for India in Council* v. *Jillo*[3] receives considerable support from the later decisions of the Allahabad High Court with which we are in agreement. Of these Allahabad decisions the next case is reported in *Chunna Mal* v. *Bhagwant*[4] which contains observations that though the application contains averments and facts necessary for a plaint it is not in fact a plaint, and therefore where a Court rejects an application for permission to sue as pauper it cannot, after rejection of the application, by a separate and subsequent order, allow the applicant to pay the Court-fee under section 149 and treat the application as a plaint. In a very recent Full Bench decision of the same High Court in *Devender Kumar* v. *Mahanta Raghuraj*[5], there is a discussion about the nature of the application and also of the applicability of Order 33, rule 5. Though therefore an application for permission to sue as a pauper contains the particulars required to be set out in a plaint and is signed and verified in the manner prescribed for the signing and verification of pleadings, it is not actually a plaint; for otherwise there is no point in the provisions of Order 33 laying down that such an application can be registered as a plaint. We are not to be understood as differing from the view taken in *Balaguru Naidu* v. *Muthuratnam Aiyar*[6], *Chidambaram* v. *Nataraja Mudaliar*[7], *Brahamaramba* v. *Seetharamayya*[8] and *Periyaswami Padayachi* v. *Minor Ulaganathan*[9], that the application is a composite one. Even so, in view of the provisions of Order 33, rule 15, it is difficult to hold that its rejection for non-payment of Court-fee amounts to a rejection of a plaint, which is appealable. It seems to us, therefore, that there is no impediment or obstacle to the hearing of the present appeal. It is also to be remembered that the appealability provided by Order 43, rule 1 (*nn*) is as a result of a Madras amendment resembling an appeal against an order of remand and being a provision to reopen a decision at an interlocutory stage. The appeal will therefore be heard on the merits by the referring Judge.

Basheer Ahmed Sayeed, J.—I agree.

R.M. *Appeal remanded.*

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1. (1954) 1 M.L.J. 544.
2. (1955) 1 M.L.J. 452.
3. (1898) I.L.R. 21 All. 133 (F.B.).
4. A.I.R. 1936 All. 584.
5. A.I.R. 1955 All. 154 (F.B.).
6. (1923) 46 M.L.J. 254.
7. (1939) 1 M.L.J. 96: I.L.R. (1938) Mad. 1060.
8. (1947) 1 M.L.J. 119 : I.L.R. (1947) Mad. 820.
9. (1948) 2 M.L.J. 150: I.L.R. (1949) Mad. 333.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

B.S. Swaminatha Iyer and another .. *Petitioners**

v.

Alagarswami Chettiar and others .. *Respondents.*

Practice—Suit for partition between father and sons—Preliminary decree—Creditors of father—If could be brought on record as necessary parties after the preliminary decree.

The sum and substance of a partition suit being the finding out of the assets and liabilities and the distribution of residue to the various sharers, in a suit for partition between the father and sons the creditors of the father can be brought on record as necessary parties even after the preliminary decree is passed but before the final decree. This would obviate multiplicity of proceedings and complications.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the orders of the Court of the Subordinate Judge of Dindigul, dated 27th July, 1953 and made in I.A. No. 342 of 1952 and I.A. No. 344 of 1952 respectively in I.A. No. 264 of 1952 in O.S. No. 7 of 1952.

M. Natesan, N. Sivamani and *C. A. Seshagiri Sastri* for Petitioners.

R. Aravamuda Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—The short point in this revision is whether certain creditors who have obtained decrees can be made parties before the final decree-stage to a partition suit which has been filed by the sons of the judgment-debtor against the father judgment-debtor and where they have obtained a preliminary decree and in which proceedings these creditors could not intervene at an earlier stage and come on record by reason of the fact that the Official Receiver who was on record and supposed to be vigilant about their interests also did not, for reasons with which we are not concerned and over which he probably had no control himself represent and press their interests as well as the debtor's interests.

In my opinion these creditors can be brought on record after the passing of the preliminary decree and before the passing of the final decree for the following three reasons.

First of all the sum and substance of a partition suit is the finding out of the assets and the liabilities and the distribution of the residue to the various coparceners entitled to share at the partition. There is no point in these creditors now being left out and their being relegated to the separate suits because that would only add to costs and trouble to these coparceners and reduce the shares which they would ultimately obtain.

There is the authority for the proposition that in the circumstances the creditors can be brought on record as proper and or necessary parties before the final decree proceedings and they are, *Ramaswami Chettiar* v. *Vellayappa Chettiar*[1], *Venku Reddi* v. *Venku Reddi*[2], *Baluswamy Iyer*, In re[3], *Shanmuka Nadan* v. *Arunachalam Chetty*[4], *Subramania Iyer* v. *Sabapathy Iyer*[5] and *Pannalal* v. *Mst. Naraini*[6]. See also the provision made in Chapter III, Part II, Civil Rules of Practice and Circular Orders, prescribed by this Court, Volume 1, 2nd edition, page 261 and following rules relating to partition suits under the Code and under the Partition Act, 1893.

Thirdly even from the point of view of the respondent-sons before me this impleading is very necessary because it is their case that there was disruption of the joint family status even before the filing of the partition suit and that these debts

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* C.R.P. Nos. 2054 and 2229 of 1953. 10th March, 1955.

1. (1930) 60 M.L.J. 229.
2. (1926) 52 M.L.J. 387 : I.L.R. 50 Mad. 535 at 539.
3. (1928) 55 M.L.J. 175 : I.L.R. 51 Mad. 417 at 447 (F.B.).
4. (1921) 42 M.L.J. 97 : I.L.R. 45 Mad. 194 at 198, 199.
5. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 at 416 (F.B).
6. (1952) 2 M.L.J. 83 at 90 : 1952 S.C.J. 211 (S.C.).

are not binding upon them even if they are shown as true and subsisting debts. They cannot escape the decision of this question at one stage or other or in separate proceedings or here and they can agitate the matter better here and in fact the creditors are only assisting them to find out the character of the joint family status and the truth and validity and the binding nature of these debts and avoid further complications for themselves.

Therefore looked at from any point of view the creditors can be brought on record as proper or necessary parties to the partition suit which is still in the stage of a commissioner having been appointed and report being filed and no final decree having been passed and the passing of which being stayed. This will obviate vexatious multiplicity of litigation.

The result is the order of the lower Court is set aside and the Civil Revision Petitions are allowed and both parties are at liberty to adduce any evidence which they desire in support of the contentions advanced by them.

The costs of these Civil Revision Petitions will be provided for in the ultimate decree and judgment to be passed in the suit.

R.M. — *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE RAJAGOPALA AYYANGAR.

Chellam Servai .. *Petitioner**

v.

Ramalingam Servai .. *Respondent.*

Code of Civil Procedure (V of 1908), *section* 145 *and Limitation Act (IX of* 1908), *Article* 182 (5) *Explanation I—Application for execution of a decree against sureties—When would amount to an application for execution or step-in-aid of execution against the judgment-debtor to save limitation.*

A surety for the performance of a decree is not a debtor or one jointly liable under a decree within the meaning of Explanation (1) of Article 182 (5) of the Limitation Act. But where the remedy pursued against a surety is in effect for the execution of the decree, that is the decree against the judgment-debtor such a petition is comprehended within Article 182 (5) of the Limitation Act and would keep the decree alive to permit of further execution against other persons liable under the decree and against their properties. But if the proceedings against the surety, having regard to the nature of the obligations undertaken by him in any particular case, does not amount to an execution of the decree passed in the suit and which is sought to be executed against the judgment-debtor, the two proceedings are parallel and the one does not serve as a further starting point or a step-in-aid to the pursuit of the other. The provisions of section 145 of the Code of Civil Procedure make it clear that to the extent to which he has rendered himself personally liable, a surety's liability is identical with that of the judgment-debtor under the decree. Where the conditions in clauses (*a*) to (*c*) of section 145, Civil Procedure Code, are satisfied an execution petition against a surety would keep alive the decree as against the judgment-debtor and *vice versa.*

Md. Hafiz v. *Md. Ibrahim,* (1920) I.L.R. 43 All. 152 ; *Badr-ud-din* v. *Md. Hafiz,* (1922) I.L.R. 44 All. 743 ; *Gangaraju* v. *Subbayya,* (1934) 68 M.L.J. 119 and *Bhavani Prasad* v. *Narani Bai,* A.I.R. 1948 Bom. 13, referred.

But in cases where the special provisions of section 145, Civil Procedure Code, are not satisfied and the surety is not one whose obligation is comprehended within any of the three classes of cases provided for by the said section, this principle does not apply. The principle that an execution against either a surety or a judgment-debtor is an execution or step-in-aid of execution as against the other, applies only to cases where the surety is one against whom the decree passed in the suit may be executed, in other words, to a surety to whom section 145, Civil Procedure Code, directly and in terms applies. In the case of other ' sureties ' whose liability is not under the decree but under a bond executed as a collateral and ancillary transaction, the execution against the sureties will not save limitation against the judgment-debtor.

Sankunni Variar v. *Vasudevan Nambudripad,* (1926) 51 M.L.J. 239; *Raj Raghubir Singh* v. *Jai Indra Bahadur Singh,* (1919) I.L.R. 42 All. 158 : L.R. 46 I.A. 228 : 39 M.L.J. 302 (P.C.) ; *Jamundas Ravji Sai* v. *Krishan,* (1933) 65 M.L.J. 507 ; *Annamalai Chettiar* v. *Sundaresa Aiyar,* (1943) 2 M.L.J. 444 and *Ramamurthy* v. *Tirupathiraju,* (1948) 2 M.L.J. 287, referred.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Manamadurai, dated 30th September, 1953 and made in E.P. No. 194 of 1953 in O.S. No. 139 of 1943.

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* C.R.P. No. 966 of 1954. 31st July, 1955.

A. Sundaram Aiyar for Petitioner.

M. R. M. Abdul Karim for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition raises for consideration a very interesting question of execution law.

The petitioner was the 2nd defendant in O.S. No. 139 of 1943 on the file of the District Munsif's Court of Manamadurai, the 1st defendant his undivided father having died after the institution of the suit. The suit was decreed on 21st August, 1943. But even before this date the plaintiff had attached certain movable property belonging to the 2nd defendant and this was left in the custody of two persons who entered into a security bond to produce the movables when called upon or to pay their value which was about Rs. 720-8-0. This attachment became absolute after the obtaining of the decree and the decree-holder became entitled to enforce the obligation of the third-party surety. The first application for execution after the decree was obtained was E.P. No. 230 of 1954 which was filed to direct the sureties to produce the movables entrusted to their care and for the sale of the movables when produced. The sureties did not produce the property and this petition was closed on 30th October, 1944. E.P. No. 394 of 1944 was the next petition in execution and that was for the issue of a warrant of arrest of the two sureties. Though the warrant was issued, the sureties could not be found with the result that the petition was closed on 29th January, 1945. The next applications were also of a similar nature. E.P. No. 68 of 1945 was for the arrest of the second surety and it was ordered. But no batta was paid and the petition was dismissed on 25th July, 1945. E.P. No. 49 of 1946 was an application for an identical relief against the same individual and was dismissed for the same reason on 25th March, 1946.

The decree-holder then turned his attention to the judgment-debtor the 2nd defendant. E.P. No. 182 of 1946 was filed for attachment and sale of his immovable properties and his properties were attached. On payment of Rs. 1,010-8-11 on 16th July, 1947 and of Rs. 500 on 26th August, 1947, part satisfaction entered the sale was not proceeded with and the petition was dismissed on 19th September, 1947. E.P. No. 125 of 1948 was the next execution petition. The properties which were attached in pursuance of E.P. No. 182 of 1946 were brought to sale and by reason of a payment of Rs. 220 on 24th August, 1948, by the 2nd defendant, part satisfaction was recorded and the petition was dismissed on 30th August, 1948. The decree-holder then proceeded against the sureties and for this purpose filed E.P. No. 144 of 1950 for the arrest of both of them. As they could not be found the petition was dismissed on 15th June, 1950. On 13th July, 1953, the decree-holder filed E.P. No. 194 of 1953 from the order against which this present revision is brought, for the recovery of about Rs. 750 being the balance of the decree amount from the 2nd defendant.

The question is whether this petition E.P. No. 194 of 1953 is in time. It would be in time only if the decree-holder's application for the arrest of the sureties, *i.e.*, E.P. No. 144 of 1950 which was dismissed on 15th June, 1950, kept alive the decree as against the judgment-debtor also.

It might be mentioned that the 2nd defendant (judgment-debtor) raised two objections to the maintainability of this petition. The first was that his property which had been attached before judgment had been entrusted to a person who was a close friend and relation of the decree-holder that there was collusion between the sureties and the decree-holder and that for these reasons the Court should hold to the extent of the value of the property entrusted to the sureties the plaintiff must be deemed to have received satisfaction of his decree. The second was that the execution petition was time barred. The Court below did not consider the first objection seriously and does not refer to it in its order. As regards the second, the District Munsif held that an execution against a surety is either execution of the decree or at least a step-in-aid of execution of that decree and therefore saved limi-

tation under Article 182 (5) of the Limitation Act and on this reasoning he allowed the execution to proceed. Against this order the 2nd defendant (judgment-debtor) has filed the revision in this Court.

Mr. Sundaram Ayyar urged both the objections put forward in the Court below. I do not however see any point in the first that the entrustment of attached movables to a person suggested by the plaintiff is tantamount to a part satisfaction of the decree to the extent of the value of that property. Learned counsel was not clear as to the legal basis upon which such an argument could be founded and in my judgment this contention does not merit serious consideration. The next point however namely whether the execution petition, E.P.No. 194 of 1953 is within time has given me considerable difficulty. The learned District Munsif has over-simplified the matter by taking it for granted that every execution petition filed against a surety for any purpose is tantamount to an execution of the decree or a step-in-aid of the execution of that decree within the meaning of Article 182 (5) of the Limitation Act.

I do not propose to deal with the entire case law on the topic—and indeed learned counsel on either side have not done so either—but merely summarise the position as it has emerged from the decisions. The whole question turns on whether the application against the sureties was

> "an application in accordance with law to the proper Court for execution or some step-in-aid of execution of that decree or order"

within Article 182 (5) of the Limitation Act. Explanation 1 to this Article reads :

> " Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 5 of this Article shall take effect in favour only of such of the said persons or their representatives as it may be made by. But where the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all. Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But, where the decree or order has been passed jointly against more persons than one, the application if made against any one or more of them, or against his or their representatives, shall take effect against them all."

All the decisions are uniform in this respect that a surety for the performance of a decree is not a joint debtor or one jointly liable under a decree within the meaning of the Explanation. The decision in *Narayan* v. *Timmaya*[1], which is a leading authority on this point has been accepted practically by all the Courts as correct so far as it lays down this proposition. The Explanation being out of the way the question is whether an execution petition filed against a surety is or is not an application for the execution or for taking some step-in-aid of execution of the decree or order. The authorities which I shall be referring to presently establish that if the remedy pursued against a surety is in effect for the execution of the decree, that is the decree against the judgment-debtor such a petition is comprehended within Article 182 (5) of the Limitation Act and would keep the decree alive to permit of further execution against other persons liable under the decree and against their properties. But if the proceeding against the surety, having regard to the nature of the obligations undertaken by him in any particular case does not amount to an execution of the decree passed in the suit and which is sought to be executed against the judgment-debtor, the two proceedings so to speak run on parallel lines and the one does not serve as a further starting point or a step-in-aid to the pursuit of the other. It is in this context that the terms of section 145, Civil Procedure Code, assume considerable importance. That provision in the form in which it has taken under the Act of 1908 provides for three sets of cases, *viz.*, (*a*) for the performance of any decree or any part thereof or (*b*) for the restitution of any property taken in execution of a decree or (*c*) for the payment of any money or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceedings consequent thereon. In these three contingencies the decree or

1. (1906) I.L.R. 31 Bom. 50.

order may be executed against the surety to the extent to which he has rendered himself personally liable in the maner provided for the execution of decrees. By virtue of this provision therefore in the cases provided by the three sub-clauses (*a*) to (*c*) the decree-holder proceeds against the surety really for the execution of the decree—to the extent to which he has rendered himself personally liable. Though section 145, Civil Procedure Code, does not make the surety a joint debtor so as to bring him within the Explanation to Article 182 (5) of the Limitation Act, a similar result is achieved by the identification of the decree passed against the judgment-debtor, with the liability under the security bond—to the extent to which the surety has rendered himself liable in the three sets of cases provided for by section 145. When these conditions are satisfied it would logically follow that an execution petition under section 145, Civil Procedure Code, against a surety would keep alive the decree as against the judgment-debtor and *vice versa* also that is execution against the principal (judgment-debtor) would keep alive the decree so far as the surety is concerned. The short point I have to consider in the present case is whether if the obligation of a surety does not fall within section 145 the same result would or could follow.

The decision of the Allahabad High Court in *Muhammad Hafiz* v. *Muhammad Ibrahim*[1], and its further elucidation in *Badr-ud-din* v. *Muhammad Hafiz*[2], arising out of the same matter both of which have been followed by a Bench of this Court in *Gangaraju* v. *Subbayya*[3], might be a good starting point for commencing the discussion on the topic. In *Muhammad Hafiz* v. *Muhammad Ibrahim*[1], the Court had to consider a situation where a surety who had made himself liable for the satisfaction of a decree had been proceeded against by the decree-holder and not having succeeded in recovering the decree-amount sought execution subsequently against the principal—the judgment-debtor. It was held that the execution against the surety kept alive the entire decree so that the decree-holder could within three years thereafter proceed against the judgment-debtor. The Lower Appellate Court held the application time-barred on the ground that an execution petition for the arrest of the surety could not keep the decree alive for execution against the judgment-debtor. The argument of learned counsel for the decree-holder was that having regard to the comprehensive nature of the liability undertaken by the surety in that particular case it was practically a case of joint and several liability as between the judgment-debtor and the surety. The learned Judges dealing with this aspect of the matter referred to the nature of the liability which the surety had undertaken. They said :

> "They (the sureties) also bound themselves to satisfy the entire decree, as it might stand after the decision of the second appeal by this Court in the event of Muhammad Ibrahim (judgment-debtor) failing to do so."

The learned Judges then referred to the provisions of section 145, Civil Procedure Code, which provided for a remedy by way of execution against a surety who had bound himself to satisfy a decree after the decree was passed. They went on to add :

> "The case of such a surety does not seem to be covered by any part of Explanation 1 to Article 182 of the first schedule to the Limitation Act"—

which was just the conclusion which had been reached by the Bombay High Court in *Narayan* v. *Timmaya*[4]. The learned Judges added :

> "The decree itself affects Muhammad Ibrahim, but Muhammad Husain (surety) has become liable to be proceeded against in execution by reason of the special provisions of section 145, Civil Procedure Code."

The learned Judges posed the question :

> "Does an application asking the proper Court to execute the entire decree by the arrest of the person of *a surety who has made himself liable for the satisfaction of the decree* amount to asking the execution Court to take a step-in-aid of the execution of the decree as against the principal whose liability the surety had taken upon himself ?"

1. (1920) I.L.R. 43 All. 152.
2. (1922) I.L.R. 44 All. 743.
3. (1934) 68 M.L.J. 119 : I.L.R. 58 M. 276.
4. (1906) I.L.R. 31 Bom. 50.

and the answer was in the affirmative. The decision in *Badr-ud-din* v. *Muhammad Hafiz*[1], arose out of the same facts and was an appeal by a co-surety in the same surety bond. On the reasoning of the Court in *Muhammad Hafiz case*[2], that the execution against the surety was an execution of the decree under Article 182 (5) the decision had to be against the co-surety as well, who was bound under the same decree and under the same order. The learned Judges held that the previous application was an application in accordance with law to the proper Court for execution of the decree. These two decisions were followed by this Court in preference to the views which prevailed in Bombay, Rangoon and Patna in *Gangaraju* v. *Subbayya*[3]. In this case the surety was one for the satisfaction of the decree by the judgment-debtor (one within section 145 (*a*), Civil Procedure Code). The earlier execution petitions were filed against the judgment-debtor and when these were unavailing to realise the decree the decree-holder sought to proceed against the surety. The learned Judges held that the application against the surety was in time. They said :

> "We agree with the Allahabad view that Explanation 1 does not contemplate a case of this kind at all and therefore that clause (5) of Article 182 itself is the only provision by which this question of limitation must be determined."

They proceeded to add that in the case of a surety it was proper that the creditor should exhaust the principal debtor before proceeding against the former and on this ground also held that the procedure adopted by the decree-holder in that case was in accordance with natural justice. This decision therefore by itself does not assist the respondent here. In *Bachchu Singh* v. *Radhe Lal*[4], the surety came on the scene after the decree and made himself liable for the entire decree amount for which he could be proceeded against under section 145 (*a*), Civil Procedure Code. The earlier execution petitions were against the surety and the question was whether the subsequent execution petition against the judgment-debtor was saved by the earlier ones, and was answered in favour of the decree-holder. The learned Judges held that Explanation 1 to Article 182 could not be applied because the liability of the surety emerged after the passing of the decree whereas the Explanation contemplated cases where the decree itself is passed against more than one person. They also held that section 145, Civil Procedure Code, which entitles the decree-holder to execute the decree against the sureties cannot make the sureties joint debtors if they were not parties to the suit at the time when the decree was passed. They were therefore left to consider whether under Article 182 (5) the execution against the surety was an execution of the decree which was subsequently sought to be executed against the judgment-debtor or at least was a step-in-aid of execution of such a decree. They answered the question thus :

> " The proceedings taken by the decree-holder for realisation of part of the decretal debt from the surety Muneshar Singh were clearly proceedings in furtherance of the decree. The judgment-debtor would have had the benefit in execution proceedings of any money realised by the decree-holder from the surety. In the circumstances, there can be no doubt that the application made by the decree-holder against Muneshar Singh (surety) from time to time were steps-in-aid of execution of the decree. The case therefore is literally covered by the terms of clause (5)."

I have to add one observation in regard to the reasons above set out and that is the fact that the moneys realised from the surety would go in reduction of the decree amount is not very material for the consideration of this question. (Vide *Vairavan Chettiar* v. *Nagaswami Aiyar and Co.*,[5].)

The Lahore High Court had to consider a similar question in *Kishan Singh* v. *Prem Singh*[6]. The surety here bound himself to pay the entire decree amount and therefore was within section 145 (*a*), Civil Procedure Code. The earlier proceedings were as in the Oudh case first against the surety and subsequently against the judgment-debtor. The learned Judges held that execution against the sureties kept the decree alive as against the principal debtor. The decision in *Badr-ud-din* v. *Muhammad Hafiz*[1], and the decision of this Court in *Gangaraju* v. *Subbayya*[3], were referred

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1. (1922) I.L.R. 44 All. 743.
2. (1920) I.L.R. 43 All. 152.
3. (1934) 68 M.L.J. 119 : I.L.R. 58 Mad. 276.
4. A.I.R. 1937 Oudh 351.
5. (1951) 1 M.L.J. 298.
6. A.I.R. 1939 Lahore 587.

to with approval and the later execution proceedings held to be in time. The Bombay High Court had to consider the converse case in *Vyasrao* v. *Ramchandra*[1]. The suretyship here extended to the entire decree amount (section 145 (*a*), Civil Procedure Code). The earlier execution applications were against the judgment-debtor and the one in controversy before the Court was against the surety and the legal representative of the deceased judgment-debtor. The learned Judges held that *Narayan* v. *Timmayya*[2], was correct law in so far as it ruled that a surety was not within Explanation 1 to Article 182 (5) of the Limitation Act but they distinguished that decision on the ground that the applicability of the main provision in Article 182 (5) was not considered and after dealing with the language of this article and following the Allahabad and Madras decisions held the application for execution to be in time. But as I have remarked already, the surety there was one who fell within section 145 (*a*), Civil Procedure Code and therefore the decree as such could be executed as against him. In the last of the series of the cases in this branch of law, it is necessary to refer to another decision of the Bombay High Court in *Bhavaniprasad* v. *Naranibai*[3]. There also the surety bond was for the satisfaction of the decree that might be passed as against the judgment-debtor though the sum payable by the surety was limited to Rs. 4,500 whereas the decree which was passed subsequently was for Rs. 5,500 and odd. The earlier execution petitions were taken against the principal debtor and the one in dispute was against the surety. The learned Judges following the decision in *Vyasrao* v. *Ramchandra*[1], held that the decree was kept alive by reason of the step-in-aid in execution of the decree and could be enforced against the surety. I do not propose to refer to other decisions of this type. These do not travel beyond affirming that where there is a surety for the performance of a decree or any part thereof, an application for execution either against the judgment-debtor or the surety is an application for the execution of the same decree.

The difficulty however in the present case is that the surety is not one whose obligation is comprehended within any of the three classes of cases provided for by section 145, Civil Procedure Code. So far as this aspect of the matter is concerned there are two decisions of this Court which bear upon it. The first is a decision of a Bench in *Sankunni Variar* v. *Vasudevan Nambudripad*[4]. There also, as here, some movables belonging to the judgment-debtor was attached but on his intercession the sale was adjourned. The attached property was delivered to certain sureties who executed a bond undertaking to produce the property when called upon. The sureties did not produce the property and in consequence the sale which the decree-holder desired to effect could not take place. The decree-holder filed an application to enforce the liability of the sureties by arresting them. The question was whether this could be done in execution or whether the decree-holder had to proceed by way of a suit after getting the security bond assigned in his favour. The learned Judges referred to the decision of the Privy Council in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*[5], and stated :

> "This is certainly authority for the proposition that although the case does not come within the terms of section 145, the Court has the inherent power to enforce its bond without recourse to a suit."
>
> "In the present case it is contended that section 145 is applicable because the sureties had become liable under clause (*c*) for the payment of money under an order of the Court in any suit or in any proceeding consequent thereon. This contention must be negatived for the liability under section 145 attaches only in the case of a person who is surety for the payment of any money under an order of the Court and not a surety liable to pay owing to default. In this case there was no order of the Court directing payment of any money by the judgment-debtor and consequently the sutetiеs were not sureties for such payment."

The learned judges went on to add that the Court had inherent power to enforce the security bond apart from the provisions of section 145. I will next refer to the decision of *Jamundas Ravuji Sait* v. *Krishnan*[6]. The learned Judge had to consider

1. A.I.R. 1945 Bom. 489.
2. (1906) I.L.R. 31 Bom. 50.
3. A.I.R. 1948 Bom. 13.
4. (1926) 51 M.L.J. 239.
5. (1919) 38 M.L.J. 302 : L.R. 46 I.A. 228 : I.L.R. 42 All. 158 (P.C.).
6. (1933) 65 M.L.J. 507.

a case converse to the present one—where the earlier execution was against the judgment-debtor, the subsequent one being against the surety.

After attachement of certain movables in execution of a decree they were left in the possession of two sureties who executed a bond for their production, agreeing that if default were made in the production of the properties the sureties would be liable for the loss that might be sustained thereby. In other words the sureties did not make themselves liable for the decree amount. The District Munsif found that the application against the judgment-debtor for execution of the decree did not keep it alive against the sureties for the enforcement of the terms of that bond, a decision which was affirmed by the District Judge on appeal. The learned Judge (Walsh, J.) held himself bound by the decision in *Sankunni Variar* v. *Vasudevan Nambudripad*[1], to hold that the case did not come within a section 145, Civil Procedure Code, though the surety might be proceeded against in execution under section 151, Civil Procedure Code. In this view he held :

" Steps therefore taken in execution against the judgment-debtor are not steps against the sureties nor are steps in execution against the sureties, steps in execution of the decree itself. There is no authority at all to the contrary and the injustice and anomalies of any doctrine which would render steps in execution against the judgment-debtor steps against the sureties, who have only agreed to produce certain articles attached in execution are obvious."

The learned Judge referred to the injustice of holding that steps taken against the judgment-debtor could save limitation against the surety and corrected himself against having decided the converse case, for the learned Judge said :

" It is unnecessary to consider the converse case whether steps taken against the sureties will be steps against the judgment-debtors to save limitation.

This decision therefore notwithstanding the reservation I have referred to is an authority in favour of the petitioner, and I do not consider that its correctness has been shaken by the decision of the Bench in *Gangaraju* v. *Subbayya*[2], which dealt with a case of surety who had rendered himself liable to be proceeded against for the performance of the decree.

In connection with the last point I might refer to the decision of Kuppuswami Ayyar, J., in *Annamalai Chettiar* v. *Sundaresa Ayyar*[3], which has been specifically approved by a Bench of this Court in *Ramamurthi* v. *Tirupatiraju*[4]. A security bond was executed by the sureties to whom the judgment-debtor's movable properties were entrusted when they were attached in execution of a decree. This bond was executed on 13th August, 1934. The execution petition in the course of which this bond was executed was struck off on 24th November, 1934. The petition to enforce the security bond was filed on 12th December, 1938. In the meantime however the decree-holder had filed applications against the judgment-debtor for attachment and sale of other properties belonging to him. The District Munsif dismissed the execution petition against the sureties on the ground that it was barred by limitation as it was filed more than three years after the date on which the sureties failed to produce the article and a right to enforce the security bond accrued to the decree-holder, a decision which was affirmed on appeal by the Subordinate Judge. The learned Judge dismissed the second appeal holding that the execution application against the surety was not for the execution of the decree which was being executed against the judgment-debtor but only for the enforcement of the liability which arose out of the bond. The decision of Walsh, J., in *Jamundas Ravuji Sait* v. *Krishnan*[5], was followed and holding that the proper article of limitation for the enforcement of this right was Article 181 it was held that the execution petition was barred by limitation and that the application for execution against the judgment-debtor could not keep alive the right to enforce this order as against the surety. The ratio of the decision is to be found in the passage :

" It is not in execution of decree that the claim is sought to be enforced as against the surety. When the judgment-debtor's properties were attached they must have been left in the custody of the

1. (1926) 51 M.L.J. 239.
2. (1934) 68 M.L.J. 119 : I.L.R. 58 Mad. 276.
3. (1943) 2 M.L.J. 444.
4. (1948) 2 M.L.J. 287 at p. 290.
5. (1933) 65 M.L.J. 507.

Court. The Court delivered them to the sureties because they executed a security bond. It is that security bond which is sought to be enforced by the Court at the instance of the decree-holder. It is the liability under the security bond that is sought to be enforced. In Madras this could be done in the execution proceeding itself by a summary procedure which enables the decree-holder to realise the amount payable under the bond (evidently referring to *Sankunni Variar* v. *Vasudevan Nambudripad*[1]. I therefore do not think that this could be considered to be an execution petition for the execution of the decree, though the summary remedy arises by reason of the bond executed to the Court in the course of the execution proceedings."

It is unnecesary to refer to the facts of the decision of the Bench in *Ramamurthy* v. *Tirupatiraju*[2]. It is sufficient to mention that the decision of Walsh, J., in *Jamundas Ravuji Sait* v. *Krishnan*[3], and Kuppuswami Ayyar, J., in *Annamalai Chettiar* v. *Sundaresa Ayyar*[4], were referred to with approval as deciding that in such cases the proper article of limitation in the matter of enforcement of the liability of the sureties in such bonds is Article 181 and not Article 182 which applies to the execution of the decree passed in the suit. There are some decisions of other High Courts which appear to favour the view that a surety as in the present case—for the production of movable property entrusted to his custody and in default to pay the value as recited in the bond—is a surety who satisfies the requirements of section 145 (*b*), Civil Procedure Code. I am unable to agree with this view because assuredly in such a case there is no principal debtor for whom the person who has executed the bond has become surety and moreover the decisions of this Court have uniformly held that this condition has to be fulfilled before the executant of the security bond could be deemed to be a surety within section 145 (*b*), Civil Procedure Code. These decisions are binding upon me and I do not therefore propose to discuss this question in any detail and will proceed upon the footing that the surety in the present case is not within section 145 though according to the practice in this State following *Sankunni Variar* v. *Vasudevan Nambudripad*[1], the remedy by way of execution is open in the event of a default on the part of the surety.

If then the obligations of the surety and his liability to make good the amount of the bond arise independently of the decree, it follows that an application for execution of that liability is not an application for the execution of the decree passed in the suit and which is being executed against the judgment-debtor. In my opinion the principle of the decision in *Gangaraju* v. *Subbayya*[5], that an execution against either a surety or a judgment-debtor is an execution or step-in-aid of execution as against the other, applies only to cases where the surety is one against whom the decree passed in the suit may be executed, in other words to a surety to whom section 145, Civil Procedure Code, directly and in terms applies. In the case of other "sureties" such as the one we have in the present case there is so to speak a separation of the obligations of the two parties. The liability of the judgment-debtor is under the decree and the liability of the "surety" is not under the decree but under a bond which he has executed in a collateral and ancillary transaction. If in the present case the judgment-debtor had satisfied the entire decree by payment of the decree amount, he could undoubtedly have proceeded to execute the security bond and the obligations arising under it against the surety. This itself shows that what is sought to be enforced against the surety is not an obligation under the decree but one *de hors* the decree, though, if any sum were recovered by the decree-holder by proceeding against the surety, it would go in reduction of the decree.

Before concluding it is necessary to notice an argument advanced by learned counsel for the respondent that E.P. No. 144 of 1950 should be deemed to be an application for the execution of the decree in O.S. No. 139 of 1943 for the reason that it sought relief against the movables of the judgment-debtor. But unfortunately the facts do not permit any such contention. The movables of the judgment-debtor being deemed to have been attached in execution of the decree after it was passed, if an application were filed for directing the executants of the security bond to produce

1. (1926) 51 M.L.J. 239.
2. (1948) 2 M.L.J. 287.
3. (1933) 65 M.L.J. 507.
4. (1943) 2 M.L.J. 444.
5. (1934) 68 M.L.J. 119 : I.L.R. 58 Mad. 276.

these articles and for their sale when produced, such an application would undoubtedly have been one for the execution of the decree. Such application would have been against the judgment-debtor also and he would have been impleaded as a party thereto. E.P. No. 230 of 1944 was such an application. E.P. No. 144 of 1950 however was merely for the arrest of the sureties and not for sale of the movables belonging to the judgment-debtor. The relief sought was therefore against the executants of the security bond to enforce their obligation under the bond and not a proceeding against property belonging to the judgment-debtor. In my opinion, therefore, the proceedings in E.P. No. 144 of 1950 could not be deemed to be an execution of the decree in O.S. No. 139 of 1943.

In my judgment therefore the execution petition, E.P. No. 144 of 1950 was not an application for the execution of or a step-in-aid of the execution of that decree which is sought to be executed in E.P. No. 194 of 1953. The later application having been filed more than three years after the disposal of the last application for execution of the decree in O.S. No. 139 of 1943 is clearly barred by limitation.

The revision petition is allowed and the execution petition is dismissed with costs here and below.

R.M. ——— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE RAMASWAMI.

Boologam Naidu *alias* Chengalvaroya Naidu .. *Appellant**

v.

Jagannath and others .. *Respondents.*

Limitation Act (IX of 1908), *Article* 138—*Applicability—Suit for possession by a purchaser of a Hindu coparcener's interest in joint family property—Period of limitation.*

The word 'possession' in Article 138 of the Limitation Act should be deemed to take in the possession which an undivided member of a joint Hindu family has in the joint family properties.

Bhogavalli Venkayya v. *Bhogavalli Ramakrishnamma*, (1911) 9 I.C. 495; *Ram Lakhi* v. *Durga Charan Sen*, (1885) I.L.R. 11 Cal. 680 and *Muthuswami* v. *Ramakrishna*, (1889) I.L.R. 12 Mad. 292, referred.

Article 138 of the Limitation Act contemplates a suit by a purchaser at a sale in execution of a decree when the judgment-debtor was in possession at the date of sale. Hence a suit by a purchaser of the interest of a member of a joint Hindu family either in Court auction or by private treaty, filed within twelve years from the date when the sale becomes absolute will be in time under Article 138 of the Limitation Act.

Shevantibai v. *Janardan*, A.I.R. 1939 Bom. 322, considered and approved in part. Applicability of Article 120 of the Limitation Act as the only residuary article to such cases doubted.

Appeal against the Decree of the Subordinate Judge of Chingleput, dated 10th January, 1949 and passed in Original Suit No. 66 of 1947.

S. Tyagaraja Ayyar for Appellant.

K. Sankara Sastri, and *T. S. Venkatarama Ayyar* for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—This is an appeal by the second defendant, the son of the first defendant, against the decree of the lower Court directing the sale of his one-eighth share. Mr. S. Tyagaraja Ayyar for the appellant contends that since the second defendant was not made a party to Execution Petition No. 308 of 1937, the sale of his share is null and void. We find that it was after the filing of Execution Petition No. 308 of 1937 that the decree in Original Suit No. 55 of 1936 was passed on 10th July, 1937, by which the order on the claim petition was set aside and the attachment of the second defendant's share was restored. As the first defendant was the kartha of the family, he must be deemed to have represented the second defendant also in Execution Petition No. 308 of 1937. It cannot be said that even though the second defendant was not *eo nomine* a party to this execution petition, he was not represented in the petition, because his father, the manager of the joint family, was on record.

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* Appeal No. 818 of 1949. 20th July, 1954.

The other argument of the learned counsel is that the decree in Original Suit No. 55 of 1936 cannot be held to have restored what was disallowed on the claim petition ; because it is only a party against whom an order is made that may institute a suit to establish the right which he claims in the property in dispute and since Original Suit No. 55 of 1936 was by the sixth defendant, the order on the claim petition must be deemed to have become conclusive and therefore the attachment of his one-eighth share must be deemed to have been disallowed long ago. We are unable to accept this contention because in the decree in Original Suit No. 55 of 1936, it is clearly stated that what was disallowed on the second defendant's claim had been restored as a result of the suit.

Mr. Tyagaraja Ayyar then raised the question of limitation which the learned Judge has decided under issue No. 7. This raises a rather interesting question where the applicability of Article 120 has to be considered.

The sale certificate Exhibit A-1 is dated 6th May, 1938, whereas the sale took place on 13th October, 1937. The present suit was instituted on 30th July, 1947, *i.e.*, more than three months before the expiry of ten years from the date of sale but within a few more months of the termination of that period from the issuing of the sale certificate. The arguments of the learned counsel is that where the rights in joint family property of a coparcener is sold in Court-auction, or is alienated by him voluntarily, what the purchaser gets is an "equity" to work out his remedies by filing a suit for partition and getting the share of the vendor, or judgment-debtor-coparcener, allotted to him. Until such an event takes place, what has been acquired by the purchaser is what is legally termed an equity or an inchoate right which cannot be tangibly exercised or utilized. Such a purchaser does not become a coparcener with the remaining members of the family ; nor is he entitled to be in joint possession of the properties as a tenant-in-common can be under an ordinary co-ownership of property. He is also not entitled to claim mesne profits from the other coparceners until and unless after a suit for partition, or by consensus of opinion among the remaining members, the seller's or judgment-debtor-coparcener's share in the property is specifically allotted to him. In these circumstances, it cannot be said that any particular article prescribing a period of limitation in the schedule to the Limitation Act can be said to apply to a suit by a purchaser except the residuary Article 120. Observations of their Lordships of the Supreme Court in *Sidheshwar Mukherjee* v. *Bhubneshwar Prasad Narain Singh and others*[1], are relied upon. At page 188 of the report their Lordships say :

> " All that he (the purchaser) purchased at the execution sale was the undivided interest of the coparceners in the joint property. He did not acquire title to any defined share in the property and was not entitled to joint possession from the date of his purchase. He could work out his rights only by a suit for parition and his right to possession would date from the period when a specific allotment was made in his favour. In our opinion this is the right view to take and Mr. Daphtary who appeared in support of the appeals could not satisfy us that in law his client was entitled to joint possession on and from the date of purchase."

This case did not deal directly with any question of limitation but the rights of a purchaser are enumerated and clarified by their Lordships in detail. There can be no doubt, in view of these observations as well as the settled principles of Hindu law, that a purchaser cannot be inducted into joint possession with the erstwhile coparcener whose rights have been sold and purchased by him. (See also *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*[2], and *Nanjaya Mudali* v. *Shanmuga Mudali*[3]. But does that by itself attract the operation of Article 120 of the Limitation Act or is there any other provision of the Limitation Act which specifically can be made applicable to a state of circumstances like this ?

In the decision reported in *Shevantibai* v. *Janardan*[4], the facts were : two out of three undivided members of a joint Hindu family mortgaged their share in the joint property in 1879. In 1882 one of them sold his share to the mortgagee. The

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1. (1953) 2 M.L.J. 789 : (1953) S.C.J. 700 : (1954) S.C.R. 177 at 188.
2. (1914) 27 M.L.J. 409 : I.L.R. 39 Mad. 265.
3. (1913) 26 M.L.J. 576.
4. A.I.R. 1939 Bom. 322.

vendor-coparcener died in 1896 and the other mortgagor in 1898, both without leaving any male issue. In 1937 the successor-in-title of the mortgagee filed a suit for partition of the joint family property and to have allotted to him a share purchased by the mortgagee from one of the coparceners and also sought to enforce the mortgage. On those facts it was held that neither Article 144 nor Article 142 applied, but only the residuary Article 120 applied and that the suit was therefore barred by limitation. But the emphasis is laid both by Beaumont, C.J., and Wadia J., on the starting point of limitation being the date of death, of the alienating coparcener; and since that took place in 1896, there can be no question of enforcing any right of possession which he possessed. Wadia, J., at page 334 of the report refers to this question in the following terms :—

> " The other question is whether the suit to enforce partition is barred by limitation. I do not think the case falls within Article 127 because that clearly refers to a claim made by the plaintiff as a member of the coparcenary and the words ' when the exclusion becomes known to the plaintiff' refer to the plaintiff as the member of the coparcenery and not to the purchaser from that member. I do not think that the case falls within Articles 136, 137 and 138 either. Nor does it fall within Article 142 though the allegation in paragraph 10 of the plaint seem to point to it. Article 144 also does not apply. Both these articles are articles applicable to suits for possession and it is admitted that an alienee of the undivided interest of a Hindu coparcener is not entitled to possession. It cannot be said that the possession of any person is adverse to that of a person who is not entitled to any possession at all. The only other article therefore is the residuary Article 120 and that gives six years as the period of limitation from the time the cause of action arose. The cause of action in this case at the latest would arise from the death of the vendor when he lost his right to possession by reason of his death.........."

The circumstances of the present case are not similar to what came up for discussion before the Bombay Bench. At the time of the sale 13th October, 1937, the first and second defendants, as members of an undivided joint Hindu family, were in joint possession of the family properties with other members of the family and their right to possession ceased to be effective only from the date of sale. In such a case, though the *terminus a quo* arose from that date, does it necessarily mean that Article 120 ought to be applied? Recently our learned brother Krishnaswami Nayudu, J., had to consider the same point in Second Appeals Nos. 1655 of 1949 and 2781 of 1949, which arose from the judgment of one of us (Ramaswami, J., as District Judge of Chingleput) and before him the Bombay decision was cited. Our learned brother was of opinion that the matter is an important one and has referred both the second appeals for decision by a Bench. In the very nature of things, we cannot have those appeals posted before us for decision, but as the same point has been raised and discusssed at great length before us, we propose to express our opinion about the applicability of the Bombay decision to cases where the cause of action arose by the sale of the interest of a member of a joint Hindu family either in Court-auction or by private treaty. As has already been remarked the *raison d'etre* of the Bombay case is based upon the date of death of the alienating coparcener and the learned Judges were therefore of opinion that none of the articles of the Limitation Act, except Article 120 would apply. We agree with them that Article 127 has no relevancy whatever because it can apply only to a member of a joint family excluded from participation in the joint family property and who seeks to enforce a right to share in it. The period of limitation in such a case is twelve years from the date when the exclusion becomes known to the plaintiff. Article 127 is thus inapplicable to cases of outsiders. Therefore the view of the Bombay Judges that a purchaser from a coparcener is not affected by that article is in our opinion correct.

But the question is whether any of the articles in the fasciculus of Articles 136, 137 and 138 can be attracted. Article 136 contemplates a case where the vendor was out of possession on the date of sale. In the present case, the judgment-debtor's vendors were in joint possession and therefore we cannot use Article 136. Article 137 is intended to be utilized in cases where there is a suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was out of possession at the date of sale. The starting point of the period of limitation therefore is when the judgment-debtor was first entitled to possession. Like Article 136, this article also is inapplicable. But the third article, Article 138, is, in our opinion, the one which has relevancy. It contemplates a suit by a purchaser at a sale in execution of a decree when the

judgment-debtor was in possession at the date of sale. As we have already remarked, defendants 1 and 2 were in joint possession of the properties on 13th October, 1937, when the sale took place and therefore when a suit is filed within twelve years from the date when the sale becomes absolute, it is in time.

Whether joint possession of a coparcener is "possession" as contemplated in Article 138 has next to be considered. A Bench of this Court in a case reported in *Bhogavalli Venkayya* v. *Bhogavalli Ramakrishnamma*[1], had to consider the meaning of the word "possession" in Article 136, and the learned Judges Abdur Rahim and Ayling, JJ., came to the conclusion that the word "possession" in Article 136 includes possession which a member of a joint Hindu family is presumed to have in the family property until excluded therefrom ; and therefore when a suit is brought by a purchaser from a member of a joint Hindu family, who is alleged to have been out of possession at the time of sale, Article 136 applies. As authority for this proposition *Ram Lakhi* v. *Durga Charan Sen*[2], and *Muttusami* v. *Ramakrishna*[3], are cited. In both these decisions, there is the assumption that every member of a joint Hindu family is in possession of the entire joint family property along with others and the learned Judges were of opinion that possession contemplated in Article 136 can be said to be the possession of such a joint family member. If the possession referred to in Article 136 can be that of a member of a joint Hindu family having joint possession, we fail to see why, when the Act deals with possession of judgment-debtors and alienating coparceners, as in Articles 137 and 138, a different meaning should be given to the word "possession" in Articles 137 and 138. We are therefore definitely of opinion that the word "possession" in Article 138 should be deemed to take in the possession which an undivided member of a joint Hindu family has in the joint family properties. This view of ours finds support in the recent edition (seventh edition) of Mitra's "Law of Limitation and Prescription," at page 751 where the authors say that a suit by an auction-purchaser of the share of a member of a joint family, for partition and possession, would come either under Article 137 or Article 144. That Article 138 would apply to a case where the judgment-debtor was in possession at the date of sale is clear from the observations of Best, J., in *Arumuga* v. *Chockalingam*[4], though the decision is that it would not apply to a purchaser from a Court-auction-purchaser. There are observations of a similar nature in *Pullayya* v. *Ramayya*[5], though in that case it was held that since the execution purchaser would be barred, an assignee from him would equally be barred. Horwill, J., was of opinion that Article 137 would apply to a case of a purchaser from a purchaser in Court-auction. See *Venkataswami Naicker* v. *Navaneethakrishna Chettiar*[6]. It is unnecessary in the present case to go so far because the plaintiff here is the purchaser himself. There is no escape from the plain words of Article 138 unless we hold that the word "possession" should be understood as possession of a single individual and not that of the members of a joint Hindu family. As we are in agreement with the learned Judges who defined that word in *Bhogavalli Venkayya* v. *Bhogavalli Ramakrishnamma*[1], there is absolutely no room for doubt that "possession" of a member of a joint Hindu family is not the "possession" contemplated in Article 138. Our attention was also invited to the observations in *Harikrishna Chowdary* v. *Venkata Lakshmi Narayana*[7]. We do not think that that decision has any application to the facts of the present case. Though the learned Subordinate Judge has not given any reasons for coming to the conclusion that the suit brought within a period of twelve years is in time, for the reasons above stated we are in agreement with his conclusion and this appeal is dismissed but in the circumstances without costs.

R.M. *Appeal dismissed.*

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1. (1911) 9 I.C. 495.
2. (1885) I.L.R. 11 Cal. 680.
3. (1889) I.L.R. 12 Mad. 292.
4. (1892) I.L.R. 15 Mad. 331, 332.
5. (1894) I.L.R. 18 Mad. 144.
6. (1943) 1 M.L.J. 207.
7. (1910) 20 M.L.J. 823: I.L.R. 34 Mad. 402.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

K. Mohamed Kassim and Brother .. *Petitioner**

v.

The Municipal Council, Ootacamund, by its Commissioner .. *Respondent.*

Madras District Municipalities Act (V of 1920), *section* 249 (3)—*Grant of licence—Discretion of the executive authority—If opposed to Article* 19 (*g*) *and* (6) *of the Constitution of India.*

Under sub-section (3) of section 249 of the Madras District Municipalities Act the executive authority is given an absolute power of refusing to grant a licence as also the power of imposing such restrictions and conditions as he might think fit. The vesting of such an absolute power in the executive authority without any guidance by the legislature as to the relevant conditions and restrictions will not be a reasonable restriction within Article 19 (6) of the Constitution. The sub-section is in contravention of Article 19 (6) of the Constitution and has to be struck down as violating the fundamental rights guaranteed by Article 19 (*g*).

An order of an executive authority of a Municipal Council refusing to grant a licence on irrelevant grounds is liable to be quashed. The Municipal Council which is vested with a statutory duty to hear and dispose of appeals from the orders of an officer in the matter of grant of a licence cannot abdicate itself of its duty to hear and dispose of the appeal on the merits by passing a resolution that it does not like to interfere with the jurisdiction of the officer.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* against the Respondent herein calling for the records of the petitioner's application, dated 14th September, 1954, for the grant of a licence to store and sell fireworks from 16th October, 1954, to 31st March, 1955 and the orders passed thereon by the Health Officer, Ootacamund, dated 28th September, 1954 and the order, dated 13th October, 1954, of the Municipal Council, Ootacamund and to quash the orders of the above referred Health Officer and Municipal Council and for a writ of *mandamus* directing the respondents to grant the petitioners the licence applied for, for the premises 290 and 291, Main Bazaar, Ootacamund and the stalls Nos. 10 and 11 Market, Ootacamund and for the issue of any other appropriate writ.

S. K. Ahmed Meeran and *M. Khaja Mohideen* for Petitioner.

D. Souza for *Messrs. John and Row*, for the Respondent.

The Court made the following

ORDER.—This is an application for the writ of *certiorari* against the Municipal Council of Ootacamund to quash an order refusing the applications made by the petitioners for the grant of a licence to store and sell fireworks and for a writ of *mandamus* directing the respondent to grant to the petitioners the licence applied for.

It is necessary to set out a few facts in order to understand the points raised for decision. The petitioners are merchants doing business at Ootacamund. In accordance with the provisions of section 249 of the District Municipalities Act, the Municipal Council of Ootacamund notified on 26th November, 1952, that no place within the Municipality shall be used for selling or storing fireworks without the licence of the executive authority. In compliance with this notification, the petitioners submitted two applications on 14th September, 1954, for the issue of a licence for storing and selling fireworks not exceeding 50lbs in premises Nos. 290 and 291, Main Bazaar, Ootacamund and in stall Nos. 10 and 11 in the market at Ootacamund from 16th October, 1954, to 31st March, 1955. These applications were made to the Municipal Health Officer who forwarded them to the Madras Fire Service Officer for his remarks. The Fire Service Officer stated in reply that from the fire service point of view there was no objection to the storage and sale of crackers provided the Explosives Rules were adhered to. The Health Officer however refused the petitioners' applications by an order, dated 28th September, 1954, for the following reasons :

* W.P. No. 674 of 1954. 28th January, 1955.

"The places referred to above are not 150 feet at least away from residential building."

Meanwhile the petitioners were in communication with both the Fire Service Officer as well as the Inspector of Explosives as regards any possible objection by these two departments to the grant of the licences which he had applied for. A reply was received from the Fire Service Officer on 1st October, 1954, in which it was stated that there was no objection from the Fire Service point of view for the grant of the licence for the sale of manufactured crackers under the condition of licence in Form K at the two premises mentioned by the petitioners. They also received a similar reply from the Inspector of Explosives, dated 4th October, 1954, as follows:

"A clearance of 150 feet all round is required only for premises where explosives (fireworks) are proposed to be manufactured, possessed and sold such premise being licenced in Form 1 of the Explosives Rules. Premises which do not observe any clearance around them can be licenced in Form K of the Explosives Rules, 1940, for possession and sale of manufactured fireworks in quantities not exceeding 200lbs provided such buildings are substantially built structures and they conform to the conditions laid down under a licence in Form K of the Explosives Rules, 1940.

In view of the above you may approach the authorities concerned and obtain the no-objection certificate and thereafter forward the same with other particulars to this office for necessary action."

On receipt of these two communications, the petitioners filed an appeal to the Municipal Council against the order of the Health Officer to whom had been delegated the duty of dealing with these licences in the first instance. In an appeal petition, dated 4th October, 1954, the petitioners drew the sttention of the Municipality to these two communications and the unreasonableness of insisting on the condition regarding a clearance of 150 feet around the premises for the grant of a licence to store 50lbs of crackers for sale. The matter came up before the Municipal Council at a meeting held on 13th October, 1954, when the following resolution was passed :

"The discretion of either giving or refusing the grant of licence rests with the Municipal Health Officer and the Council does not like to interfere with his jurisdiction and upset his proceedings."

This was the order on the appeal which was communicated to the petitioners on 20th October, 1954. Meanwhile the petitioners had applied to the Additional District Magistrate, Nilgiris, for a no-objection certificate to the grant of licence in Form K. The Additional District Magistrate granted the certificate as prayed for by a communication, dated 22nd October, 1954, in which he stated :

"The Station Officer, Madras Fire Service, Ootacamund, has stated that there is no objection to the grant of a licence for the said premises from the point of view of the Fire Services. The Tahsildar, Ootacamund, has reported that there is no objection in the said premises being licenced in Form K. But the Ootacamund Municipality has not issued the necessary certificate as the premises are not separated by 150 feet from dwelling houses. As there is no such condition to the grant of a licence in Form K and as the Municipality's objection is not on valid grounds the Additional District Magistrate, Nilgiris, finds no objection to the grant of a licence in Form K....As the time available before Deepavali is short this certificate is issued."

A copy of this was also forwarded to the Commissioner, Ootacamund Municipality. As the Municipal authorities continued to refuse to grant the licence, the petitioners have approached this Court for the relief mentioned earlier.

Besides the above facts, the petitioners have also alleged in their affidavit in support of the petition that the action of the Municipality was *mala fide* and was actuated by improper motives as a reprisal for two suits which the petitioners have filed against the Municipality for the recovery of damages for malicious prosecution. I shall deal with this point at a later stage.

The defence of the Municipality to the writ petition is three-fold. The first is that the discretion of the Municipal authorities under section 249 of the District Municpalities Act is absolute and that this Court could not interfere with the exercise of such a discretion. Secondly they deny that they were actuated by improper motives in rejecting the petitioners' applications. The main point, however, raised by them was that owing to a fire which had broken out in a shop vending crackers, fireworks, etc., in 1950, from 1951 onwards the Municipality had set apart a piece of land far removed from residential quarters, that they were issuing licences for storing fireworks and crackers only in that plot and that the petitioners were not

entitled to insist on their premises in the shop and residential areas being licensed for storing and selling these dangerous goods. In regard to this, it might be mentioned that as early as 30th September, 1954, the petitioners had applied to the Municipality for information as to whether particular plots had been set apart for storing and selling crackers during 1954-55 and it is admitted that the Municipality had sent no reply at all to this communication. Further as the refusal to issue the licence was not based upon the Municipality having set apart any particular plot where this trade could be carried on, in my judgment it is not open to the Municipality to sustain the rejection of the licence on this ground.

Two questions arise for consideration in this petition. (1) Was the refusal of the licence illegal? (2) Was it improper as motivated by *mala fide* reasons?

In the first place the terms of section 249 might be noticed. The relevant portions of section 249 of the District Municipalities Act which govern the grant of licence are these:

"249 (1). The Council may publish a notification in the District Gazette and by beat of drum that no place within municipal limits or at a distance within three miles of such limits shall be used for anyone or more of the purposes specified in Schedule V without the licence of the executive authority and except in accordance with the conditions specified therein:

Provided that no such notification shall take effect

(*a*) Until sixty days from the date of publication and

(*b*) except with the previous sanction of the State Government in any area outside the municipal limits.

(2) The owner or occupier of every such place shall within thirty days of the publication of such notification apply to the executive authority for a licence for the use of such place for such purpose.

(3) The executive authority may by an order and under such restrictions and regulations as he thinks fit grant or refuse to grant such licence."

It will be seen that under sub-section (3) the executive authority is given an absolute power of refusing to grant the licence as also the power of imposing such restrictions and conditions as he might think fit. As the petitioners have under the Constitution a fundamental right to carry on their business subject to such reasonable restrictions as might be imposed, the question is whether the vesting of such an absolute power as would be involved in sub-section 3 in an executive authority without any guidance by the Legislature as to the relevant conditions and restrictions would be a reasonable restriction within Article 19 (6) of the Constitution. In my opinion, the sub-section in its present form is in contravention of Article 19 (6) and has to be struck down as violating the fundamental rights guaranteed by Article 19 (*g*). But even apart from this, it is clear from the communications from the Fire Service Officer as well as from the Inspector of Explosives and the Additional District Magistrate, which I have set out above, that the Municipal Health Officer was under a mistaken impression that for the issue of a licence in Form K, Indian Explosives Rules, 1940, the restriction which he imposed namely that there should be no habitation within 150 feet of the place of the storage was applicable. In my judgment, it is clear that the Municipal Health Officer, who is the executive authority vested with the power by the Municipal Council to grant or refuse a licence has exercised his discretion to refuse the petitioners' applications on irrelevant grounds and his order is therefore liable to be quashed.

There is one further matter that might be referred to and that is, that the Municipal Council which is vested with the statutory duty to hear and dispose of appeals from the orders of the Municipal Health Officer has really abdicated its duty by passing a resolution in the terms I have set out earlier. After all, the executive authority was functioning as a statutory delegate and it was for the Municipal authorities to consider whether objections raised by the petitioners to the order of the Municipal Health Officer was justified or not, on the merits. The Municipal Council never considered the appeal on the merits and its rejection of the appeal on the ground stated by it is therefore improper.

In the view which I have taken of the action of the Municipality as being illegal and not in accordance with the law, it is unnecessary to consider the point about the *mala fides* by reason of the petitioners having filed two suits for damages for malicious prosecution and I do not propose to express any opinion on that beyond saying that I do not consider that the suggestion is wholly without foundation.

In my opinion, the petitioners have made out the illegality of the order of the respondent refusing them the grant of the licence. The orders therefore of the Municipal Health Officer and the Municipal Council refusing the petitioners the grant of the licence are hereby quashed and the respondent Municipality is directed to issue the licence to the petitioners as prayed for in their petitions. The petitioners are entitled to their costs. Advocate's fee Rs. 100.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Rangayyan and another .. *Appellants**

v.

Innasimuthu Mudali and others .. *Respondents.*

Evidence Act (I of 1872) section 11, 13, 32 (3) and 157—Recitals of boundaries in documents inter partes *and between party and strangers and between strangers—Admissibility and probative value.*

The recital of boundaries of a property in a document *inter partes* is a joint statement made by the parties to the document and therefore relevant against all of them as an admission. Where such recital is in a document between a party and a stranger it is relevant against the party as an admission but is not admissible in his favour. But where such recital is in a document between strangers it is not ordinarily admissible to prove possession or title as against a person who is not a party to the document except in cases falling under sections 11, 13, 32 (3) or 157 of the Evidence Act, the particular circumstances of the case determining the particular section applicable. The probative value to be attached will also equally depend upon the circumstances of each case and may vary from nothing to almost clinching evidence.

Thyagarajan v. *Narayana*, A.I.R. 1940 Mad. 450, and *Komirineni Rosayya* v. *Munnamgi Rosayya*, (1947) 1 M.L.J. 60, followed.

Karuppanna v. *Rangaswami*, A.I.R. 1928 Mad. 105, differed.

Case-law reviewed.

Appeal against the Decree of the Court of the Subordinate Judge of Coimbatore in Appeal Suit No. 50 of 1953, preferred against the Decree of the Court of the District Munsif of Gobichettipalayam in Original Suit No. 543 of 1950.

G. R. Jagadisan, A. R. Ramanathan and *C. Ramanathan* for Appellants.

K. Narayanaswami Mudaliar and *T. Sundaram* for Respondents.

The Court delivered the following.

JUDGMENT.—This is a second appeal which has been preferred against the decree and judgment of the learned Subordinate Judge of Coimbatore in A.S. No. 50 of 1953, confirming the decree and judgment of the learned District Munsif of Gobichettipalayam in O.S. No. 543 of 1950.

The facts are: The 1st plaintiff purchased the suit property, a vacant site with a Salai thereon, along with other properties from his sisters, who are the widows of one Madhe Goundan under Exhibit A-1, dated 4th April, 1934. The plaintiff's case is that after the purchase the disputed property remained vacant, that the 1st plaintiff put up a Salai thereon in 1936 and after that his farm-servants used to be housed therein. The 1st defendant occupied the property in 1945 as one of the farm-servants. Subsequently he left the service of the 1st plaintiff. He did not vacate the Salai and site. Therefore, this suit has been filed for a declaration, possession and mesne profits. The 1st plaintiff died pending suit and his legal representatives have been brought on record as plaintiffs 2 and 3 by order, dated 9th April, 1952.

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* Second Appeal No. 741 of 1954. 8th March, 1955.

On coming to Court the contention raised by the defendants, who are now occupying the property, is that the 1st defendant's father Sevuthi Mudali purchased the suit property from Madhe Goundan under an oral sale several years prior, that Sevuthi Mudali put up a building and ever since Sevuthi Mudali and after him the defendatns have been living there. The evidence in this case consisted of (*a*) two documents Exhibits B-1 and B-2 and (*b*) other documentary and oral evidence. Both the Courts below came to the conclusion that the evidence on record did not make out the case for the plaintiffs, *viz*., that they were in possession of the property within 12 years prior to the filing of the suit and that on the other hand the defendants have shown that they prescribed their title by adverse possession and limitation for over the statutory period. Hence this second appeal by the defeated plaintiffs.

The two points for consideration before me are (*a*) the relevancy and mode of proof and the probative value to be attached to Exhibits B-1 and B-2; and (*b*) the conclusions to be drawn from the other evidence.

Exhibit B-1 is a registration copy of a sale-deed, dated 14th January, 1933, executed by Sankaran Chetti in favour of Arumugham Pillai (D.W. 1) in respect of the house south of the suit property. In that document the northern boundary of the house sold is given as Sevuthi Mudali's house and the eastern boundary as the Government natham. Exhibit B-2 is a registration copy of the mortgage deed, dated 11th May, 1929, of the same property executed by Sankaran Chetti in favour of D.W. 1. This document also contains the same description as in the subsequent sale-deed. In regard to these documents the question which arises first is whether they are relevant and admissible in evidence.

In regard to recitals of boundaries in documents, cases falling under this head may be divided into three classes;

(*a*) When the recital is in a document *inter partes*. In such a case the recital is a joint statement made by the parties to the document and, therefore, relevant against all of them as an admission.

(*b*) When the recital is in a document between a party and a stranger. In such a case, the recital is relevant against the party as an admission but is not admissible in his favour, *Radha Kishen* v. *Sarabeswar*[1], *Daulat* v. *Bishan*[2], unless the fact recited is deposed to in Court by the executant of the document, in which case the recital will become admissible under section 157 of the Evidence Act to corroborate the evidence of the executant. *Ketabuddin* v. *Nafar*[3], and see also *Ambicacharan* v. *Kunud*[4] or under section 155 of the Evidence Act to contradict such evidence: *Dasmal* v. *Sunder*[5].

When the recital is in a document between strangers. Now it is well settled that a recital as to boundary in documents between third parties is not ordinarily admissible to prove possession or title as against a person who is not a party to the document. But that rule is subject to exceptions which again can be classed under four heads, *viz*., if those documents come within the relevancy and admissibility contemplated under (*a*) sections 157 and 155 of the Indian Evidence Act; (*b*) section 32 (3) of the Evidence Act; (*c*) under section 13 of the Evidence Act; and (*d*) under section 11 of the Evidence Act.

In regard to the relevancy and admissibility of documents between strangers reciting boundaries under section 157, the line of decisions can be summarized as follows: In *Thyagarajan* v. *Narayana*[6], Wadsworth, J., held as follows:

"It is, however, contended that when the executant of the document containing a recital of boundary upon which reliance is placed is himself a witness in the case the recital can be let into evidence under section 157, Evidence Act, as a former statement corroborating the deposition. The only express decision on this point to which my attention has been drawn is contained in *Ketabuddin* v.

1. A.I.R. 1925 Cal. 684.
2. A.I.R. 1934 Lah. 750.
3. A.I.R. 1927 Cal. 230.
4. A.I.R. 1928 Cal. 893.
5. A.I.R. 1937 Lah. 480.
6. A.I.R. 1940 Mad. 450.

Nafar Chandra[1]. That decision does not discuss the precise terms of section 157 but proceeds on a concession that the recital of a boundary in a document not *inter partes* can be admitted to corroborate a witness who himself is the executant of the document. It must however be pointed out that section 157 does not make all previous statements admissible to corroborate the testimony of a witness but only two classes of statements : (1) a statement made by a witness relating to the same fact at or about the time when the fact took place and (2) a statement made before any authority legally competent to investigate the fact. Clearly, the second of these categories has no reference to recitals in deeds. But can it be said that a recital of a boundary in a mortgage deed is a statement at or about the time when the fact took place ? With some hesitation I think that it can. One cannot of course speak of a boundary as a fact which took place at one time or another. But what is to be got from this statement is not really the fact of the boundary the fact that land on the boundary was at a particular time in the possession of a particular individual, and the statement in the mortgage deed that so and so was in possession of the land on such and such a boundary is in my opinion a former statement made at the time when the fact of possession was taking place—a contemporaneous statement regarding the occupation of land on the boundary. In this view, it is admissible under section 157, Evidence Act."

In *Komirineni Rosayya* v. *Munnamgi Rosayya*[2], Kuppuswami Ayyar, J., following *Thyagarajan* v. *Narayana*[3], held :

"That if a statement that a particular property was in possession of a particular person in a particular period is relevant evidence of a fact that had taken place, the recital that the person owned it, also is a statement of fact that had taken place at the time when it was made. Possession is a legal conception as also ownership. If a particular statement about a particular individual that he was in possession of a property is relevant evidence of a fact that had taken place, then the fact he owned it is also a similar recital of a fact that had taken place. The statement in the document in question was therefore relevant as corroborative evidence being a statement made by the witness on a previous occasion."

These two decisions lay down that a document though not *inter partes* is admissible to prove the possession and title to the property if it is used as corroboration for the oral evidence of the executant of the document. In *Mohim Chandra* v. *Kanilal Saha*[4], Suhrawardy and Garlick, JJ., held referring to *Ketabuddin* v. *Nafar Chandra*[1].

"In a suit for possession of land if the opposite party disputes the boundaries of the land in suit, it is open to the plaintiff to produce documents relating to neighbouring lands in which there is recital as to particular boundaries of the land in suit, and *such documents will be admissible to prove the plaintiffs' title if the persons in whose favour the documents are executed are examined* and admit the correctness of the boundaries."

I need not point out that a recital which becomes admissible under section 157 to corroborate the testimony can also be used under section 155 to contradict such testimony.

The matter, however, does not stand merely with the relevancy and admissibility. The probative value to be attached will depend upon the circumstances of each case and may range from zero to almost clinching proof.

In regard to section 32 (3), Evidence Act, in the following cases where the executant could not be produced as a witness the recitals were admitted : *Thyagarajan* v. *Narayana*[3], *Tika Ram* v. *Moti Lal*[5], *Ahmad Shahji* v. *Jamal Ahmad*[6], *Sarat Chandra Rakhit* v. *Sarala Bala Ghosh*[7], *Katabuddin* v. *Nafar Chandra*[1], *Pramatha Nath Roy Chowdhury* v. *Bejoy Singh Dudhuria*[8], *Abdul Rahim Kazi* v. *Jonabali Sikdar*[9], *Ambar Ali* v. *Lutfe Ali*[10], *Natwar* v. *Alkhu*[11], *Imrit Chamar* v. *Sridhari Panday*[12], *Abdullah* v. *Kunja Behari Lal*[13], *Raji Bibi* v. *The Agha Khan*[14], *Ningawa* v. *Bharmappa*[15], *Trimbak* v. *Ganesh*[16], there has been a decision of Jackson, J., in *Karuppanna* v. *Rangaswami*[17] to the effect that it cannot be said that a statement of boundaries is against the proprietary interest of the person making it excepting on the assumption that every person must be presumed to own the universe until he makes a statement circumventing his title. But with respect to Jackson, J., his observation seems to miss the real point.

1. A.I.R. 1927 Cal. 230.
2. (1947) 1 M.L.J. 60.
3. A.I.R. 1940 Mad. 450.
4. A.I.R. 1930 Cal. 311.
5. (1929) 52 All. 464 : A.I.R. 1930 All. 299.
6. A.I.R. 1928 Oudh 248.
7. A.I.R. 1928 Cal. 63.
8. A.I.R. 1927 Cal. 234.
9. A.I.R. 1923 Cal. 299.
10. (1917) I.L.R. 45 Cal. 159.
11. (1913) 18 I.C. 752.
12. (1911) 15 C.L.J. 7.
13. (1911) 12 I.C. 149 : 14 C.L.J. 467.
14. (1908) 11 Bom. L.R. 409.
15. (1897) I.L.R. 23 Bom. 63.
16. A.I.R. 1923 Nag. 22.
17. A.I.R. 1928 Mad. 105.

Section 32 (3) states that when the statement is against the pecuniary or proprietary interest of the person making it, it is relevant when the person making it is dead, or cannot be found or has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable. First of all, recitals of boundaries of property, contained in deeds not *inter partes* have been held to be admissible to prove the ownership or possession of adjoining property, on the ground that, when the deed is a mortgage-deed, it amounts to a statement against the pecuniary or proprietary interest of the mortgagor, inasmuch as he admits therein that he is indebted in a certain sum of money and that this money is a charge on his property; *Ningawa* v. *Bharmappa*[1], *Thyagarajan* v. *Narayana*[2], *Abdulla* v. *Kunja Behari Lal*[3], and, when the deed is a deed of conveyance, on the ground that it amounts to a statement against the vendor's interest, inasmuch as he admits therein that he is extinguishing his interest in the property conveyed. The mortgage deed or the deed of conveyance having thus been held to be a statement against the pecuniary or proprietary interest of the executant of the deed, on the authority of *Higham* v. *Ridgway*[4], the document is made evidence not only of the precise fact against interest, but of all the collateral facts mentioned therein, and consequently of the possession or ownership of persons who are mentioned in the deed as possessing or owning the land adjoining the property mortgaged or conveyed. *Rajahaddi Sarkar* v. *Gangachannan*[5], *Ambar Ali* v. *Lutfe Ali*[6], *Abdulla* v. *Kunja Behari Lal*,[3] *Ram Sarup* v. *Bhagwat*[7]. Another ground on which recitals of boundaries of the land conveyed is held to be against interest is that a statement by the vendor that his land is limited by certain boundaries is an admission that his proprietary interest does not extend over any land beyond the boundaries mentioned in the deed. *Ningawa* v. *Bharmappa*[1]. *Haji* v. *The Aga Khan*[8], *Tika Ram* v. *Moti Lal*[9], *Trimbak* v. *Ganesh*[10], *Pramatha Nath* v. *Bijoy Singh*[11], *Abdul Rahim* v. *Jonabali*[12], *Kangali* v. *Ben Biswash*[13], *Imrat Kumar Chamar* v. *Panday*,[14] *Ramanandan* v. *Lala*[15], *Lalu Singh* v. *Sahdev Singh*[16]. To my mind, therefore, there will be no impediment in regard to the relevancy and admissibility of a document between strangers reciting boundaries under this section provided in the circumstances of the case the other requirements of section 32 (3) are complied with.

Recitals of boundaries in documents not *inter partes* may also become relevant and admissible under section 13 which states :

> " Where the question is as to the existence of any right or custom........ (*a*) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence (*b*) particular instances in which the right or custom was claimed recognised, or exercised, or in which its exercise was disputed, asserted or departed from are relevant."

The section applies to all kinds of rights, whether rights of full ownership, or falling short of ownership, *e.g.*, rights of easement, etc. A right may be public, or general, or private. Further, a right may be incorporeal, *e.g.*, a right of way; or corporeal, *e.g.*, right of ownership. *Raghupat* v. *Narabadeswar*[17], *Tepu Jhan* v. *Das*[18], *Ram Kishan* v. *Narayan*[19]. A transaction is a business or dealing which is carried on or transacted between two or more persons ; it is something which has been concluded between persons by a cross or reciprocal action ; and, in the largest sense, it means that which is done. *Gujjalal* v. *Fatteh Lall*[20], *Sarapalli Raju* v. *Narasayya*[21], *Pratapchandra* v. *Jagadish.*[22]

1. (1897) I.L.R. 23 Bom. 63.
2. A.I.R. 1940 Mad. 450.
3. (1911) 12 I.C. 149 : 14 C.L.J. 467.
4. (1808) 10 East 109.
5. (1920) 53 I.C. 863.
6. (1917) 45 Cal. 159.
7. (1920) 57 I.C. 194.
8. (1908) 11 B.L R. 409 (2 I.C. 874).
9. A.I.R. 1930 All. 299 : (1929) I.L.R. 52 All. 64.
10. A.I.R. 1923 Nag. 22.
11. A.I.R. 1927 Cal. 234.
12. A.I.R. 1923 Cal. 299.
13. (1916) 34 I.C. 534.
14. (1911) 13 I.C. 120.
15. A.I.R. 1933 Pat. 636.
16. (1916) 36 I.C. 610.
17. (1936) 166 I.C. 664 : A.I.R. 1938 Pat. 103.
18. I.L.R. (1925) Cal. 522.
19. A.I R. 1933 Pat. 285.
20. (1880) I.L.R. 6 Cal. 171 (F.B.).
21. (1914) 26 I.C. 747.
22. A.I.R. 1925 Cal. 116.

On account of the governing qualification *by which* in regard to any transaction if it is a case which is sought to be made admissible on the ground of the right being created, claimed, modified, asserted or denied, then it must be shown to be not apart from the transaction by which it was created, claimed, etc. Instances of creation or modification of a right would be inconceivable apart from the transaction *by which* it was created or modified. This distinction between the expression *by which* and the expression *in which* has been emphasised in *Brojendra* v. *Mohim Chandra*[1], *Asaddar Ali Khan* v. *Province of Assam*[2], *Subharayulu* v. *Vengama*[3], etc. But there may be a transaction by which there has been a recognition of a right or the exercise of a right which can be proved by recitals in a document not *inter partes*. In other words, a transaction in which there is a recognition by mere assertion and a recognition of the exercise of a particular instance of the same, as distinct from a transaction by which the right or custom is created, claimed, modified or denied, has got to be distinguished. The reason for this distinction is the word "claimed" denotes a demand or assertion in relation to a thing or attribute, as against or from some person, showing the existence of a right to it in the claimant. A mere assertion of a right in a document to which the person against whom the right is asserted is not a party and of which he knows nothing, is not to claim the right. The word "assertion" indicates some act or deed which may or may not follow a statement. It is on that foot that Jackson, J., held in *Karuppanna* v. *Rangaswami*[4] that a mere statement of boundary as such cannot be classed with any of the verbs in section 13. But in doing so, with respect, the learned Judge went too far and did not give full effect to the verbs "recognised," "exercised." In the Concise Oxford Dictionary the word "recognised" is defined as "acknowledge validity or geniuneness or character or claims or existence of, accord notice or consideration to, discover or realise nature of, treat as, acknowledge for, realize or admit that." In Ramanatha Ayyar's "Law Lexicon" (M.L.J. Publication) at page 1089, it is mentioned ;

"The word 'recognise' according to the best lexicographers, signifies to admit; to acknowledge something existing before, recognise, acknowledge. To recognise is to take cognizance of that which comes again before our notice; to acknowledge is to admit to one's knowledge whatever comes fresh under our notice."

Webster's Dictionary :

"To admit the fact, truth or validity. To avow knowledge of; to consent to admit hold or the like; to admit with a formal acknowledgment; as to recognise an obligation; to recognise a consul."

Murray's Dictionary :

"To acknowledge by special notice, approval or sanction; to treat as valid; as having existence or as entitled to consideration; to take notice of (a thing or person) in some way. To admit to consideration or to a status as being something."

Ballantine's Law Dictionary: The Lawyer's Co-operative Publishing Co., Rochester, N.Y.) 1948 Edition, page 1095 :

"To try a question of fact; to ratify; to adopt, to become bound by a recognisance."

There is no impediment therefore on the wording of section 13 of the Evidence Act as it stands, where the existence of a right is in question, it is permissible for the party relying on its existence to prove any transaction by which it was recognised, a particular instance in which it was exercised by means of recitals of boundaries in documents not *inter partes*. The narrower construction that is sought to be placed upon section 13 has no merit even otherwise because as laid down by Lord Hardwicke in *Omychund* v. *Barker*[5].

"The judges and sages of law have laid it down that there is but one general rule of evidence the best that the nature of the case will admit."

In many cases unimpeachable documents of neighbours who would be the best persons in our country where people are rooted for generations to the same place about the possession and title of their adjoining properties would constitute the best evidence. There is no reason why what the Americans would call the grass-root evidence should be excluded and incur once more the reproach that the growth

1. A.I.R. 1927 Cal. 1.
2. A.I.R. 1944. Cal. 57.
3. A.I.R. 1930 Mad. 742.
4. A.I.R. 1928 Mad. 105 (2).
5. 1744 Atk. 22.

of the Indian Evidence Act has been exercised under the influence of English precedents and Indian lawyers by so much restrictiveness that the law of evidence has become more remarkable for what it shuts out than what it lets in. The object of a judicial investigation seems to have become more the obscuring of the truth rather than the discovery of it. I would in this connection refer to a brilliant exposition of this aspect by the late Mr. G.F. Arnold, I.C.S., in his "Psychology Applied to Legal Evidence and other Constructions of Law" (Thacker, Spink & Co., Calcutta, 1913). Therefore, the recitals of boundaries in documents not *inter partes* would be admissible under section 13 in fitting cases where the circumstances of the particular case permit such a course.

These recitals of boundaries can also become relevant and admissible under section 11 of the Evidence Act. According to this section a fact is relevant when by itself or in connection with other facts it makes the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. The section attempts to state in popular language the general theory of relevancy and may, therefore, be described as the residuary section dealing with the relevancy of facts. The words of section 11 are very wide, and it may be safely laid down that all evidence which would be held to be admissible by English Law would be properly admitted under this section of the Act. Collateral facts which, by way of contradiction, are inconsistent with a fact in issue or another relevant fact, *i.e.*, which makes the existence of a fact in issue or a relevant fact impossible or highly improbable, or which, by way of corroboration are consistent with the existence of a fact in issue or a relevant fact, *i.e.*, tend to render the existence of a fact in issue or a relevant fact highly probable, are themselves made relevant by the present section. The only two limitations on the use of these documents under section 11 are : The Court must exercise a sound discretion and see that the connection between the fact to be proved and the fact sought to be given under section 11 to prove it must be so immediate as to render the co-existence of the two highly probable. The section makes admissible only those facts which are of great weight in bringing the Court to a conclustion one way or the other as regards the existence or the non-existence of the fact in question. The admissibility under this section must, in each case, depend on how near is the connection of the facts sought to be proved with facts in issue and to what degree do they render facts in issue probable or improbable when taken with the other facts in the case. *Reg.* v. *Parbudas*[1] *Ambica Charan* v. *Kumud*[2], *Empress* v. *Vyapoory*[3], *Emperor* v. *Panchu*[4], *Lovelock & Lewes* v. *Malabar Timber & Sawmills, Ltd.*[5], *Htin Gyaw* v. *Emperor*[6]. Secondly, this section is also controlled by the more specific provisions of the Act, *viz.*, sections 17 to 39. In *Sheik Katabuddin* v. *Nafar Chandra*[7], *Ambica Charan* v. *Kumud Mohan*[2] it was held that where the executants of a document containing recitals of boundaries of land are alive and do not give their evidence, such documents are not admissible under the section. An *Ambica Charan* v. *Kumud Mohan*[2], Cuming and Mukherji, JJ., held that as a general rule section 11 is controlled by section 32 when the evidence consists of statements of persons who are dead and the test whether such statement is relevant under section 11, though not relevant under section 32, is that it is admissible under section 11 when it is altogether immaterial whether what was said was true or false but highly material that it was said.

The net result of this analysis is that recitals of boundaries in documents not *inter partes* will be relevant and admissible under sections 157, 32 (3), 13 and 11 of the Indian Evidence Act, the particular circumstances of the case determining the particular section applicable to the facts of that case. The probative value to be attached will also equally depend upon the circumstances of each case and may vary all the way from zero to almost clinching evidence.

Bearing these principles in mind if we examine the facts of the instant case, we find that Exhibits B-1 and B-2 are relevant and admissible under section 157

1. 11 Bom. H.C R. 90.
2. A.I.R. 1928 Cal. 893.
3. (1881) 6 Cal. 655.
4. (1920) I.L.R. 47 Cal. 671.
5. (1913) 18 I.C. 997 : 13 M.L.T. 282.
6. A.I.R. 1928 Rang. 118.
7. A.I.R. 1927 Cal. 230.

But their probative value is practically zero since the recital is consistent both with the possession of Sevuthi Mudali as owner or as lessee.

The inconclusive nature of the evidence furnished by Exhibits B-1 and B-2 and which is also consistent as I have just now said, with the case of the plaintiffs of Sevuthi Mudali being in possession as a farm servant, has to be coupled in the case of the plaintiffs with the other evidence adduced by them. It is in the probable and natural course of conduct that Sevuthi Mudali might have been allowed by Madhe Goundan to occupy the vacant site and put up a Salai therein. This is usual in the case of landlord and pannai servant. The sale deed in favour of the 1st plaintiff is as early as 1934 and there is no reason why at that stage when the 1st plaintiff had purchased several properties worth Rs. 3,000 he should have got included falsely a site which did not belong to Madhe Goundan and his widows. It also stands to common-sense that if he had deliberately inserted such a false recital he would not have refrained from taking proceedings to evict Sevuthi Mudali's family till 1952. On the other hand, it is consistent with the 1st plaintiff allowing this pannaiyal to continue to occupy and put a up Salai, which has got to be renewed often. On the other hand, there is no evidence whatsoever regarding the oral sale alleged by the defendants. It is easy to assert such oral sales and difficult to refute them and therefore the evidence regarding the same must be carefully scrutinised. Out of the three witnesses examined by the defendants, D.W. 3 is the first defendant himself and an interested party. D.W. 1, the ex-karnam of the village, does not know under what right Sevuthi Mudali was enjoying the suit house. D.W. 2 states that nobody else was present at the time of the negotiations of the sale by Madhe Goundan to Sevuthi Mudali. D.W. 3 states that he was present at the time of the talks and that he knew about the oral sale in favour of his father. The learned District Munsif came to the conclusion that the defendants have not placed before the Court sufficient evidence to prove the oral sale by Madhe Goundan in favour of Sevuthi Mudali as alleged by them. On the other hand, on the side of the plaintiff five witnesses were examined and they are all neighbours occupying respectable stations in life and there is no reason why they should falsely support the plaintiffs' version. It is unnecessary to multiply these details to show that not only are the recitals of boundaries in Exhibits B-1 and B-2 consistent with the plaintiffs' case but the other circumstances set out above make out the plaintiffs' version.

In the result, the plaintiffs have shown that they have been in possession of the property within 12 years prior to the filing of the suit and the defendants have not shown that they have prescribed their title by adverse possession and limitation for over a period of 12 years. The issues are accordingly found in favour of the plaintiffs and against the defendants and the suit is decreed for the plaintiffs with costs throughout. In regard to future mesne profits, this is relegated for enquiry in execution proceedings.

No leave.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT : MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

R. Dasaratha Rao and others .. *Petitioners**

v.

K. Ramaswamy Iyengar and others .. *Respondents.*

Arbitration Act (X of 1940), *section* 14 (1)—*Arbitration award—Signing of the award by all the arbitrators—Necessity—Failure to sign—If invalidates the award—Doctrine of* functus officio—*Scope and applicability to ministerial acts.*

Limitation Act (IX of 1908), *Article* 178—*Scope and applicability—Arbitration proceedings—Filing of award into Court by Arbitrator—Applicability of Article* 178.

The signing of an award by an arbitrator is only a formality after it has been made and pronounced. Where an arbitrator who has taken part in the arbitration proceedings throughout along with the

* C.R.P. No. 672 of 1952 and A.A.O. Nos. 214 and 215 of 1952. 3rd May, 1955.

other arbitrators and has been a party to the decision and pronouncement of the award refuses to sign the award after it has been engrossed it could not be a valid ground to set aside the award which has been validly given. What is crucial in the matter of arbitration proceedings is the making of the award and not the formality of signing the same after it had been made and mere non-signing of the award by one of the arbitrators who had been throughout a party to the making of the award would not vitiate the award.

Johara Bibi v. *Mohd. Sadak Thambi Marakayar*, (1951) 2 M.L.J. 56, followed.

Kuppuswamy Chetty v. *Anantharamier*, I.L.R. (1948) Mad. 83 : (1947) 1 M.L.J. 297, distinguished.

The proposition that when once an arbitration award has been pronounced the arbitrators having done what they were called upon to do under the submission become *functus officio* thereafter in regard to the reference cannot be disputed. But certain ministerial acts such as the engrossing of the award on stamp paper and getting the award so engrossed registered are acts which cannot be put on the same footing as proceedings in connection with the pronouncement of the award.

Where an award is passed the writing out of it on a stamp paper which would be necessary before it could be filed in Court is merely a ministerial act. But if the award is re-written in the sense that there are substantial changes or material alterations made then certainly the doctrine of *functus officio* would apply and the arbitrator would be precluded from resorting to such a re-writing of the award already pronounced.

Chhatilal v. *Ram Chariter*, A.I.R. 1941 Pat. 215 ; *Parshottamdas* v. *Kekhushru*, A.I.R. 1934 Bom. 6, referred.

A careful scrutiny of Article 178 of the Limitation Act with reference to what is contained in the third column thereof makes it clear that the application to which that article applies is not the application by the arbitrator or umpire but the application of the party making the reference to the arbitration on whom notice of the making of the award by the arbitrators has to be served. In so far as there is no time prescribed for an application by the arbitrators to file the award into Court either expressly or otherwise, Article 178 cannot apply to them ; and it applies only to applications made to the Court by the party who desires that the award should be filed. The mere fact that rules 1, 5 and 6 of the rules framed by the High Court under the Arbitration Act require that the filing of the award should be by means of an application or petition and that such application or petition is one made under the Arbitration Act would not by itself be sufficient to say that the application of the arbitrator to the Court to receive the award for the purpose of filing the same would be governed by Article 178 of the Limitation Act. The application contemplated in Article 178 cannot have any reference to the arbitrators as such but only to the parties to the reference.

Jayanti'lal v. *Chhaganlal*, I.L.R. (1946) Bom. 116 ; *Radhakrishan* v. *Madhokrishna*, A.I.R. 1952 All. 856, referred.

Article 178 of the Limitation Act does not apply to a case where the arbitrators take out an application to file the award in Court.

Per *Govinda Menon, J.*—On a plain construction of Article 178 of the Limitation Act along with its position in the third column of the First Schedule of the Limitation Act it is clear that the article provides for applications by the parties and not by the arbitrator himself. All provisions of the Limitation Act are intended to prescribe a period for taking steps by a party who has perforce to have recourse to a Court of law for getting relief. An arbitrator is not in that position. His situation is analogous to that of an adjudicator resembling a Court and unless the provisions of the Limitation Act expressly provide a period of limitation for any act to be performed by him it is unreasonable to impute any intention to the Legislature that an article of the Limitation Act should control his action. Article 178 of the Limitation Act is applicable only to parties and not to arbitrators. Rules 5 and 6 of the rules framed under the Indian Arbitration Act do not in any way attract the application of the said article to an arbitrator.

Keshrimull v. *Meghraj Basdeo*, A.I.R. 1942 Cal. 532 ; *John* v. *Soomar*, A.I.R. 1943 Sind 33 ; *Jaikishen* v. *Ramlal Gupta*, A.I.R. 1944 Lah. 398 ; *Dwaraka Das* v. *Peary Lal*, A.I.R. 1949 All. 234, referred.

Gendalal v. *Mathuradas*, A.I.R. 1941 Nag. 32, followed.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order, dated 21st December, 1950, of the Court of the Subordinate Judge of Salem and made in O.P. No. 13 of 1949.

D. R. Krishna Rao, *M. S. Ramachandra Rao* and *M. Krishna Rao* for Petitioner.

D. Ramaswami Aiyangar and *P. R. Varadarajan* for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—I am in agreement with my learned brother that the appeals and revision should be dismissed, but I wish to add a few words with regard to the scope and import of Article 178 of the Limitation Act. Before its amendment by the Arbitration Act, X of 1940, the first column of that Article was as follows :—

"Under the same Code for the filing in Court of an award in a suit made in any manner referred to arbitration by order of Court or of an award made in any manner referred to arbitration without the intervention of Court."

The period of limitation fixed was six months and the time from which the period began to run as mentioned in the third column was the date of the award. The form in which the Article now stands was the result of the amendment by which the period is cut down to ninety days and the *terminus a quo* is stated to be the date of service of the notice of the making of the award ; in column 1 the description of the application reads as :

"Under the Arbitration Act, 1940, for the filing in Court of an award".

The change with regard to the time from which the period begins to run is significant because originally when once the award is made, if a decree has to be passed in terms of the award, then the application has to be filed within six months thereof. The date of the award is considered to be of prime importance in the matter of filing the application. It seems to me what when the third column specifies the starting point of limitation as the date of service of the notice of the making of the award, this Article can be applied only to cases where the party applies to the Court for a decree in terms of the award. Otherwise, it is impossible to find any necessity for the change. It was clear that under the article as it stood originally, the period of limitation was prescribed for an application by the party. Difficulties had arisen on account of the starting point being the date of the award because there had been instances in which the award was signed on a particular date but pronounced later, in which case hardship was caused because the limitation began to run even from an anterior date to the time when the parties got notice of the award. If therefore the unamended article was restricted to cases where the party had to move the Court, there is no reason for imputing to the Legislature another intention especially when the language of the third column was altered to mitigate the hardship caused on the parties.

In this connection it would be profitable to refer to Article 158 which gives the period of limitation for setting aside an award. The first column is to the following effect :—

"Under the Arbitration Act, 1940, to set aside an award or to get an award remitted for reconsideration."

The period prescribed is thirty days from the date of service of the notice of filing of the award. There can be no doubt whatever that Article 158 is intended to provide a limitation for an application by the parties. It is therefore unnecessary to make a distinction between Article 158 and Article 178 as to the persons to whom it should apply. If Article 158 cannot apply to an arbitrator himself because it is not the business of the arbitrator either to have the award set aside or to get it remitted, I do not see any reason why Article 178 should be construed as fixing a time for the arbitrator to file the award in Court. Such being the case, on a plain construction of the two Articles along with their position in the third division of the First Schedule of the Limitation Act, I am of opinion that these two articles provide for applications by parties and not by the arbitrator himself.

But it is urged on behalf of the appellant that Rules 5 and 6 under the Indian Arbitration Act printed at page 244 Chapter XIV of the Civil Rules of Practice, Volume 1, contemplate an application by the arbitrator when he moves the Court for filing the award. The second step in the argument is : for filing an award by an arbitrator, if an application is a pre-requisite, then the third division of the first schedule dealing with limitation for applications must apply and such being the case, a request by the arbitrator to file his award in Court must be governed by Article 178. The foundation for this argument is contained in Rules 5 and 6. Rule 5 states that applications under section 14 of the Act shall be numbered and registered as suits. Rule 6 reads as follows :—

"When the award or a signed copy of it is filed in Court under section 14 (2) of the Act the Arbitrator shall send to the Court any depositions or documents which have been taken and proved

before him. He shall also file with the petition a copy of the notice given to the parties concerned and an affidavit of service of such notice."

Because in Rule 5 the word "application" and in rule 6 the word "petition" are used, it is contended that when an arbitrator puts into Court his award, he cannot do so except by means of an application or a petition and if that is so, necessarily the provisions of the third division of First Schedule are attracted. I am not inclined to accept this contention. Sub-section (1) of section 14 lays down that when the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award. This part of the section has therefore no application to Rule 5 framed under the Arbitration Act. It is sub-section (2) that needs consideration. A duty is cast upon the arbitrator at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court, upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, to cause the award or a signed copy of it together with any depositions and documents which may have been taken and proved before him to be filed in Court. Now, if the Legislature had contemplated that every arbitrator or umpire, after the conclusion of the arbitration and the making of the award, should intimate the fact of such making to the Court, then there is no necessity whatever for the elaborate provisions contained in this sub-section. It would have been enough if it was stated that on the making of the award the arbitrator or umpire shall file the award in Court together with any depositions and the documents which may have been taken. In that case, the third column of Article 178 would have been the date of making the award. No such provision has been enacted but the fulfilment of certain conditions are made necessary for the application of sub-section (2). As already stated they are, that a request should be made by a party to the arbitration agreement or person claiming under that party or a Court should direct the arbitrator. In all these cases, the arbitrator can insist upon the payment of fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award. It is then and then only that he need file the award in Court. If there is any duty cast upon the arbitrator or the umpire to file the award, then it is ununderstandable how he could do it in case the parties refused to pay him the charges and the fees. The provisions of sub-section (2) will be rendered impossible of working if Article 178 were to be applicable, for the party who does not want the arbitrator to file the award can desist from payment of the charges. The fact that Rules 5 and 6 speak of applications and petitions does not mean the attraction of Article 178, for an arbitrator or umpire, when he puts a paper in Court, has to intimate to the Court as to what he is doing. A letter by him or a stamped petition for an application would be necessary to inform the Court of what he is doing. Without such intimation the Court would not be in a position to know the nature of the records and papers which the arbitrator or the umpire puts before it; especially since the third column of Article 178 refers to the date of service of the notice of making the award, the reference can only be to an application by a person on whom the notice is, or has to be, served and not to a person whose statutory duty is to serve the notice. All provisions of limitation are intended to prescribe a period for taking steps by a party who has perforce to have recourse to a Court of law for getting relief. The arbitrator is not in that position. His situation is analogous to that of an adjudicator resembling a Court and unless the provisions of the Limitation Act expressly provide a period of limitation for any act to be performed by him, it is unreasonable to impute any intention to the Legislature that an article of the Limitation Act should control his actions. That Article 178 is applicable only to parties and not to arbitrators has been decided already by other High Courts and I would only refer to a few cases.

Gentle, J., as he then was in *Keshri Mull* v. *Megh Raj Basdeo*[1], considered the applicability of the amended Article 178 and held that the amendment made no

1. A.I.R. 1942 Cal. 532.

difference in its effect as the limitation provided by Article 178, just like other articles in the third division, is in respect of applications for acts to be done by parties and is not a period of limitation in respect of the act itself. Therefore it was open to the arbitrator to put into Court the award even after 30 days, though if the parties require the arbitrator to do so, the same must be done within 90 days. That being the case, Article 178 does not prevent the actual act of filing the award more than 90 days after notice of it had been given.

In a similar strain is a judgment of the Judicial Commissioner of Sind in *John* v. *Soomar*[1], where it is held that Article 178 applies only to cases wher a party to the arbitration proceedings applies to the Court for filing of an award under section 14 (2) or under the implied power given under section 38. It was further held there that though the Rules of the Sind Chief Court prescribe a form in which the application by the arbitrator for filing an award is to be made, still such a form cannot attract the application within the purview of Article 178. To some extent this answers the objection of the learned counsel for the appellant that Rules 5 and 6 of the Rules framed under the Arbitration Act make it obligatory that Article 178 should be applied to an arbitrator filing the award. Abdur Rahman, J., in *Jai Kishen* v. *Ram Lal Gupta*[2], was of the same opinion that Article 178 would be applicable only when the parties apply to the Court for filing in Court of the award. I may also refer to a Bench decision in *Dwarka Das* v. *Peary Lal*,[3] which is to the same effect. The learned Judges held that the act of the arbitrator in putting the award in Court is only a ministerial act and if he does not comply with the request of a party to file in Court the award, the party then has to make an application to the Court asking the Court to direct the arbitrator to file the award in Court. Such an application by a party is covered by Article 178.

A case which is directly in point is a judgment of Hidayatulla, J., as he then was, reported in *Gendalal* v. *Mathuradas*[4], where the learned Judge lays down that Article 178 does not apply to an application made by an arbitrator to file an award and that the rules made by the High Court requiring the arbitrator to file the award in a particular way are only intended to make it convenient to the arbitrator to forward the award but that such rules would not make it compulsory that the award should be filed within the period mentioned in Article 178. The learned Judge observes as follows :

> " It has been held in a series of cases that Article 178 of the Limitation Act as substituted by section 49 and schedule IV, Arbitration Act, 1940, does not apply to an arbitrator....It is true that the rules of this Court require the arbitrator to file the award in a particular way but those rules are merely to make it convenient to the arbitrators to forward their awards. The fact that an application is made is not sufficient to import Article 178, Limitation Act."

I am in entire agreement with the views expressed by the learned Judge. It is unnecessary to multiply decisions on this point, but the observations of the learned Judge in *Radha Kishen* v. *Madho Krishna*[5], may also be referred to. That the signing of the award is a mere formality is clear from a decision of this Court in *Johara Bibi* v. *Mohammad Sadak Thambi Marakayar*[6], I am therefore of opinion that there is no bar of limitation so far as the filing of the award into Court is concerned.

Basheer Ahmed Sayeed, J.—The Revision Petition No. 672 of 1952 arises out of the order passed by the learned Principal Subordinate Judge of Salem in O.P. No. 13 of 1949 filed by the petitioners under section 14, clause (2) of the Indian Arbitration Act. C.M.A. No. 214 of 1952 arises out of an order passed by the same learned Principal Subordinate Judge of Salem in I. A. No. 1059 of 1949 in O. P. No. 13 of 1949 preferred under section 33 of the Indian Arbitration Act by the 4th respondent in the Original Petition. C.M.A. No. 215 of 1952 arises out of a similar order of the learned Principal Subordinate Judge of Salem in I.A. No. 554 of 1949

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1. A.I.R. 1943 Sind 33.
2. A.I.R. 1944 Lah. 398.
3. 1949 All. 234.
4. A.I.R. 1951 Nag. 32.
5. A.I.R. 1952 All. 856.
6. (1951) 2 M.L.J. 56.

in O.P. No. 13 of 1949 filed under section 33 of the Indian Arbitration Act by the 3rd respondent in the said Original Petition.

The main order of the learned Principal Subordinate Judge was passed in O.P. No. 13 of 1949 and the reasons set out in the said order were adopted by the learned Subordinate Judge for disposing of the other two applications filed under section 33 of the Indian Arbitration Act. Since the Civil Revision Petition and the Civil Miscellaneous Appeals arise out of the same common order they have also been argued before us together and we propose to deal with them also in a common judgment.

The petitioners in O.P. No. 13 of 1949 on the file of the learned Principal Subordinate Judge of Salem were respectively the umpire and four arbitrators appointed by the respondents in the said Original Petition—all members of a joint Hindu family—requesting the umpire and the arbitrators under an agreement, dated 28th January, 1948, to divide their joint family properties and pronounce an award. Among the arbitrators, the 1st and the 2nd arbitrators are both advocates practising at Krishnagiri. The other three arbitrators were in no way connected with the joint family of the respondents.

Though the agreement referring the matter to arbitration was executed on 28th January, 1948, the arbitrators actually entered upon their duties on 12th February, 1948. The award by the arbitrators was pronounced on 28th May, 1948. It was engrossed on a stamp paper on 19th June, 1948 and after certain proceedings before the Registrar of Assurances, it was finally registered long after 19th June, 1948, but within the period prescribed by the Registration Act. It may be mentioned that the award pronounced by the arbitrators relates only to the division of the immoveable properties belonging to the joint family of the respondents, though the original reference included the division of moveables as well. Pending the arbitration, it transpires that the moveable properties were divided among the members without the intervention of the arbitrators, and that is why the arbitration confined itself to a division of the immoveable properties of the joint family.

After the award was registered the 1st respondent wrote a letter, Exhibit A-5, on 8th January, 1949, to the umpire to file the award in Court. Thereupon the arbitrators filed the Original Petition in O.P. No. 13 of 1949 under section 14, clause (2) of the Arbitration Act for filing in Court the award passed by them. The 3rd and the 4th respondents raised objections to the Original Petition and also filed respectively I.A. Nos. 554 of 1949 and 1059 of 1949 for setting aside the award. Objections to the Original Petition as well as the applications to set aside the award were all considered by the learned Principal Subordinate Judge, and by his orders in the Original Petition as well as the applications the learned Principal Subordinate Judge rejected the contentions of the respondents, allowed the application of the arbitrators and directed a decree to be passed in terms of the award with costs. Respondents 2 to 4 in the Original Petition have preferred C.R.P. No. 672 of 1952. Respondents 3 and 4 have preferred respectively C.M.As. Nos. 215 and 214 of 1952.

Respondents 1 to 4 constituted a joint Hindu family, the 1st respondent being the uncle and respondents 2 to 4 being his nephews. Respondents 2 and 3 are the sons of Ramaswami Rao, deceased, one of the brothers of the 1st respondent. Respondent 4 is also the son of another deceased brother of the 1st respondent. Having agreed to enter into a partition of the moveable and immoveable properties belonging to the joint family, all the four respondents executed an agreement on 28th January, 1948, in favour of the five arbitrators, the first of whom was appointed the umpire. The recitals of the agreement stated that the 1st respondent in the original petition was to get an exclusive 1/4th share for himself in his individual capacity in consideration of his having, by his own exertions, use of intelligence and ability, augmented the family assets and a further 1/4th share for himself, his sons and the family represented by him, that the 2nd respondent was to get a

1/8th share for himself and his family, that the 3rd respondent was to get a similar 1/8th share for himself and his family that the 4th respondent was to get a 1/4th share for himself and his family and that after the partition they should live as members of divided families. The said agreement further recited that the four respondents bound themselves to abide by the award passed unanimously or by a majority of the panchayatdars. It is stated that the immoveable properties to be divided among the respondents consisted of nanja and punja lands and houses worth over 2 lakhs of rupees. The moveable properties which also were originally intended to be divided through the intervention of the panchayat, but which were not so divided for the reason as already stated, were divided between the respondents amicably and they were taken out of the purview of the panchayat. It is also stated that the umpire was a longstanding advocate of the family of the respondents and that the respondents had complete confidence in him. Similarly, the 2nd of the panchayatdars was also an advocate of the family of the respondents in whom the respondents had confidence, and they are said to be acquainted fully with the affairs of the family and the details of properties owned by it. That appears to be the reason why apart from other things they were chosen along with three others to act as arbitrators.

Mr. D.R. Krishna Rao, appearing on behalf of the petitioners in the Civil Revision Petition and the appellants in the Civil Miscellaneous Appeals, has raised various grounds for setting aside the orders of the learned Principal Subordinate Judge in O.P. No. 13 of 1949 and I.A. Nos. 554 of 1949 and 1059 of 1949. His first point was, when the arbitrators approached the Court with the Original Petition for filing the award pronounced by them, there was no valid award in terms of which any decree could be passed. Against the validity of the award he pressed two or three points. The first was that the award was passed beyond the period of limitation prescribed under Rule 3 of the First Schedule to the Indian Arbitration Act. That rule is to the effect that the arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow. In this case the arbitration agreement was entered into on 28th January, 1948. The arbitrators entered upon their work on 12th February, 1948. On 13th February, 1948, the first respondent in the Original Petition, Narayana Rao, filed a list of immoveable properties which was accepted by the other respondents in the Original Petition as correct. On 25th May, 1948, Exhibit A-1 which is a list of the immoveable properties alloted to each of the respondents was prepared by the arbitrators.

On 28th May, 1948, Exhibit A-2 the award was pronounced. On the same day, Exhibit A-3 was drawn up, which contains the proceedings of the meetings held by the arbitrators. It was signed by respondents 1 and 4 and all the arbitrators. On 19th June, 1948, Exhibit A-4 the award was engrossed on stamp papers and was signed by all the arbitrators as also the respondents, and registered. This was the award that was actually filed in Court. If Exhibit A-2 is considered to be the award pronounced by the arbitrators, the contention of Mr. Krishna Rao that it is out of time, cannot have much force, for it will be within the four months' period prescribed under Rule 3 of the First Schedule to the Arbitration Act, calculated either from the date of the agreement of reference, namely 28th January, 1948, or from the date from which the arbitrators entered upon the reference, namely 12th February, 1948. But Mr. Krishna Rao would argue that Exhibit A-2 cannot be considered to be the award, for, in the first instance, according to him, it was not signed by one of the arbitrators, that it was, in the next instance, not stamped and not registered and therefore inadmissible in evidence. It is true that Exhibit A-2 is signed only by four of the arbitrators out of the five. Under section 14, clause (1) of the Arbitration Act, when the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award. But in view of the agreement in the reference to the arbitrators that the award

might be pronounced by all the arbitrators or by a majority of them, the failure of one of the arbitrators to sign the award does not seem to affect the validity of the award. It is not contended, however, by the learned counsel for the petitioners and appellants that the arbitrator, who did not sign the award, did not take part in the proceedings of the arbitrators, which resulted in the award. On the other hand, it is admitted by both parties that all the five arbitrators took part in the arbitration proceedings and the award is the result of their deliberations on the reference and the division of the immoveable properties sought by the respondents to the Original Petition. We do not think therefore there is much point in this technical objection by the learned counsel to the validity of the award. In *Johara Bibi* v. *Mohammad Sadak Thambi Marakayar*[1], it was held that the signing of the award was only a formality after it had been made and pronounced, and where an arbitrator who had taken part in the arbitration proceedings throughout along with the other arbitrators and had been a party to the decision and pronouncement of the award, refused to sign the award after it had been engrossed, it could not be a valid ground to set aside the award which had been validly given. We further held that what was crucial in the matter of arbitration proceedings was the making of the award and not the formality of signing the same after it had been made, and mere non-signing of the award by one of the arbitrators who had been throughout a party to the making of the award would not vitiate the award. The ruling in this decision, in our view, applies to the facts of the present case, and we do not think there is much point in the argument advanced by the learned counsel for the petitioners and appellants. Mr. Krishna Rao invited our attention to a decision in *Kuppuswamy Chetty* v. *Anantharamier*[2], where a Bench of this Court has held that:

> "Where the reference is to two or more named arbitrators all the arbitrators must act together. If one of them declines to act during the arbitration proceedings and the award is made by the remaining arbitrators after consideration of the whole matters in dispute the award is invalid and cannot stand even though there might be a provision in the arbitration agreement that the majority view should prevail."

We do not think that this decision, has any application to the facts of the present case, for, as we have already observed there is nothing on the record to show that any one of the arbitrators declined to act during the arbitration proceedings or that the award was made by the remaining arbitrators to the exclusion of one who declined to act.

Similarly in our view the non-stamping and the non-registration of the award, Exhibit A-2, pronounced on 28th May, 1948, is not of much consequence, in view of the fact that the award was actually engrossed on stamp papers on 19th June, 1948, as found in Exhibit A-4, which was finally registered, after passing through certain vicissitudes on 10th December, 1948. The contention of Mr. Krishna Rao in regard to Exhibit A-4 is that, if Exhibit A-4 is to be treated as the award, though stamped and registered, it is out of time for the reason that it was made clearly four months after the arbitrators entered on the reference. A reading of the recitals in Exhibit A-4 discloses that Exhibit A-4 was really not pronounced on the date on which it purports to be written. The recitals therein make it quite clear that the award was actually pronounced on 28th May, 1948 and that what is sought to be done under Exhibit A-4 was merely the transcription of Exhibit A-2 on stamp papers for the purpose of registration after obtaining the signatures of the parties to the award. For in the document dated 19th June, 1948, which, is Exhibit A-4, a clear reference is made only to the award pronounced on 28th May, 1948 and there is no reference to any other award. Much less does Exhibit A-4 purport to be an award pronounced on 19th June, 1948. All that the document, Exhibit A-4, indicates is that the award pronounced on 28th May, 1948, is written up on 19th June, 1948, on stamp papers purchased subsequent to the pronouncement of the award. In these circumstances, we do not think that Exhibit A-4 could be considered to be the award in this case. It is only a transcription of the real award, dated 28th May, 1948, for purposes of registration.

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1. (1951) 2 M.L.J. 56.

1. (1947) 1 M.L.J. 297; I.L.R. (1948) Mad. 83.

If Exhibit A-2 is to be considered to be the real award Mr. Krishna Rao urges that its non-registration seriously affects its validity and admissibility and has invited our attention to a series of decisions which required the award to be stamped and registered, when it deals with the rights of parties to immoveable properties. In *Dewaram Tewari* v. *Harinarain Tewari*[1], it has been held that under section 49, Registration Act, an award, which is compulsorily registrable, if not registered, cannot be received in evidence of any transaction affecting such property and that the Court cannot, therefore, enforce such an award in proceedings under the Arbitration Act. It was further held that an award made without the intervention of the Court was no longer exempt from registration and if it amounted to a non-testamentary instrument purporting to create, declare, assign, etc., any interest of the value of over Rs. 100 in immoveable property, it must be compulsorily registered under section 17 (2) of the Registration Act. To similar effect is the decision in *Yanadamma* v. *Venkateswaralu*[2]. There, a Bench of this Court has held that if the nature of the contract between the parties is such that it actually declares or creates or assigns any interest in immoveable property, the award just like any other contract having that effect, must be registered. So also in *Anandi Lal* v. *Keshavdeo*[3] Gentle, J., held at page 557 that, if an award purports to create, declare or extinguish the right, title or interest of the respective parties in the properties and falls within section 17 (1) (*b*) of the Registration Act, it should be registered. In *Jitendra* v. *Nagendra*[4], a Bench of the Calcutta High Court held that a private award falls within the class of documents specified in section 17 (1) (*b*) of the Registration Act and that by the amendment of section 17, Registration Act, by section 10 of Transfer of Property (Supplementary) Act, 1929, the exception contained in section 17 (2) (*vi*) having been removed, a private award if it satisfied the requirement as to value, is compulsorily registrable. But so far as the award in the present case is concerned, it cannot be argued that the award has not been stamped or registered, for in our opinion, the award pronounced on 28th May, 1948 and later engrossed on stamp papers has been actually registered as required by the Registration Act. Therefore, there is no more room for any contention that the award pronounced on 28th May, 1948, remained unregistered. As we have already observed what is contained in Exhibit A-4 and registered is none other than the award pronounced on 28th May, 1948.

As against this, Mr. Krishna Rao contended that after the award, as contained in Exhibit A-2, was pronounced by the arbitrators they became *functus officio* and the document, Exhibit A-4, which came into existence was without authority and jurisdiction and therefore was not a valid award to be filed in Court. The proposition that when once the award has been pronounced, the arbitrators, having done what they were called upon to do under the submission, become *functus officio* thereafter, in regard to the reference, cannot be disputed. But there remain certain ministerial acts such as the engrossing of the award on stamp paper and getting the award so engrossed registered, which acts cannot be put on the same footing as proceedings in connection with the pronouncement of the award. If the arbitrators are to be deemed to have become *functus officio* even with regard to the carrying out of such ministerial acts, then the resultant situation would be extremely untenable, as the arbitrators in such a case would be precluded from doing anything by way of even formal acts required in connection with the award pronounced. Even the question of giving notice to the parties of the award or the filing of the award in Court may also be said to be acts done at a stage when the arbitrators have become *functus officio*, if the argument is pushed to its logical conclusion. Therefore, the contention of Mr. Krishna Rao, the learned counsel for the appellants, that after the award was pronounced on 28th May, 1948, the arbitrators were not entitled to act in any manner even with reference to the formalities required in connection with the award pronounced, does not appeal to us.

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1. A.I.R. 1948 Pat. 320.
2. (1946) 2 M.L.J. 345 : A.I.R. 1947 Mad. 168.
3. A.I.R. 1949 Cal. 549 at 557.
4. A.I.R. 1934 Cal. 815.

Mr. Krishna Rao has relied upon a decision reported in *Chhati Lal* v. *Ram Chariter*[1], to show that once the arbitrators have issued an award they become *functus officio* and they have no jurisdiction subsequently to re-write the original award. The decision referred to above went more upon the fact that the award was not registered as required by section 23 of the Registration Act within the period of four months prescribed, than upon the fact that it was an award re-written. Having considered very carefully the observations made by Wort, J., in the case relied upon by the learned counsel for the appellants, we do not think that the copying of the original award on stamp paper with a view to engross the same can be considered to be a re-writing of the award. The reproduction of the original award pronounced on 28th May, 1948, cannot be considered to be an act to which the doctrine of *functus officio* could apply. If the award is re-written in the sense that there are substantial changes or material alterations made, then certainly the doctrine of *functus officio* would apply and the arbitrators would be precluded from resorting to such a re-writing of the award already pronounced. Mr. Krishna Rao, however, attempted to show that the award engrossed on 19th June, 1948, on stamp paper and registered subsequently was not a mere copy of the original award but that it was re-written in the sense that it contained material changes, corrections and alterations, and he desired us to compare the original award as contained in Exhibit A-2 and the registered award as contained in Exhibit A-4. On such comparison we did notice in Exhibit A-2 that there were alterations and interpolations and in several places the matter originally written had been struck out. Mr. Krishna Rao urged in view of these facts, that Exhibit A-4 must be deemed to be a re-writing of Exhibit A-2. But the comparison of the actual matter contained in Exhibit A-2 with all the alterations and changes made therein does not appear to any extent to be different from the matter contained in Exhibit A-4. The latter is a verbatim copy of the former. There is also nothing in the evidence to show that the alterations, changes and the striking out portions of Exhibit A-2 did not exist at the time when the award contained in Exhibit A-2 was pronounced and were introduced later. On the other hand, it seems to us that once the award was reduced to writing as in Exhibit A-2 these changes, alterations and striking out must have been resorted to before the award was actually pronounced. If there was evidence to show that these alterations came into existence at the time when Exhibit A-4 was being written up on stamp paper, there would have been some substance in the contention put forward by the learned counsel for the appellants. But that is not the case here by any means.

The learned counsel for the appellants also contended that there was difference between the schedules attached to Exhibit A-2 and those attached to Exhibit A-4, but he could not succeed in showing to us where exactly the difference existed. As has been held in *Parshottamdas* v. *Kekhushru*[2]:

> "Where an award is passed the writing out of it on a stamp paper which would be necessary before it could be filed in Court is merely a ministerial act."

We think that in this case what has happened is merely the writing out of the award pronounced on stamp paper and nothing more. If there was any substitution by the arbitrators of the award pronounced on 28th May, 1948, by another award either in whole or in part, then certainly the award which came into existence in substitution of the previous one would not be valid, for, the authority of the arbitrators ceases at the time when they make the award, and no action of the parties either by way of consent or otherwise could give the arbitrators power to make a second award and such a second award would be absolutely void. No such thing has happened in the case before us. We are unable to hold with the learned counsel for the appellants that the award now in question is void on any of the grounds so far urged by him.

Taking his stand on the view that Exhibit A-4 is the award, the learned counsel for the appellants urged that since the document bears the date 19th June, 1948,

1. A.I.R. 1941 Pat. 215. 2. A.I.R. 1934 Bom. 6.

it must be considered to have come into existence after the arbitrators had become *functus officio*, they not having pronounced their award within four months from the date on which they entered on the reference, namely 12th February, 1948. Mr. Krishna Rao relied upon a decision in *Ramnath* v. *N. S. & Co.*[1], in support of his contention. But as we have already stated that in this case Ex. A-4 was merely a copy of Exhibit A-2, which was the award pronounced on 28th May, 1948, that is within the four months' period from the date of the arbitrators entering upon the reference, we do not think that the decision relied upon by the learned counsel is of much assistance to him.

A more substantial point, however, was raised by the learned counsel for the appellants in regard to the validity of the award, when he urged that under Article 178 of the Limitation Act the award should have been filed within 90 days after notice was served on the parties of the making of the award. Article 178 occurring in the First Schedule, third division under the heading 'application' states that for an application under the Arbitration Act, 1940, for filing in Court of an award, the period of limitation is ninety days, which runs from the date of service of notice of the making of the award. The contention of Mr. Krishna Rao is that in this case, the award having been made on 28th May, 1948 and the same having been signed by all the parties on 19th June, 1948, it should be deemed that the parties had notice of the making of the award either on 28th May, 1948, or on 19th June, 1948. The award, therefore, according to him, having actually been filed in Court by the arbitrators on 10th January, 1949, when the O.P. No. 13 of 1949 itself was filed, is clearly beyond ninety days prescribed by Article 178 of the Limitation Act. Therefore, Mr. Krishna Rao argues that an award filed by the arbitrators or any other party beyond the period of limitation cannot form the basis of any decree, in so far as Article 178 of the Limitation Act in the First Schedule does not specify in terms the party by whom the application is to be made for the filing of the award in Court. The argument *prima facie* would appear to be plausible, but a careful scrutiny of the article with reference to what is contained in the third column thereof makes it clear that the application to which the article applies is not the application by arbitrators or umpire but the application of the party making the reference to arbitration, on whom notice of the making of the award by the arbitrators has to be served. For, if it were otherwise, the third column of the article would not have stated that the ninety days should be reckoned from the date of the service of notice of the making of the award. It must be borne in mind, that the provisions contained in the Arbitration Act do not lay down that it is compulsory or obligatory on the part of the arbitrators to file the award in Court. All that the Act makes incumbent upon the arbitrators is to pronounce the award and sign it and give notice of the making of the award to the parties to the reference. Under section 14 (1) after the award has been pronounced and after it has been signed and notice has been given in writing to the parties of the making and signing of the award and also the amount of fees and charges payable in respect of the arbitration and award there is nothing more which the arbitrators are called upon to do under the Arbitration Act. If the award is to be filed in Court, then, as provided for in section 14 (2) of the Arbitration Act, the arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court. In this case, one of the parties to the reference did give notice to the umpire to file the award into Court on 8th January, 1949, by Exhibit A-5. But this requisition is not an application to the Court that could be said to fall within the scope of Article 178 of the First Schedule to the Limitation Act. In fact, no limitation is prescribed for any of the parties requesting the umpire or the arbitrators to file the award into Court. Article 178 of the Limitation Act, in our view, applies only to applications made to the Court by the party who desires that the award should

1. A.I.R. 1953 Cal. 787.

be filed. In this case, it is not any one of the parties that has made the application to the Court but actually the application is by the umpire or arbitrators to file the award in Court. If the article were to apply to the application of the arbitrators, then the 3rd column to the article loses meaning and significance. It is not clear why the arbitrators should be burdened with the extra responsibility of filing the award within a specified period after giving notice of the making of the award. The arbitrators or umpire are by no means interested in taking the award to Court unless required to do so under section 14 (2) of the Arbitration Act. It stands to reason that it is the lookout of the parties to the reference to see that the award becomes a decree of Court and it is they who could apply for such a thing being done, and it is this which they have to do within the prescribed period. In so far as there is no time prescribed for an application by the arbitrators to file the award in Court, either expressly or otherwise, in our view, Article 178 cannot apply to the present application, namely O.P. No. 13 of 1949. It may be that the arbitrators have taken out this application at the instance of one of the parties but this fact will not make any difference to the application of the Article to the case. What is contemplated under Article 178 of the Limitation Act is not an application by the arbitrators, for, as we have already observed, there is no obligation on the arbitrators under the Arbitration Act to file the award in Court *suo motu* with or without any application. After they have pronounced the award they could do some ministerial acts to put the award in proper shape such as engrossing on stamp paper and issuing copies of the same to the parties concerned or sending it to the Registrar's office at the instance of the parties if the award requires registration. We do not, therefore, think that the present Original Petition can be said to be one which falls within the scope of Article 178 of the Limitation Act, and in our view the bar of limitation does not apply to the Original Petition filed by the arbitrators.

Learned counsel for the appellants invited our attention to Rules 1, 5 and 6 of the Rules framed by our High Court under the Arbitration Act. Rule 1 says that all applications shall be made by petitions. Rule 5 says that applications to be filed shall be numbered and registered as suits, and, Rule 6 says that the arbitrator shall file with the petition a copy of the notice, etc. It is the contention of the learned counsel for the appellants that these rules contemplate that while the umpire or arbitrators seek to file an award, whether it be *suo motu* or at the instance of the party to the reference, they should do so by means of an application or petition, and, that being so, it would be an application under the Arbitration Act and attract to itself the provisions of Article 178 of the Limitation Act. There can be little doubt that these rules framed by the High Court lay down the procedure to be followed in regard to applications made under the Arbitration Act. But, the mere fact that these rules required that the filing of the award should be by means of an application or petition and that such application or petition is one made under the Arbitration Act, would not by itself be sufficient to say that the application of the arbitrator to the Court to receive the award for the purpose of filing the same would be governed by Article 178 of the Limitation Act. If that were so, it is difficult to see what bearing the provision in column 3 set out against Article 178 has on such an application. Column 3 states that time shall be reckoned from the date of service of the notice of the making of the award on the parties. If it were really the intention of the legislature that a period of limitation should also operate in the case of awards to be filed by the umpire or arbitrator into Court, either *suo motu* or at the instance of parties, there is no reason why it should not have made it clear that the filing in Court of the award and the connected records, etc., by the arbitrator or umpire should be within 90 days from the making of the award or from the date of the notice of the making of the award to parties to the reference. The application contemplated, in our view, in Article 178 cannot have, therefore, any reference to the arbitrators as such but only to the parties to the reference, and, that being the case, the application or petition made by the arbitrator to the Court for receiving the award and the connected papers along with the award will not be a petition or application that the legislature had in view when it enacted Article 178 of the Limitation Act. As already observed, when the Arbitration Act itself has not made it the concern of the arbitrators to file the award unless section 14 (2)

of the Act is put into effect, it is too much to say that a mere application or petition that is presented to Court by the arbitrators, to receive the award which they are called upon to file in Court, either at the instance of the parties or under the directions of the Court, is an application which should be made within 90 days from the date of the service of the notice of the making of the award. Even as the making of the award and the service of the notice of such making has only reference to the parties, the application for the filing of the award in Court must also have a reference only to the parties who are interested in seeing that the award is brought to Court and is made a decree of the Court. We do not, therefore, think that there is much substance in the contention of the learned counsel for the appellants that these rules, because they state that the filing of the award should be by means of a petition or application, attract to itself the provisions of Article 178 when such an application or affidavit is made by the arbitrators who are not interested in the award any more after they have once pronounced and notified to the parties. It makes little difference to the arbitrators whether the award is filed within 90 days after notice to the parties or within three years after such notice to the parties. As soon as the award is pronounced and notice is issued to the parties to the reference, the arbitrators are no more concerned with the same, except when they are called upon either to do some ministerial act or to comply with orders of the Court or requests of parties to the reference in connection with the award.

How far Article 178 of the Limitation Act applies to the filing of the award in Court by the arbitrators or umpires has been considered in *Jayantilal* v. *Chhaganlal*[1]. Though the observations made by Chagla, J., as he then was, in that decision were with particular reference to the provisions of rules 373 and 375 of the Bombay High Court Rules framed under the Arbitration Act, we entirely agree with his view that Article 178 of the Limitation Act does not apply to the filing of the award by the arbitrator or umpire at the request of one of the parties to the arbitration agreement. We agree with him also when he says that it is only when a party to the arbitration agreement applies to the Court to direct the arbitrator to file the award and the arbitrator in pursuance of the order of the Court files the award that Article 178 applies, and, if the application to the Court by the party to the reference is beyond 90 days of the service of the notice on the party, then the application would be barred by limitation. To similar effect are the decisions in *Keshri Mull* v. *Megh Raj Basdeo*[2], *John* v. *Soomar*[3] and *Roberts* v. *Harrison*[4]. It has been held in all these cases referred to above that Article 178 applies only to the party to the reference who applies for the award to be brought into Court and not to the arbitrators or umpire who may comply either with the request of the party or with the direction of the Court.

In *Dwarka Das* v. *Pearay Lal*[5], a Bench of the Allahabad High Court has also held that Article 178 does not apply to the arbitrator himself filing the award at the instance of a party but that it applies only to an application to the Court made by a party to the reference for directing the arbitrator to file the award. At page 236 the Bench has observed as follows :

> " It is clear that a party must ask the arbitrator himself to file the award in Court. If the arbitrator agrees he will file it in Court. In that case the arbitrator need not make any application to the Court. He may merely file the award in Court and just intimate to the Court that he is doing so. Such an intimation will not be an application as contemplated under Article 178, Limitation Act, for filing the award in Court. The arbitrator merely does a ministerial act in filing the award in Court. If, however, the arbitrator does not comply with the request of a party to file the award in Court the party then has to make an application to the Court asking the Court to order the arbitrator to file the award in Court. Such an application by the party to the Court is covered by Article 178, Limitation Act. This a party can do within 90 days of the service of the notice given by the arbitrator that he has made an award. If the party fails to make such an application within the period prescribed his remedy is lost unless he can persuade the arbitrator to file the award in Court at his own instance."

In *Gendalal* v. *Mathuradas*[6], it has been held by Hidayatullah, J., confirming the earlier decisions of that Court referred to at page 33, column 1, of the report that Article 178 of the Limitation Act, as substituted by section 49 and Schedule IV

1. A.I.R. 1945 Bom. 417 : I.L.R. 1946 Bom. 116.
2. A.I.R. 1942 Cal. 542
3. A.I.R. 1943 Sind 33.
4. (1881) I.L.R. 7 Cal. 333.
5. A.I.R. 1949 All. 234.
6. A.I.R. 1951 Nag. 32.

of the Arbitration Act, 1940, does not apply to an arbitrator. The learned Judge also observed that the rules of the Nagpur High Court framed under the Arbitration Act required the arbitrator to file the award in a particular way, and, that those rules are merely to make it convenient to the arbitrators to forward their awards. The fact that an application is made is not sufficient to import Article 178, Limitation Act.

In *Radha Kishen* v. *Madho Krishna*[1], another Bench of the Allahabad High Court held that Article 178 of the Limitation Act applies to applications made under section 14 of the Act and not to those under section 17. The distinction was drawn that under section 14 the arbitrator is called upon to file the award whereas under section 17 the prayer is that the award may be made a rule of the Court and a judgment and decree may be pronounced accordingly.

We have no hesitation in agreeing respectfully with the decisions cited above, and, in our opinion, Article 178 of the Limitation Act does not apply to a case where the arbitrators take out an application to file the award in Court.

A further point was taken by the learned counsel for the appellants as to the validity of the award in that the arbitrators exceeded their jurisdiction when they gave a decision in regard to the immoveable properties which did not belong to the joint family but belonged to the wife of the first party to the reference. His point was that the arbitrators were not called upon under the terms of the reference to decide whether certain properties which have been excluded from the scope of the award belonged actually to Krishna Bai the wife of the first party to the reference and not to the joint family. It is true that this was not specifically referred to the arbitrators in the agreement of reference, but it cannot at the same time be contended with any force, that the arbitrators were going beyond their jurisdiction when they were deciding as to which properties belonged to the joint family and which did not. When the division was to be made of the joint family properties, it will be too much to say that if the arbitrators decided that certain properties did not belong to the joint family but belonged to an individual, they were acting beyond the scope of their jurisdiction as arbitrators called upon to make a division of the joint family properties. There is also the further point that cannot be lost sight of in this connection, for when the list of joint family properties was given by the first of the parties to the reference, *i.e.*, the husband of Krishna Bai, he has specifically stated in his statement before the arbitrators that certain properties which are said to be worth about a lakh of rupees did not belong to the joint family but belonged actually to Krishna Bai. This statement was endorsed and accepted to be correct by the appellants before us in this appeal. Though the statement of the appellants endorsing the statement of Narayana Rao, the first of the parties to the reference, has not been actually exhibited, still our attention has been called to that statement which was exhibited in a collateral criminal proceeding. However that be, we are not inclined to agree with the learned counsel for the appellants that the arbitrators were wrong in excluding from the scope of the award, the properties which were agreed by all the parties to the reference to belong to Krishna Bai. We, however, do not want to say further in this regard as it is not our desire to prejudice the rights of the appellants, if any, to take any proceedings to establish that the properties which have been excluded from the scope of the award as belonging to Krishna Bai, the wife of Narayana Rao, did not belong to her. Nor is it necessary for us at this stage to express any view with regard to the binding nature of Exhibit A-4 signed by all the parties to the reference, stamped and registered as a document having the effect of a partition amongst the members of the family. This point does not arise in the revision petition or the appeals that are now before us.

In the result we confirm the decree and judgment of the learned Subordinate Judge, and dismiss the Civil Revision Petition as well as the two appeals. In the circumstances of the case we do not think that we shall award costs to the respondents.

R.M. ——— *Appeals and Petition dismissed.*

[END OF VOLUME (1955) 2 M.L.J. (REPORTS.).]

1. A.I.R. 1952 All. 856.

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[1955]

(1955) 1 M.L.J.		68 L.W.		1955 M.W.N.		I.L.R. (1955) Mad.
1	=	—	=	1954 M.W.N. 697	=	—
5	=	—	=	—	=	—
8	=	67 L.W. 1067	=	1954 M W N. 902	=	1037
9	=	938	=	1955 M.W.N. 105	=	1035
10	=	67 L.W. 1081	=	77	=	—
12	=	67 L.W. 889	=	1954 M.W.N. 794	=	—
16	=	—	=	1954 M.W.N. 721	=	—
20	=	67 L.W. 928	=	1954 M.W.N. 860	=	883
22	=	—	=	—	=	—
23	=	67 L.W. 1061	=	1954 M.W.N. 878	=	1174
25	=	67 L.W. 420	=	—	=	—
46	=	875	=	1954 M.W.N. 855	=	948
51	=	67 L.W. 894	=	79	=	—
53	=	67 L.W. 895	=	1954M. W.N. 800(2)	=	—
54	=	—	=	1954 M.W.N. 934	=	—
55	=	90	=	1954 M.W.N. 900	=	—
58	=	67 L.W. 1033	=	50	=	1102
60	=	—	=	1954 M.W.N. 526	=	—
63	=	—	=	1954 M.W.N. 460	=	—
65	=	67 L.W. 940	=	—	=	—
66	=	—	=	—	=	—
70	=	—	=	1954 M.W.N. 1015	=	—
71	=	—	=	1954 M.W.N. 942	=	—
72	=	943	=	1954 M.W.N. 974	=	1122
79	=	67 L.W. 1192	=	—	=	—
83	=	—	=	—	=	—
84	=	86	=	—	=	1115
87	=	67 L.W. 1005	=	1954 M.W.N. 885	=	832
104	=	67 L.W. 804	=	—	=	—
105	=	67 L.W. 1074	=	1954 M.W.N. 903	=	1062
113	=	67 L.W. 991	=	—	=	—
114	=	—	=	—	=	—
118	=	—	=	—	=	—
120	=	67 L.W. 965	=	—	=	—
145	=	67 L.W. 992	=	—	=	—
148	=	67 L.W. 997 (2)	=	—	=	—
150	=	228	=	102	=	—
155	=	—	=	90	=	—
157	=	—	=	—	=	—
165	=	—	=	—	=	—
169	=	900	=	57	=	825
172	=	939	=	37	=	—
177	=	—	=	—	=	—
178	=	67 L.W. 801	=	1954 M.W.N. 861	=	—
181	=	—	=	—	=	1239
186	=	—	=	—	=	—
187	=	—	=	1954 M.W.N. 933 (2)	=	—
188	=	—	=	1954 M.W.N. 933 (1)	=	—
189	=	132	=	1954 M.W.N. 960	=	1042
201	=	—	=	1954 M.W.N. 874	=	—
205	=	—	=	1954 M.W.N. 950	=	1084
215	=	124	=	125	=	—
220	=	56	=	87	=	1188
221	=	—	=	60	=	—
223	=	—	=	61	=	—
224	=	—	=	63	=	—
227	=	92	=	—	=	—
229	=	66	=	107 (1)	=	—
230	=	—	=	1954 M.W.N. 996	=	—

(1935) 1 M.L.J.		68 L.W.		1955 M.W.N.		I.L.R. (1955) Mad.
231	=	67 L.W. 1217	=	—	=	—
234	=	67 L.W. 1216	=	49	=	—
235	=	21	=	—	=	—
240	=	58	=	372	=	1201
243	=	26	=	—	=	—
245	=	55	=	45	=	—
247 (F.B.)	=	107 (F.B.)	=	—	=	339
255	=	—	=	171	=	—
258	=	164	=	176	=	—
260	=	156	=	204	=	—
261	=	—	=	349	=	—
262	=	221	=	244	=	1307
264	=	67 L.W. 1068	=	—	=	1074
269	=	317	=	133	=	—
279	=	252	=	129	=	1191
285	=	—	=	65	=	—
286	=	—	=	62	=	—
287	=	244	=	97	=	—
293	=	—	=	81	=	—
299	=	951	=	—	=	1213
306	=	293	=	285	=	—
308	=	150	=	345 (1)	=	—
309	=	227	=	486	=	1230
310	=	144	=	212	=	—
312	=	99	=	41	=	1167
316	=	868	=	91	=	—
322	=	—	=	—	=	744
337	=	181	=	198	=	1293
345	=	151	=	184	=	—
346	=	67 L.W. 932	=	—	=	—
355	=	28	=	—	=	—
363	=	—	=	73	=	—
366	=	—	=	243	=	—
368	=	250	=	245	=	—
370	=	174	=	205	=	1179
375 (F.B.)	=	—	=	—	=	1 (F.B.)
394	=	189	=	268	=	—
397	=	243	=	375	=	—
399	=	157	=	—	=	—
401	=	—	=	369	=	—
406	=	364	=	—	=	—
409	=	160	=	142	=	—
414	=	166	=	118	=	1278
422	=	36	=	—	=	1248
439	=	—	=	—	=	1151
448	=	180	=	175	=	—
449	=	219	=	345 (2)	=	—
452	=	222	=	281	=	—
454	=	224	=	296	=	—
457	=	146	=	185	=	—
459	=	97	=	88	=	—
461	=	289	=	229	=	—
464	=	—	=	173	=	—
467	=	152	=	209	=	—
471	=	—	=	247	=	1227
473	=	—	=	13	=	—
485	=	67 L.W. 872	=	—	=	—
488	=	368	=	—	=	—
492	=	394	=	—	=	—
494	=	406	=	221	=	—
503	=	67 L.W. 830	=	—	=	—
510	=	67 L.W. 789	=	—	=	—
516	=	67 L.W. 821	=	—	=	—
523	=	147	=	169	=	—
525	=	257	=	272 (2)	=	—
527	=	281	=	278	=	—
531	=	—	=	298	=	—
534	=	402	=	—	=	—
538	=	—	=	1037	=	—
542	=	489	=	—	=	—

(1955) 2 M.L.J.	68 L.W.	1955 M.W.N.	I.L.R. (1955) Mad.
1	—	253	—
13	—	300	—
14	—	214	—
16	—	272 (1)	—
17	327	286	1207
20	237	274	—
24	968	271	1224
26	—	—	87
28	475	444	—
30	477	379	—
34	—	312	—
36	192	350	—
43 (F.B.)	199 (F.B.)	177 (F.B.)	688 (F.B.)
49 (F.B.)	206 (F.B.)	186 (F.B.)	—
63 (F.B.)	923 (F.B.)	—	579 (F.B.)
79	608	—	325
81	—	—	184
99	330	—	289
106	426	469	I.L.R. (1956) Mad. 161
112	462	—	—
116	419	639	—
121	—	366	—
124	393	490	—
125	—	—	—
130	391	464	—
132	—	662	—
134	235	295	—
136	—	473	—
141	—	—	528
152	482	520	—
159	—	266	—
161	415	376	—
163 (F.B.)	542 (F.B.)	530 (F.B.)	1027 (F.B.)
165	418	—	—
166 (F.B.)	534 (F.B.)	532 (F.B.)	1133 (F.B.)
168	524	527	—
172	544	526	—
173	546	534	—
178	—	447	—
180	—	—	—
184	500	544	—
188	451	385	—
199	—	301	—
205	—	—	—
206	655	736	—
209	360	—	—
211	424	378	—
213	—	306	—
215 (F.B.)	527 (F.B.)	547 (F.B.)	1032 (F.B.)
216	633	961	—
224	—	497	497
227	—	493	—
238	435	512	—
232	441	502	—
240	—	395	—
252	518	728	—
254 (F.B.)	537 (F.B.)	572 (F.B.)	1145 (F.B.)
259 (F.B.)	528 (F.B.)	—	1138 (F.B.)
266	621	644	—
267	737 (1)	660	—
268	737 (2)	669	—
269	—	—	—
271	—	—	—
276	573	778	—
282	520	541	—
285	565	559	—
293	432	—	—
296	376	—	—
302	349	—	—
313	474	615 (1)	—
314	—	902	—

(1955) 2 M.L.J.	68 L.W.	1955 M.W.N.	I.L.R. (1955) Mad.
315	—	342 (2)	—
316	—	249	—
319	471	—	—
323	578	619	—
326	668	746	—
331	—	383	—
333	550	—	—
336	—	568	—
337	—	—	—
339	588	—	—
357	—	664	—
359	515	538	—
363	641	—	—
369	583	615 (2)	—
376	—	637	—
380	581	—	—
382	—	605 (1)	—
383	—	605 (2)	—
385	653	732	—
388	664	648	—
393	—	—	702
401	67 L.W. 541	—	786
405	—	—	—
408	659	—	—
414	—	—	—
423	—	489	—
425	—	344	—
426	703	652	—
433	763	718	—
435	67 L.W. 605	720	149
441	720	—	—
454	616	727 (2)	—
456	—	491	—
457	622	658	—
460	712	771	—
467	—	727 (1)	—
468	738	—	—
469	614	661	—
471	—	609	—
472	561	666	—
477	812	—	—
485	674	—	—
494 (F.B.)	—	709 (F.B.)	—
505	—	—	613
514	—	—	—
518	467	—	—
522	695	—	—
526	—	—	—
535	624	800	—
541	699	768	—
545	—	569	—
555	—	566	—
556	686	1030	—
564	—	—	—
569	—	721	—
573	—	724	—
576	—	823	—
577	847	—	—
579	—	—	—
583	—	—	—
584	—	—	—
585	735	611	—
587	909	—	176
590	882	—	798
595	961	—	—
602	832	—	—
612	777	865	—
618	755	750	—
625	765	739	—
628	822	894	—
629	—	741	—

(1955) 2 M.L.J.		68 L.W.		1955 M.W.N.		I.L.R. (1955) Mad.
635 (F.B.)	=	69 L.W. 18 (F.B.)	=	980 (F.B.)	=	—
638	=	69 L.W. 21	=	—	=	—
640	=	826	=	903	=	—
644	=	809	=	820	=	—
646	=	260 (1)	=	252 (1)	=	—
647	=	128	=	—	=	721
651	=	236	=	252 (2)	=	—
653	=	610	=	829	=	—
657	=	958	=	—	=	—
659	=	—	=	949	=	—
660	=	807	=	819	=	—
662	=	960	=	945	=	—
663	=	—	=	—	=	—
665	=	852	=	887	=	—
671	=	831	=	—	=	—
672	=	795	=	761	=	—
680	=	103	=	—	=	981
684	=	823	=	—	=	—
687	=	—	=	—	=	—
693	=	—	=	832	=	—

I.L R. (1955) Mad.		M.L. J.		
1 (F.B.)	=	(1955)	1	375
40	=	(1954)	2	195
45	=	(1954)	1	384
53	=	(1954)	2	151
61	=	(1954)	2	138
69	=	(1954)	2	92
73	=	(1954)	2	134
80	=	(1954)	2	273
87	=	(1955)	2	26
92	=	(1955)	2	166
116 (F.B.)	=	(1955)	2	731
128	=	(1955)	2	743
149	=	(1955)	2	435
159	=	(1954)	2	93
176	=	(1955)	2	587
184	=	(1955)	2	81
227	=	(1954)	2	83
233	=	(1954)	2	636
241	=	(1953)	2	574
247	=	(1954)	1	654
274	=	..	—	..
285	=	(1954)	1	32
302	=	(1953)	2	372
325	=	(1955)	2	79
329	=	..	..	..
339 (F.B.)	=	(1955)	1	247
356	=	(1953)	2	699
389	=	(1954)	1	183
398	=	(1953)	1	476
411	=	(1954)	1	560
425	=	(1953)	2	17
445	=	(1954)	1	272
457	=	(1953)	2	839
460 (F.B.)	=	(1955)	2	49
489	=	(1954)	1	390
498	=	(1954)	1	462
511	=	(1954)	2	44
519	=	(1954)	1	530
528	=	(1955)	2	141
552	=	(1954)	2	454
562	=	(1954)	1	294
570	=	(1954)	1	537
579 (F.B.)	=	(1955)	2	63
613	=	(1955)	2	505
635	=	(1954)	1	468
648	=	(1954)	2	319
654	=	(1954)	1	578

I.L.R. (1955) Mad.		M.L.J.		
660	=	(1954)	1	551
664	=	(1954)	1	554
670	=	(1954)	2	148
672	=	(1954)	2	234
675	=	(1954)	2	86
680	=	(1954)	2	308
688 (F.B.)	=	(1955)	2	43
702	=	(1955)	2	393
721	=	(1955)	2	647
732	=	(1954)	2	573
744	=	(1955)	1	322
774	=	(1954)	2	282
781	=	(1954)	2	314
786	=	(1955)	2	408
795	=	(1954)	1	286
798	=	(1955)	2	590
810	=	(1954)	2	400
821	=	(1954)	2	550
825	=	(1955)	1	169
832	=	(1955)	1	87
870	=	(1954)	2	595
883	=	(1955)	1	20
887	=	(1954)	2	475
912	=	(1955)	1	316
927	=	(1955)	1	494
948	=	(1955)	1	46
960	=	..	..	..
972	=	(1956)	1	93
981	=	(1955)	2	680
990	=	..	..	..
999	=	(1954)	2	683
1027 (F.B.)	=	(1955)	2	163
1032 (F.B.)	=	(1955)	2	215
1033	=	(1954)	2	473
1035	=	(1955)	1	9
1037	=	(1955)	1	8
1039	=	(1954)	2	755
1042	=	(1955)	1	189
1062	=	(1955)	1	105
1074	=	(1955)	1	264
1084	=	(1955)	1	205
1102	=	(1955)	1	58
1106	=	(1955)	1	172
1115	=	(1955)	1	84
1122	=	(1955)	1	72
1133 (F.B.)	=	(1955)	2	166
1138 (F.B.)	=	(1955)	2	259

I.L.R. (1955) Mad.		M.L.J.		
1145 (F.B.)	=	(1955)	2	254
1151	=	(1955)	1	439
1167	=	(1955)	1	312
1174	=	(1955)	1	23
1179	=	(1955)	1	370
1188	=	(1955)	1	220
1191	=	(1955)	1	279
1201	=	(1955)	2	240
1207	=	(1955)	2	17
1213	=	(1955)	1	299
1224	=	(1955)	2	24
1227	=	(1955)	1	471
1230	=	(1955)	2	309
1232	=	..	..	..
1239	=	(1955)	1	181
1248	=	(1955)	1	422
1278	=	(1955)	1	414
1293	=	(1955)	1	337
1307	—	(1955)	1	262
1310	=	(1956)	1	223

1955 M.W.N.		M.L.J.		
1 (F.B.)	=	(1954)	2	743
9	=	..	..	..
12	=	..	..	..
13	=	(1955)	1	473
24	=	..	..	..
25	=	..	..	..
26	=	..	..	..
28	=	..	..	..
29 (S.C.)	=	..	..	..
34 (S.C.)	=	(1954)	2	720
37	=	(1955)	1	172
41	=	(1955)	1	312
45	=	(1955)	1	245
46	=	(1954)	2	768
49	=	(1955)	1	234
50	=	(1955)	1	58
52	=	(1954)	2	696
57	=	(1955)	1	169
59	=	(1955)	1	227
60	=	(1955)	1	221
61	=	(1955)	1	223
62	=	(1955)	1	286
63	=	(1955)	1	224
65	=	(1955)	1	285
66	=	(1955)	1	264
71	=	..	..	..
73	=	(1955)	1	363
75	=	..	..	..
77	=	(1955)	1	10
79	=	(1955)	1	51
80	=	..	..	..
81	=	(1955)	1	293
87	=	(1955)	1	220
88	=	(1955)	1	459
90	=	(1955)	1	155
91	=	(1955)	1	316
97	=	(1955)	1	287
102	=	(1955)	1	150
105	=	(1955)	1	9
106	=	..	..	..
107 (1)	=	(1955)	1	229
107 (2) (S.C.)	=	(1955)	1	113
111 (F.B.)	=	(1955)	1	247
118	=	(1955)	1	414
125	=	(1955)	1	215
129	=	(1955)	1	279
133	=	(1955)	1	269
142	=	(1955)	1	409

1955 M.W.N.		M.L.J.		
146 (S.C.) or 149		(1955)	1	66
161 (S.C.)	=	..	..	..
167	=	..	..	..
169	=	(1955)	1	523
171	=	(1955)	1	255
173	=	(1955)	1	464
175	=	(1955)	1	448
176	=	(1955)	1	258
177 (F.B.)	=	(1955)	2	43
184	=	(1955)	1	345
185	=	(1955)	1	457
186 (F.B.)	=	(1955)	2	49
198	=	(1955)	1	337
204	=	(1955)	1	260
205	=	(1955)	1	370
209 (1)	=	(1955)	1	467
209 (2)	=	..	..	..
212	=	(1955)	1	310
214	=	(1955)	2	14
216	=	..	..	..
221	=	(1955)	1	494
229	=	(1955)	1	461
232 (S.C.)	=	(1955)	1	173
240 (S.C.)	=	(1955)	1	83
243	=	(1955)	1	366
244	=	(1955)	1	262
245	=	(1955)	1	368
247	=	(1955)	1	471
248	=	..	..	..
249	=	(1955)	2	316
252 (1)	=	(1955)	2	646
252 (2)	=	(1955)	2	651
253	=	(1955)	2	1
264	=	..	..	..
266	=	(1955)	2	159
267	=	..	..	..
268	=	(1955)	1	394
271	=	(1955)	2	24
272 (1)	=	(1955)	2	16
272 (2)	=	(1955)	1	525
274	=	(1955)	2	20
278	=	(1955)	1	527
281	=	(1955)	1	452
283	=	..	..	..
285	=	(1955)	1	306
286	=	(1955)	2	17
289	=	(1955)	2	99
295	=	(1955)	2	134
296	=	(1955)	1	454
298	=	(1955)	1	531
300	=	(1955)	2	13
301	=	(1955)	2	199
306	=	(1955)	2	213
309	=	..	..	..
312	=	(1955)	2	34
313 (S.C.)	=	(1955)	1	105
317 (S.C.)	=	..	..	..
322 (S.C.)	=	(1955)	1	198
326 (S.C.)	=	(1955)	1	141
331 (S.C.)	=	(1955)	1	203
336	=	..	..	..
342 (1)	=	..	..	..
342 (2)	=	(1955)	1	315
344	=	(1955)	1	425
345 (1)	=	(1955)	1	308
345 (2)	=	(1955)	1	449
347	=	..	..	..
349	=	(1955)	1	261
350	=	(1955)	2	36
363	=	..	..	..

1955 M.W.N.		M.L.J.		
366	=	(1955)	2	121
369	=	(1955)	1	401
372	=	(1955)	1	240
375	=	(1955)	1	397
376	=	(1955)	2	161
378	=	(1955)	1	211
379	=	(1955)	2	30
383	=	(1955)	2	331
385	=	(1955)	2	188
395	=	(1955)	2	240
406 (S.C.)	=	..	..	..
416 (S.C.)	=	(1955)	1	183
421 (S.C.)	=	(1955)	1	220
444	=	(1955)	2	28
446	=	..	..	..
447	=	(1955)	2	178
449 (S.C.)	=	(1955)	2	157
462	=	..	..	..
463	=	..	..	..
464	=	(1955)	2	130
465	=	..	..	..
467	=	(1955)	2	209
469	=	(1955)	2	106
473	=	(1955)	2	136
478 (S.C.)	=	(1955)	1	188
485	=	..	..	..
486	=	(1955)	1	309
487	=	..	..	..
489	=	(1955)	2	423
490	=	(1955)	2	124
491	=	(1955)	2	456
492	=	..	..	..
493	=	(1955)	2	227
494	=	..	..	..
495	=	..	..	..
497	=	(1955)	2	224
499	=	..	..	..
502	=	(1955)	2	232
509	=	..	..	..
512	=	(1955)	2	228
515	=	..	..	..
518	=	(1955)	2	293
520	=	(1955)	2	152
526	=	(1955)	2	172
527	=	(1955)	2	168
530 (F.B.)	=	(1955)	2	163
532 (F.B.)	=	(1955)	2	166
534	=	(1955)	2	173
538	=	(1955)	2	359
541	=	(1955)	2	282
544	=	(1955)	2	184
547 (F.B.)	=	(1955)	2	215
548 (F.B.)	=	(1955)	2	259
553	=	..	..	..
559	=	(1955)	2	284
566	=	(1955)	2	555
567	=	..	..	..
568	=	(1955)	2	336
569	=	(1955)	2	545
572 (F.B.)	=	(1955)	2	254
576	=	(1955)	2	333
578	=	(1955)	2	380
580	=	..	..	..
582	=	..	..	..
583	=	(1955)	2	414
591	=	..	..	..
593	=	(1955)	2	485
601	=	(1956)	1	78
605 (1)	=	(1955)	2	382
605 (2)	=	(1955)	2	383
607	=	..	..	..
609	=	(1955)	2	471
610	=	(1956)	1	51
611	=	(1955)	2	585
613	=	..	..	..
615 (1)	=	(1955)	2	313
615 (2)	=	(1955)	2	369
619	=	(1955)	2	323
622	=	..	..	..
625	=	..	..	..
629	=	..	..	..
630	=	..	..	..
631	=	..	..	..
633	=	..	..	..
634	=	..	..	..
635	=	..	..	..
637	=	(1955)	2	376
639	=	(1955)	2	116
644	=	(1955)	2	266
645	=	(1955)	2	522
648	=	(1955)	2	388
652	=	(1955)	2	426
658	=	(1955)	2	457
660	=	(1955)	2	267
661	=	(1955)	2	469
662	=	(1955)	2	132
664	=	(1955)	2	357
666	=	(1955)	2	472
669	=	(1955)	2	268
670	=	..	..	..
672 (S.C.)	=	..	..	..
675 (S.C.)	=	(1955)	2	99
705 (S.C.)	=	..	..	..
707 (S.C.)	=	(1955)	2	96
709 (F.B.)	=	(1955)	2	494
718	=	(1955)	2	433
720	=	(1955)	2	440
721	=	(1955)	2	569
724	=	(1955)	2	573
727 (1)	=	(1955)	2	467
727 (2)	=	(1955)	2	454
728	=	(1955)	2	252
730	=	..	..	..
732	=	(1955)	2	385
734	=	..	..	..
736	=	(1955)	2	206
739	=	(1955)	2	625
741	=	(1955)	2	629
746	=	(1955)	2	326
750	=	(1955)	2	618
757	=	(1956)	1	40
761	=	(1955)	2	672
768	=	(1955)	2	541
771	=	(1955)	2	460
778	=	(1955)	2	276
782 (S.C.)	=	(1955)	2	23
790 (S.C.)	=	(1955)	2	49
799	=	..	..	..
800	=	(1955)	2	535
805 (S.C.)	=	(1955)	2	68
812 (S.C.)	=	(1955)	2	31
817	=	..	..	..
819	=	(1955)	2	660
820	=	(1955)	2	644
822	..	..	..	..
823	=	(1955)	2	576
824	=	(1955)	2	468
825	=	..	..	..
826	=	..	..	..
829	=	(1955)	2	653
832	=	(1955)	2	693
844 (S.C.)	=	(1955)	2	13

1955 M.W.N.		M.L.J.		
852	=	(1955)	2	84
860	=	..	..	..
862	=	(1956)	1	1
863	=	..	..	..
865	=	(1955)	2	612
870	=	(1955)	2	564
874	=	..	..	..
877	=	..	..	..
880	=	(1956)	1	72
883	=	(1956)	1	47
886	=	(1956)	1	34
887	=	(1955)	2	665
891	=	..	..	..
894	=	(1955)	2	628
895	=	..	..	..
897	=	..	..	..
900	=	..	..	..
902	=	(1955)	2	314
903	=	(1955)	2	640
907	=	(1956)	1	36
910	=	(1956)	1	179
915	=	(1956)	1	52
919 (S.C.)	=	(1955)	2	1
930 (S.C.)	=	(1955)	2	136
935 (S.C.)	=	(1955)	2	76
941 (S.C.)	=	(1955)	2	662
945	=	(1955)	2	36
946	=	..	..	..
947	=	..	..	..
949	=	(1955)	2	659
951	=	..	..	..
953	=	..	..	..
955	=	..	..	..
956	=	..	..	..
960	=	(1956)	1	210
961	=	(1955)	2	216
967	=	..	..	..
973 (S.C.)	=	(1955)	2	59
980 (F.B.)	=	(1955)	2	635
983	=	..	..	..
984	=	(1956)	1	184
989	=	(1956)	1	75
991 (S.C.)	=	(1955)	2	154
1000	=	..	..	..
1004 (S.C.)	=	(1955)	2	41
1011	=	..	..	..
1015 (F.B.)	=	(1956)	1	5
1030	=	(1955)	2	556
1037	=	(1955)	1	538
1041	=	(1956)	1	204
1042 (1)	=	(1956)	1	151
1042 (2)	=	(1956)	1	206
1046	=	..	..	..
1049	=	..	..	..
1051	=	(1955)	1	205

68 L.W.		M.L.J.		
1 (S.C.)	=	(1954)	2	717
3 (S.C.)	=	(1954)	2	720
8 (S.C.)	=	(1954)	2	622
21	=	(1955)	1	235
26	=	(1955)	1	243
28	=	(1955)	1	355
36	=	(1955)	1	422
54	=	..	..	..
55	=	(1955)	1	245
56	=	(1955)	1	220
58	=	(1955)	1	240
61	=	..	..	..
65	=	..	..	..
70	=	..	..	..
82	=	..	..	..
86	=	(1955)	1	84
90	=	(1955)	1	55
92	=	(1955)	1	227
94	=	..	..	..
97	=	(1955)	1	459
99	=	(1955)	1	312
103	=	(1955)	2	680
107 (F.B.)	=	(1955)	1	247
115 (F.B.)	=	(1954)	2	743
124	=	(1955)	1	215
128	=	(1955)	2	647
132	=	(1955)	1	189
144	=	(1955)	1	310
147	=	(1955)	1	523
150	=	(1955)	1	308
151	=	(1955)	1	345
152	=	(1955)	1	467
156	=	(1955)	1	260
157	=	(1955)	1	399
160	=	(1955)	1	409
164	=	(1955)	1	258
166	=	(1955)	1	414
174	=	(1955)	1	370
180	=	(1955)	1	448
181	=	(1955)	1	337
189	=	(1955)	1	394
192	=	(1955)	2	36
199 (F.B.)	=	(1955)	2	43
206 (F.B.)	=	(1955)	2	49
219	=	(1955)	1	449
221	=	(1955)	1	262
222	=	(1955)	1	452
224	=	(1955)	1	454
227	=	(1955)	1	309
228	=	(1955)	1	150
233	=	..	..	..
235	=	(1955)	2	134
236	=	(1955)	2	651
237	=	(1955)	2	20
241	=	..	..	..
243	=	(1955)	1	397
244	=	(1955)	1	287
250	=	(1955)	1	368
252	=	(1955)	1	279
257	=	(1955)	1	525
260 (1)	=	(1955)	2	646
260 (2)	=	..		..
281	=	(1955)	2	527
285	=	..		..
286	=	..		..
289	=	(1955)	2	461
293	=	(1955)	2	306
295	=	..		..
317	=	(1955)	2	269
327	=	(1955)	2	17
330	=	(1955)	2	99
337	=	..		..
341	=	..		..
349	=	(1955)	2	302
360	=	(1955)	2	209
362	=	..		..
363	=	..		..
364	=	(1955)	1	406
368	=	(1955)	1	488
371	=	..		..
376	=	(1955)	2	296
383	=	..		..
385	=	..		..
390	=	..		..

68 L.W.		M.L.J.		
391	=	(1955)	2	130
393	=	(1955)	2	124
394	=	(1955)	1	492
397	=	..		..
399	=	..		..
402	=	(1955)	1	534
406	=	(1955)	1	494
415	=	(1955)	2	161
417	=	..		..
418	=	(1955)	2	165
419	=	(1955)	2	116
424	=	(1955)	2	211
426	=	(1955)	2	106
432	=	(1955)	2	293
435	=	(1955)	2	228
439	=	(1955)	2	224
441	=	(1955)	2	232
451	=	(1955)	2	188
462	=	(1955)	2	112
467	=	(1955)	2	518
471	=	(1955)	2	319
474	=	(1955)	2	313
475	=	(1955)	2	28
477	=	(1955)	2	30
482	=	(1955)	2	152
489	=	(1955)	1	542
496	=	..		..
500	=	(1955)	2	184
504	=	..		..
508	=	..		..
515	=	(1955)	2	359
518	=	(1955)	2	252
520	=	(1955)	2	282
524	=	(1955)	2	168
527 (F.B.)	=	(1955)	2	215
528 (F.B.)	=	(1955)	2	259
534 (F.B.)	=	(1955)	2	166
537 (F.B.)	=	(1955)	2	254
542 (F.B.)	=	(1955)	2	163
544	=	(1955)	2	172
546	=	(1955)	2	173
550	=	(1955)	2	333
553	=	..		..
554	=	..		..
555	=	..		..
558	=	..		..
561	=	(1955)	2	472
565	=	(1955)	2	285
573	=	(1955)	2	276
578	=	(1955)	2	323
581	=	(1955)	2	380
583	=	(1955)	2	369
588	=	(1955)	2	339
608	=	(1955)	2	79
610	=	(1955)	2	653
614	=	(1955)	2	469
616	=	(1955)	2	454
617	=	..		..
621	=	(1955)	2	266
622	=	(1955)	2	457
624	=	(1955)	2	535
630	=	..		..
633	=	(1955)	2	216
641	=	(1955)	2	363
649	=	..		..
653	=	(1955)	2	385
655	=	(1955)	2	206

68 L.W.		M.L.J.		
659	=	(1955)	2	408
664	=	(1955)	2	388
668	=	(1955)	2	326
674	=	(1955)	2	485
683	=	..		..
686	=	(1955)	2	556
695	=	(1955)	2	522
699	=	(1955)	2	541
703	=	(1955)	2	426
710	=	..		..
712	=	(1955)	2	460
720	=	(1955)	2	441
734	=	..		..
735	=	(1955)	2	585
737 (1)	=	(1955)	2	267
737 (2)	=	(1955)	2	268
738	=	(1955)	2	468
739	=	..		..
740	=	..		..
755	=	(1955)	2	618
763	=	(1955)	2	433
765	=	(1955)	2	625
767	=	..		..
770	=	..		..
777	=	(1955)	2	612
783	=	..		..
795	=	(1955)	2	672
803	=	..		..
807	=	(1955)	2	660
809	=	(1955)	2	644
810	=	..		..
812	=	(1955)	2	477
820	=	..		..
822	=	(1955)	2	628
823	=	(1955)	2	684
826	=	(1955)	2	640
831	=	(1955)	2	671
832	=	(1955)	2	602
843	=	(1956)	1	1
844	=	..		..
847	=	(1955)	2	577
848	=	..		..
852	=	(1955)	2	665
857	=	..		..
861	=	..		..
865	=	..		..
868	=	(1955)	1	316
875	=	(1955)	1	46
880	=	(1953)	2	839
882	=	(1955)	2	590
887	=	..		..
892	=	..		..
896	=	(1954)	1	537
900	=	(1955)	1	169
903	=	..		..
909	=	(1955)	2	587
912	=	(1954)	1	32
923 (F.B.)	=	(1955)	2	63
938	=	(1955)	1	9
939	=	(1955)	1	172
943	=	(1955)	1	72
951	=	(1955)	1	299
958	=	(1955)	2	657
960	=	(1955)	2	662
961	=	(1955)	2	595
968	=	(1955)	2	24
969	=	..		..